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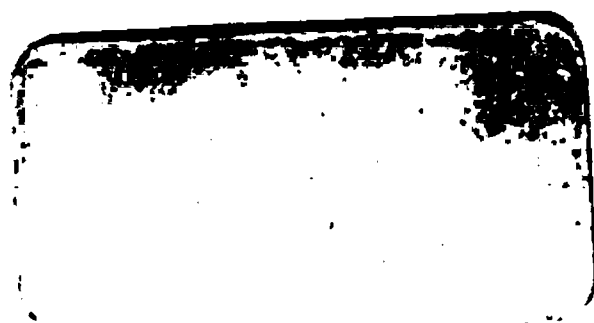
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**A TREATISE**  
**ON THE**  
**LAW OF WATERS,**  
**INCLUDING**  
**RIPARIAN RIGHTS,**  
**AND**  
**PUBLIC AND PRIVATE RIGHTS IN WATERS**  
**TIDAL AND INLAND.**

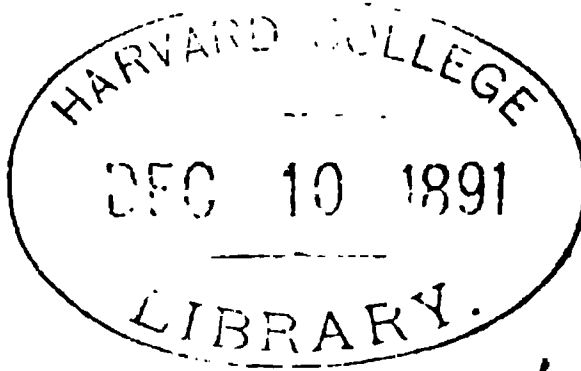
**SECOND EDITION.**

**BY**  
**JOHN M. GOULD, PH. D.,**  
**JOINT AUTHOR OF**  
**"GOULD AND TUCKER'S NOTES ON THE UNITED**  
**STATES REVISED STATUTES," ETC.**

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## PREFACE.

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**T**HE number and importance of the recent decisions upon the Law of Waters, as shown by the additions or changes upon nearly every page of this work, as well as the marked favor with which the first edition was received, appear to abundantly justify a new edition after the lapse of eight years. About three thousand seven hundred cases have been added; new illustrations of the principles considered have been derived from the Canadian and colonial reports as well as from those of the United States and England, and all the more important articles and monographic notes are cited. The original aim has been pursued of making the book a contribution to systematic jurisprudence, and in view of the local value of decisions, even upon well-settled rules, the citation of decisions has been made as exhaustive as possible. Certain of the latest cases are added in the Appendix preceding the Index.

Boston,  
*August 1, 1891.*





## PREFACE TO FIRST EDITION.

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**T**HE present work was begun about three years since, at the suggestion of the publishers, with the intention of stating the law upon Riparian Rights, Mill Privileges, and rights in fresh waters only. As the authorities upon Tide Waters were found to be not fully collated elsewhere, and in view of their importance in relation to public and private rights in our large fresh-water rivers and lakes, it was deemed advisable to review also the rules applicable to that topic. The subject of navigable waters, both salt and fresh, is still encumbered by some of the refinements which prevailed before the necessities of modern commerce brought sufficient cases before the courts to clearly define the law, and is affected by ancient usages and local or general laws in certain States, while in others the real or supposed rules of the common law have been held inapplicable. The development of these topics has been traced historically from the earliest times to the present, in England and in this country; the attempt has been made to indicate the principles conducing to harmony; and the aim has been to present exhaustively and concisely all the authorities, ancient and modern, which have been collected by a thorough examination of all the original reports and abridgments.

On account of the difficulty and complexity arising upon questions of substantive law, and the delay incident to a proper consideration of them, the author was led to entrust to Merritt Starr, Esq., of the Chicago bar, the preparation of

that part of the work which relates to Private Remedies at common law, in equity, and under the Mill Acts of different States. To his thorough and efficient labors are due the credit and responsibility of the entire discussion of those topics in Chapter XII. (beyond § 367), and in Chapters XIII. and XIV., subject to verbal changes in order to secure uniformity of style throughout the work, and the division into sections, which were made by the author. He is further indebted to William V. Kellen, Esq., of the Boston bar, for valuable assistance in collecting the authorities in several Southern and Western States, and in the preparation of the original draft of that part of Chapter IX. which relates to surface water, and the latter part of Chapter X.; and to Samuel H. Emery, Jr., Esq., of the Boston bar, for assistance and important suggestions in the revision of proofs.

The hope is indulged, that the great labor expended in collecting from original sources the numerous authorities cited or discussed in each chapter, and in assorting and digesting them, may prove serviceable to the profession in their investigations of a topic, which, from its nature, and the many conflicting interests so frequently involved, will doubtless continue to be as intricate as any in the law.

BOSTON,  
*October, 1883.*

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# THE LAW OF WATERS.



# THE LAW OF WATERS.

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## PART I.

### PUBLIC WATERS.

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#### CHAPTER I.

##### OF PROPERTY IN TIDE WATERS AT COMMON LAW.

###### SECTION.

1. Property in the open sea.
- 2, 3. Rights in territorial waters.
- 4, 5. The Crown's property in tide waters within the realm.
6. What this includes.
- 7-9. The seaward limit of national property and jurisdiction.
10. Right to minerals beneath the sea and seashore.
- 11, 12. *Regina v. Keyn*.
- 13, 14. The authority of this decision.
- 15, 16. Effect of legislation respecting territorial waters.
- 17, 18. The nature of the Crown's title. The *jus publicum* and the *jus privatum*.
19. Foundation of the doctrine of a *jus privatum*.
20. What are included within the public rights of navigation and fishery.
21. Purprestures and nuisances.
- 22, 23. Prescriptive rights against the Crown.
- 24, 25. The rights of the public with respect to sand, gravel and sea-weed.
26. Bathing.
27. Limits of the shore.
28. Words synonymous with "shore."
29. Meaning of these terms in legal instruments.

§ 1. **The sea — Property in.**— The sea is serviceable for important uses, especially for navigation and fishery; but it is incapable, from its nature, of permanent appropriation and continuous occupation. It thus remains without an owner, as a barren and unappropriated waste. When articles of value are taken from the sea, they belong to the finder, inasmuch

as there is no title which is superior to his possession. Between different claimants what constitutes such possession may depend upon usage. In the whale fisheries, it is a valid usage that the boat first striking a whale, and afterwards obtaining a firm possession, shall be entitled to the fish.<sup>1</sup> But, where no special custom of fishery was proved, it was held that the plaintiff, who while fishing had nearly encompassed the fish with his net, could not recover from the defendant for rowing his boat to the opening, thereby disturbing the fish and preventing their capture.<sup>2</sup> So, in general, in an ordinary case of fishing in tide water by weirs, nets or lines, no action lies by one fisherman against another for anticipating him in a capture of fish.<sup>3</sup> The tests for determining the ownership of such parts of the sea as can be appropriated, or of islands arising therefrom or newly discovered, are occupancy, discovery or conquest.<sup>4</sup> Those, for instance, who expend money in mining guano upon a newly discovered island and convey it to the shore, are entitled to protection in the enjoyment of the property thus acquired.<sup>5</sup> Ships upon the ocean continue

<sup>1</sup> *Fennings v. Grenville*, 1 Taunt. 241; *Littledale v. Smith*, id. 243, note; *Aberdeen Arctic Co. v. Sutter*, 4 Macq. H. L. Cas. 855; *Hogarth v. Jackson*, M. & M. 58; *Skinner v. Chapman*, id. 59, note; *Taber v. Jenny*, 1 Sprague, 815; *Bartlett v. Budd*, 1 Lowell, 223; *Bourne v. Ashley*, 1 Lowell, 27; *Swift v. Gifford*, 2 Lowell, 110. Fish not reclaimed or confined are not the subject of larceny. *Rex v. Carrodice*, 2 Russ. 1199; *State v. Krider*, 78 N. C. 481. A sale of fish afterwards to be caught in the sea is invalid. *Low v. Pew*, 108 Mass. 347. By usage, on Cape Cod, fishermen who shoot, with lances, fired from guns, bearing the owner's mark, fin-back whales, which frequent the eastern part of Massachusetts Bay in the early spring, and, when killed, sink at once to the bottom, but usually rise again and float within three days, own the whale thus killed, although they are accustomed to pay a small salvage to per-

sons who find them on the beach; and this usage, which has continued for many years, has been held to be reasonable and valid, the appropriation being as complete as the nature of the case admits of. *Ghen v. Rich*, 8 Fed. Rep. 159. See *Heppingstone v. Mammen*, 2 Hawaiian, 707.

<sup>2</sup> *Young v. Hitchens*, 6 Q. B. 606. *Contra*, if the defendant's act were malicious. *Post*, § 87; *Keble v. Hickeringill*, 11 Mod. 74, 130.

<sup>3</sup> *Stevens v. Jeacocke*, 11 Q. B. 731; *Cheney v. Guptill*, 2 Hannay (N. B.), 379.

<sup>4</sup> *Lawrence's Wheat. Int. Law*, pt. II, ch. 4, § 5; 2 *Black. Com.* 3, 8, 258, 400; 3 *Kent Com.* 318; *Grotius, Mare Lib.* chs. 5, 7; *Fleta*, lib. 3, ch. 2, §§ 6, 9; *Just. Inst.* lib. 2, tit. 1, § 22; *Schultes, Aquatic Rights*, 45.

<sup>5</sup> *American Guano Co. v. United States Guano Co.*, 44 Barb. 23. See 11 U. S. Stats. at Large, 119; U. S. Rev. Stats. §§ 5570-5578; *Benson v.*

subject to the law of the flag, making those on board amenable to the laws of the nation to which the vessel is accredited.<sup>1</sup> A nation's jurisdiction extends to the punishment of its citizens for offenses committed on deserted islands or an uninhabited coast;<sup>2</sup> and the consensus of civilized nations may establish rules for navigators having the force of a law of the sea.<sup>3</sup> But, with respect to property, the sea is not subject to the exclusive dominion of any nation, and cannot be apportioned by municipal law.<sup>4</sup>

Ketchum, 14 Md. 331; *Duncan v. Navassa Phosphate Co.*, 35 Fed. Rep. 474; 11 S. Ct. 242; *Jones v. United States*, 137 U. S. 202; 11 S. Ct. 80; *Smith v. United States*, 11 S. C. 88; *Whiton v. Albany Ins. Co.*, 109 Mass. 24.

<sup>1</sup> *Crapo v. Kelly*, 16 Wall. 610; 45 N. Y. 86; 41 Barb. 603; *McDonald v. Mallory*, 77 N. Y. 547; *In re Bye*, 2 Daly, 525; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *The Gaetano*, 7 P. D. 187; *Reg. v. Bjornsen*, 10 Cox, C. C. 74; *Reg. v. Sattler*, 7 id. 431; *Dears. & B. C. C.* 525; *Reg. v. Lesley*, 8 Cox, C. C. 269; *Bell*, C. C. 220; *Reg. v. Anderson*, L. R. 1 C. C. 161; 9 Cox, C. C. 198; *In re Moncan*, 8 Sawyer, 350; *Lawrence's Wheat. Int. Law*, pt. II, ch. 2, § 4; *Wildman's Int. Law*, 40; *Halleck's Int. Law*, 185; *Bluntschli*, § 317; *Parker v. Byrnes*, 1 Lowell, 539; *Johnson v. Twenty-one Bales*, 2 Paine, 601; *United States v. Bennett*, 3 Hughes, 466; *Calahan v. Babcock*, 21 Ohio St. 281. The State to which a vessel belongs, and not the United States, is, in this country, the sovereignty whose laws accompany the vessel in respect to matters which are not granted exclusively to the general government or rightfully legislated upon by Congress. *Crapo v. Kelly*, *supra*; *Steamboat Co. v. Chase*, 16 Wall. 522; 9 R. L. 419; *Sherlock v. Alling*, 93 U. S. 99; *Mc-*

*Donald v. Mallory*, 77 N. Y. 546. In *Rex v. Allen*, 1 Moo. C. C. 394, an English sailor was held guilty in the English admiralty for stealing tea from his own vessel when lying in a river in China twenty miles or more from its mouth, there being no evidence as to the tide. See *United States v. Gordon*, 5 Blatch. 18.

<sup>2</sup> *United States v. Smiley*, 6 Sawyer, 640; *Re Stupp*, 11 Blatch. 124; 12 id. 501; *Roth v. Roth*, 104 Ill. 85; 19 A. G. Op. 66, 477.

<sup>3</sup> *Ex parte McNeil*, 13 Wall. 236; *The Continental*, 14 Wall. 345; *Wilson v. McNamee*, 102 U. S. 572; *Lord v. Steamship Co.*, 102 U. S. 541; 1 Kent Com. 27; *Vattel*, bk. 1, ch. 19, § 216; 2 *Rutherford's Inst.*, bk. 2, ch. 9, §§ 8, 19. In *The Scotia*, 14 Wall. 170, 187, Mr. Justice Strong said: "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."

<sup>4</sup> *Ibid.*; *Vattel*, § 279; *Grotius*, bk. 2, §§ 3, 7; *Cooper's Justinian*, 67, § 1; 1 *Phil. Int. Law*, ch. 5.

§ 2. **Territorial waters — Jurisdiction — Property.**— It is somewhat different with respect to those parts of the sea which adjoin the shores of civilized nations. By general consent they have been regarded as capable of appropriation, and of being held by a kind of possession. Maritime countries have claimed from the earliest times more or less extended dominion over these waters, and subjected them to the laws and regulations of the state; and upon grounds of self-protection and mutual advantage to all such countries, the dominion of the land has been acknowledged to carry with it the control of the contiguous seas,<sup>1</sup> and the exclusive right to enjoy whatever of value may be acquired therefrom.<sup>2</sup> The dominion over the territorial seas, as they are called, may, therefore, include rights of jurisdiction, or of property, or both. By the modern law of nations, the territorial waters extend only to such distance as is capable of command from the shore, or the presumed range of cannon, which, for the purpose of certainty, is regarded as one marine league,<sup>3</sup> although, for the purpose of self-protection in time of war, and for the prevention of frauds upon its revenue, each nation is accustomed to exercise authority beyond this limit.<sup>4</sup>

<sup>1</sup> Grotius, *De Jure Belli*, lib. 2, cap. 2, § 13; cap. 3, §§ 2, 13; Loccenius, *De Jure Maritimo*, ch. 4, §§ 5, 6; Puffendorf, *De Jure Naturæ*, lib. 4, ch. 2, § 8; Vattel, *Droit des Gens*, §§ 205, 288–295; Craig, *Jus Feud.* lib. 1, § 13, p. 140; Wolff, *Jus Gentium*, ch. 1, §§ 128–132; Hautefeuille, *Hist. du Droit Maritime*, p. 197; Ortolan, *Diplomat de la Mer*, lib. 1, pp. 174, 175, 177; lib. 2, ch. 8, p. 157; Heffter, *Pub. Int. Law*, §§ 72, 75; Halleck, *Int. Law*, ch. 5, § 13; 1 Kent Com. (12th ed.), 27–30; Manning, *Law of Nations* (Amos's ed.), p. 119; Lawrence's *Wheaton's Int. Law*, pt. II, ch. 4; 1 Phillimore's *Int. Law* (2d ed.), 209, 218, 235.

<sup>2</sup> Puffendorf, lib. 4, ch. 5, § 7; Vattel, lib. 1, ch. 23; Schultes, *Aquatic Rights*, 1–5; Lawrence's *Wheaton's*

*Int. Law*, pt. II, ch. 4, §§ 8, 10; 1 Phillimore's *Int. Law* (2d ed.), 209, 218, 235; 1 Kent Com. 26–31; *Butler v. Boston & Savannah S. S. Co.*, 130 U. S. 527; *Commonwealth v. Parker*, 130 Mass. 40; *Church v. Hubbard*, *post*, § 9; *The Hungaria*, 41 Fed. Rep. 109.

<sup>3</sup> *Ibid.* According to some writers a nation may extend its jurisdiction seaward with the increased range of cannon. Hall, *Int. Law*, 127; 1 Fiore, *Int. Law*, 373; Bluntschli, § 303. This distance was fixed as a marine league at a time when no gun could force a ball farther. Granger, C. J., in *Hogg v. Beerman*, 41 Ohio St. 81, 95.

<sup>4</sup> *Ibid.*; *Commonwealth v. Manchester*, 152 Mass. 230; *Manchester v. Massachusetts*, 11 S. Ct. 559; 139 U. S. 240.

§ 3. Waters within the country — Sovereign's property.— Amid the diversity of opinions which have prevailed respecting this dominion, claims have been advanced both as to its extent and character which now seem extravagant.<sup>1</sup> At an early period England claimed dominion over the four seas which surround her coasts, including the right to prohibit foreign vessels from passing over them, and the right of property in them; and in the controversy as to the freedom of the seas in the seventeenth century, the English writers and lawyers, under the lead of Selden,<sup>2</sup> strenuously maintained the

<sup>1</sup> In *Regina v. Keyn*, 2 Ex. D. 63, 176, which is referred to *post*, §§ 11, 12, Cockburn, C. J., thus states some of the views as to the extent of this jurisdiction: "Albericus Gentilis extended it to one hundred miles; Baldus and Bodinus to sixty. Loccenius (*De Jure Maritimo*, ch. 4, § 6) puts it at two days' sail; another writer makes it extend as far as could be seen from the shore. Valin, in his commentary on the French Ordinances of 1681 (ch. 5), would have it reach as far as the bottom could be found with the lead-line, etc."

<sup>2</sup> Selden's *Mare Clausum* was published in 1635. In it he sought to establish: 1st, that the sea might be property; 2d, that the seas which washed the shores of Great Britain and Ireland were subject to her sovereignty even as far as the north pole. "The opinions of jurists, as well as the practice of nations, have decided that this work did not refute the contrary positions laid down by Grotius in his *Mare Liberum*, to which it purported to be an answer. Selden dedicated his work to Charles I; and so fully did that monarch imbibe its principles that in 1619 he instructed Carleton, the British ambassador, to complain to the States General of the Dutch provinces of the audacity of Grotius in publishing

his *Mare Liberum* and to demand that he should be punished. In the time of Cromwell war was made upon the Dutch to compel them to acknowledge the British empire over these seas." 1 *Phill. Int. Law* (2d ed.), 219. The doctrine maintained by Selden, so far at least as there was occasion to assert it in treating of the common law, was accepted by his contemporaries, Bacon, Coke, Hale, and Staunford. See 1 *Bacon Abr.* 640; *Co. Litt.* 107; Hale, *De Jure Maris*, chs. 4, 6; and *Pleas of the Crown*. Lord Hale says: "The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, as the king hath; because without a regular power he cannot possibly possess it. But though a subject cannot acquire the interest of the narrow seas, yet he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, viz., of a *districtus maris*, a place in the sea between such points, or a particular part con-



right of the crown of England to these waters, insisting that the title to the sea and to the *fundus maris*, or bed of the sea — *tam aquæ quam soli* — was in the king.<sup>1</sup> This is the doctrine of the ancient municipal law of England, under which the Crown had a property in the adjacent seas both as against foreign nations and its own subjects.<sup>2</sup> Under the

tiguous to the shore, or of a port or creek or arm of the sea. These may be possessed by a subject, and prescribed in point of interest both of the water, and the soil itself covered with the water within such a precinct; for these are manoriable, and may be entirely possessed by a subject." *De Jure Maris*, ch. 6. And see *post*, §§ 21–23. The words "*infra quatuor maria*" are said to mean, within the kingdom of England, and the dominions of the same kingdom. *Co. Litt.* 107. The four seas are: 1. The Atlantic, which washes the western shore of Ireland, and which comprises, by way of subdivision, the Irish Sea, St. George's Channel, and the Scottish Sea to the north-west; 2. The North Sea of the coast of Scotland; 3. The German Ocean on the east; and 4. The British Channel on the south. *Co. Litt.* 107 (*a*), note 7. The jurisdiction of the king, as lord and sovereign of the sea, has been defined, with respect to the Channel, to extend between England and France, and to the middle of the sea between England and Spain. *Sir John Constable's Case*, 3 Leon, 73; 5 *Com. Dig.* 102. With respect to the western and northern oceans, there was said to be more uncertainty as to the limits of British dominion. Selden contended for the fullest exercise of dominion over the British seas, both as to the passage through and fishing in them; while Sir Philip Medows suggested more confined rights, as to exclude all foreign ships of war from passing upon any of

the seas of England without special license, to have the sole marine jurisdiction within those seas, and also an appropriate fishery. Woolrych on Waters, 5; Selden, *Mare Clausum*, lib. 1, ch. 26. Observations concerning the Dominion and Sovereignty of the Seas, by Sir Philip Medows (1689); Justice's Sea Laws, art. 1, pt. 1; *Co. Litt.* 107 *b*, 260 *a*, note 1, and Hargrave's notes; Hall on the Seashore (2d ed.), 1, 2; Jerwood on the Seashore, 13; Chitty on the Prerogative, 142, 173, 206.

<sup>1</sup> Selden, *Mare Clausum*, chs. 22, 24; Bacon's *Abr.* tit. Prerogative, B. 3; Hall on the Seashore (2d ed.), 2; Jerwood on the Seashore, 13; *Co. Litt.* 107 *a*, 260 *a*, and notes; 4 *Inst.* 66; 2 *Roll. Abr.* 169, 170; Royal Fishery of the Banne, *Sir John Davies*, 149; *Sir John Constable's Case*, 3 Leon, 71, 73; *Life of Sir Leoline Jenkins*, vol. 2, p. 732; *Sir Philip Medow's Observations*; Justice's Sea Laws, art. 1.

<sup>2</sup> *Ibid.* Lord Hale says: "The narrow sea, adjoining to the coast of England, is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not. This is abundantly proved by that learned treatise of Master Selden called *Mare Clausum*; and therefore I shall say nothing therein, but refer the reader thither." *De Jure Maris*, ch. 4; Hargrave's *Law Tracts*, 10. Lord Hale refers frequently in the same treatise to "the property and jurisdiction of the king of England in the narrow

civil law, the sea was common property, and the seashore was classed by different writers among the *res communes*, or among the *res publicæ*, as being either common property or the property of the state.<sup>1</sup> There was here no exclusive or beneficial interest in the sovereign, but so far as private property is concerned, the sea and its shores were considered to be *res nullius*.<sup>2</sup> By the Roman law, and by the early common law, as stated by Bracton, occupancy was the source of title to the sea and the seashore, and pearls, gems, and other things found there, as well as islands which spring up in the sea, and derelict goods, belonged to the finder or first occupant.<sup>3</sup> The rule of the modern common law, whereby the king has a private interest, apart from the ownership of the adjoining lands, in those tide waters which are *within* the territory of England, appears to be connected historically with the above claim of sovereignty over the sea, and to be derived therefrom.<sup>4</sup>

seas." See Hargrave's Law Tracts, 31, 32, 41, 43.

<sup>1</sup> The seashore was classed among things common by Justinian (L. 2, 1, 1); but Celsus says (D. 43, 8, 3) that it belonged to the state. See Mackenzie's Roman Law, 152; Goudsmit's Roman Law, 113, note.

<sup>2</sup> Taylor's Summary of the Civil Law, 471; Inst. lib. II, tit. 1, §§ 1, 2, 5; Dig. lib. 43, tit. 12-14; Bracton, lib. I, ch. 12, fol. 7, 8; lib. II, fol. 7, § 5; 2 Domat, Civil Law, vol. 1, I, tit. 8, § 1.

<sup>3</sup> Inst. II, 1, § 18; Dig. XLI, 1, § 7; 1 Twiss's Bracton, 68; Greene's Roman Law (3d ed.), 74; Howe v. Stowell, Alcock & Nap. 348, 358.

<sup>4</sup> See *post*, § 19. England's claim of exclusive jurisdiction over all persons navigating the British seas appears to have been very ancient. These seas, says Sir Travers Twiss, under the name of "quatuor maria," are thrice mentioned by Bracton and distinctly designated as "les quatre mers d'Angleterre" in four different

places in the Domus Day of Gippeswich. Law Mag. & Rev. 4th series, vol. 2, pp. 150, 151. While Bracton, writing in the thirteenth century upon the laws of England, thus speaks of the four seas, he makes no mention of any peculiar rights of property possessed by the Crown in them. He follows the civil law, and says that the sea and its shores are common property. Bk. I, ch. 12, fol. 7, 8. This has a tendency to show that the theory of jurisdiction preceded that of property. Sir Travers Twiss observes, in the article above referred to (pp. 155, 160): "The claim to the lordship of the 'narrow sea,' which the student (Doctor and Student, 270) asserts for the kings of England, cannot be traced so far back as their claim to the lordship of 'the four seas,' unless upon the principle that *omne majus continet in se minus*. Nevertheless, the lordship of 'the narrow sea,' as asserted by the Commons of England in the reign of Henry V., rested on a more solid pre-

#### § 4. Same — Seashore — Tidal rivers — Bays — Ports.—

By the present law of England, the Crown has the right of property in the arms and inlets of the sea within the realm, if not in the sea itself.<sup>1</sup> This right includes the bed of all tide waters which are or may be within the counties.<sup>2</sup> The strip of land along the coast which is daily covered and left bare by the tide, and is called the shore,<sup>3</sup> is a part of the county when the tide is out and a part of the sea when the tide is in.<sup>4</sup> There is here *divisum imperium* between the courts of common law, whose jurisdiction is limited by the boundaries of counties, and the courts of admiralty which have jurisdiction of questions arising upon the sea,—the former having jurisdiction at low tide and the latter at high tide.<sup>5</sup> The seashore is thus, during parts of each day, within the limits of the adjacent county, and, as far as the ordinary high-water mark, it is the property of the Crown.<sup>6</sup> Rivers and parts of rivers, in which

text of right than the lordship of 'the four seas.' It rested on a principle of public law, which holds good in the present day in respect of the stream of navigable rivers, namely, that the kings of England, being in physical possession of both shores of the British Channel, were in juridical possession of the waters contained between those shores. . . . The jurisdiction of the Admiralty, on the other hand, rests upon juridical principles totally distinct from those of territorial sovereignty. It was originally a *personal* jurisdiction."

<sup>1</sup> *Post*, §§ 5–10.

<sup>2</sup> *Regina v. Keyn*, 2 Ex. D. 68.

<sup>3</sup> *Post*, § 27.

<sup>4</sup> See next note.

<sup>5</sup> *Constable's Case*, 5 Rep. 106 a; *The Admiralty*, 12 Co. 79, 80; *Regina v. Two Casks of Tallow*, 2 Hagg. 294; Co. Litt. 260; 4 Inst. 135; Finch, L. 75, 78; 1 Black. Com. 110, 112; 4 id. 268; 2 Hale, P. C. ch. 3; 2 East, P. C. 808; 1 Kent Com. 366; *The Pauline*, 2 C. Rob. 358; *Embleton v. Brown*, 3 El. & El. 234; *Regina v. Musson*, 8 El. & Bk. 900; *Regina v. Keyn*, 2 Ex.

D. 63, 66, 67; *Rex v. Forty-nine Casks of Brandy*, 3 Hagg. Adm. 257; *Lopez v. Andrew*, 3 M. & R. 329; *Barber v. Wharton*, 2 Ld. Raym. 1452; *De Lovio v. Boit*, 2 Gall. 398; *United States v. Davis*, 2 Sumner, 482; *United States v. Wilson*, 3 Blatch. 435; *Weston v. Sampson*, 8 Cush. 347, 354.

<sup>6</sup> *Ibid.*; Hale, *De Jure Maris*, ch. 4; 1 Hargr. Law Tracts, 12, 13; 1 Black. Com. 110, 264; *Constable's Case*, 5 Rep. 106 a; *Dyer*, 326; *Attorney General v. Burrige*, 10 Price, 350; *Attorney General v. Parmenter*, 10 Price, 378, 412; *Blundell v. Catterall*, 5 B. & Ald. 268; *Colchester v. Brooke*, 7 Q. B. 339; *Lopez v. Andrew*, 3 M. & R. 329; *Attorney General v. Chambers*, 4 De G. M. & G. 206; *Lowe v. Govett*, 3 B. & Ad. 863; *Scrutton v. Brown*, 4 B. & C. 485; *Somerset v. Fogwell*, 5 B. & C. 883; *Attorney General v. London*, 1 H. L. Cas. 440; 8 Beav. 270, and 12 Beav. 8, 171; 2 Macn. & G. 247; *In re Hull & Selby Railway*, 5 M. & W. 327; *Benest v. Pison*, 1 Knapp, 60; *Attorney General v. Tomline*, 12 Ch. D. 214; 5 Com. Dig. 102; *Calmady v. Rowe*, 6 C. B.

the tide ebbs and flows, as well as havens, are also within the body of the county, although the admiralty may also have jurisdiction in them,<sup>1</sup> and the soil of such waters, so far as the tide reaches inland and up their shores, appertains to the Crown.<sup>2</sup> The territorial jurisdiction of a State now extends

861, 878; 2 Dane Abr. 694; Commonwealth v. Alger, 7 Cush. 53; Weston v. Sampson, 8 Cush. 347; Commonwealth v. Roxbury, 9 Gray, 451, 482; 3 Kent Com. 427, 431; Providence Steam Engine Co. v. Providence Steamship Co., 12 R. L. 348; Pollard v. Hagan, 3 How. (U. S.) 212; Goodtitle v. Kibbe, 9 How. (U. S.) 471; State v. Sargent, 45 Conn. 358; Bell v. Gough, 21 N. J. L. 156; 22 id. 441; 23 id. 624; Stevens v. Paterson Railroad Co., 37 N. J. L. 340; Galveston v. Menard, 23 Texas, 349; Teschemaker v. Thompson, 18 Cal. 11; People v. Davidson, 30 Cal. 379. As to Scotland, "the general result of the cases seems (subject to correction) to be that in Scotland, as between subject and subject, proof of ownership of the adjoining land suffices to show title to the shore; but in cases between the Crown and a subject, by the presumption of the *prima facie* title, in order to oust the claim of the Crown, the subject must show acts of ownership on the shore in precisely the same manner as in England." Moore on the Foreshore, ch. 22. See Agnew v. Lord Advocate, 11 Ct. of Ses. (3d Series), 309; Lord Advocate v. Young, 18 id. (4th Series), 324; 12 App. Cas. 544; Smith v. Stair, 6 Bell's App. Cas. 487; Campbell v. Brown, Fac. Coll. 447; Macalister v. Campbell, 15 D. B. & M. Sess. Cas. 490; Gamell v. Lord Advocate, 3 Macq. H. L. 419, 457; Lord Advocate v. Hamilton, 1 id. 46; Sutherland v. Watson, 6 Ct. of Ses. (3d Series), 199; Lord Advocate v. Blantyre, 4 App. Cas. 770; Lord Advocate

v. Lovat, 5 id. 288; Blantyre v. Clyde Nav. Trustees, 6 id. 273.

The main or high sea begins at low water-mark on the external coast. United States v. Wiltberger, 5 Wheat. 76, 94; United States v. Pirates, 5 Wheat. 184, 200; De Lovio v. Boit, 2 Gall. 398, 428; United States v. Hamilton, 1 Mason, 152; The Abby, 1 Mason, 360; United States v. Grush, 5 Mason, 290; United States v. Robinson, 4 Mason, 307; United States v. Seagrist, 4 Blatch. 420; United States v. Wilson, 3 Blatch. 420; Johnson v. Twenty-one Bales, 2 Paine, 601; United States v. Smith, 3 Wash. C. C. 78, n.; The Martha Anne, Olcott, 18; Miller's Case, Brown Adm. 156; 1 Black. Com. 110. In The Anna, 5 Rob. 373, the shore was held to begin, under the three-mile rule, at certain mud islands at the mouth of the Mississippi river formed by its deposits.

<sup>1</sup> See Ibid.; Lacy's Case, Moore, 121, 814; East India Co. v. Sandys, Skin. 132; De Acuna v. Joliff, Hob. 79, 212; Godb. 261; Blake's Case, Moore, 891, 892; Ball v. Blackmore, 1 Keb. 14, pl. 38; 2 Roll. 157; Violet v. Blake, 2 Ro. 49; Tourson v. Tourson, 1 Ro. 80, 194; Platt v. Sheriffs of London, Plow. 37.

<sup>2</sup> Royal Fishery of the Banne, Sir John Davies, 149; Bullstrode v. Hall, Sid. 149; Fitzwalter's Case, 1 Mod. 105 and 3 Keb. 242; Warren v. Matthews, 6 Mod. 63 and Salk. 357; Carter v. Murcot, 4 Burr. 2162; Rex v. Smith, 2 Dougl. 441; Bagott v. Orr, 2 Bos. & P. 471; Ball v. Herbert, 8 T. R. 258; Blundell v. Catterall, 5 B. & Ald. 268; Colchester v. Brooke, 7 Q.

seaward to the distance of three geographical miles;<sup>1</sup> and where bays and inlets are formed by the indentations of the coast, even though they are somewhat broader than the double range of cannon, this external limit of jurisdiction is determined by measuring seaward from a straight line drawn from one enclosing headland to the other.<sup>2</sup> Such inlets and branches of

B. 339; *Williams v. Wilcox*, 8 Ad. & El. 314; *Murphy v. Ryan*, 1 R. 2 C. L. 143; *Attorney General v. Chambers*, 4 De G. M. & G. 206; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Whitstable Free Fishers v. Gann*, 11 H. L. Cas. 192; 19 C. B. N. s. 803; 13 id. 853, and 11 id. 387; *Penryhn v. Holme*, 2 Ex. D. 328; *Carlisle v. Graham*, L. R. 4 Ex. 361; *Smith v. Officers of State*, 13 Jur. 713; *Lord Advocate v. Hamilton*, 1 Macq. 46; 1 Black. Com. 264; 8 Bacon's Abr. tit. Prerogative, B. 3; 5 Com. Dig., Navigation, A., B.; 1 Roll. Abr. 168, 169; *Selden, Mare Clausum*, 251; *Hale, De Jure Maris*, 11, 12; *Palmer v. Mulligan*, 3 Caines, 307; *Adams v. Pease*, 2 Conn. 481; *McManus v. Carmichael*, 3 Iowa, 1; *Carson v. Blazer*, 2 Binney, 475; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Chapin*, 5 Pick. 199; *Weston v. Sampson*, 8 Cush. 347; 1 Dane Abr. 690, 692; 1 Kent Com. 367; 3 id. 427; *Martin v. Waddell*, 16 Peters, 367; *Hagan v. Campbell*, 8 Porter, 9. The part of a tidal river thirty miles from its mouth is not the "sea" within the meaning of 48 Geo. III. ch. 75, so as to render the county chargeable with the expense of burying persons whose bodies are cast ashore from a wreck occurring near such spot. *Church Wardens v. Robertson*, 44 L. T. N. s. 747.

<sup>1</sup> *Bynkershoek, De Dominio Maris*, ch. 2, p. 257; *Pando, Elem. del Der. Int.* 155; *Loccenius, De Jure Maritimo*, ch. 4; *Heineccius*, lib. 2, ch. 3, § 12; *Grotius, De Jure Belli*, lib. 2, ch. 3, § 13; *Vattel, Droit des Gens*,

lib. 1, ch. 23, §§ 288-295; *De Reyvenal, Liberté des Mers*, vol. 1, p. 212; *Wolff, Jus Gentium*, §§ 128-132; *Azuni*, vol. 1, 67, 68; *Ortolan, Diplom. de la Mer*, vol. 1, bk. 2, ch. 8; *Hautfeuille, Hist. du Droit Mar.* 197; *Marten, Precis du Droit*, bk. 2, ch. 1, §§ 40, 41, and bk. 4, ch. 4; *Heffter, Pub. Int. Law*, § 75; 1 *Phillimore's Int. Law*, ch. 4, § 154, and ch. 8, § 196; *Lawrence's Wheaton's Int. Law*, pt. II, ch. 4, §§ 6-10; 1 *Kent Com.* 28; *Manning's Law of Nations* (Amos's ed.), 118, 119; *Regina v. Keyn*, 2 Ex. D. 63; *The Maria*, 1 C. Rob. 352; *The Twee Gebroeders*, 3 C. Rob. 162; *The Annapolis*, Lush. Adm. 295; *The Leda*, Swa. Adm. 40; *Regina v. Fortynine Casks of Brandy*, 3 Hagg. Adm. 247; *The Saxonia*, 15 Moore, P. C. 262; *Gammel v. Commissioners of Woods*, 3 Macq. 419, 465; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; 13 C. B. N. s. 853, and 11 id. 387; *General Iron Screw Co. v. Schurmanns*, 1 J. & H. 180; *Neill v. Devonshire*, 8 App. Cas. 135; *Queen v. Cubitt*, 22 Q. B. D. 623; *Mowat v. McFee*, 5 Can. Sup. Ct. 66; *Church v. Hubbard*, 2 Cranch, 187; *United States v. Kessler*, Bald. 15; *Halifax Commission*, U. S. House of Rep. 2d Ses. of 45th Congress, Ex. Doc. No. 89, pp. 120, 166, 1654.

<sup>2</sup> *Post*, § 5; *Regina v. Cunningham*, Bell, C. C. 86; *Commonwealth v. Manchester*, 152 Mass. 230; 139 U. S. 240; *Weldt v. The Howden*, 39 Fed. Rep. 877; *McClain v. Tillson*, 82 Maine, 281; *Phillimore's Int. Law*, pt. III, ch. 8; *Lawrence's*

the sea, when sufficiently narrow, and within this line of jurisdiction, may be within the body of the adjacent county.<sup>1</sup> When shut in and protected by the land, they form harbors and havens. They may also be established as ports. A harbor or haven is a place for the shelter and safe riding of ships; a port is a haven and something more.<sup>2</sup> However commodious the

Wheaton's Int. Law, pt. 2, ch. 4, § 6; Manning's Law of Nations, 120; 1 Twiss, Law of Nations, ch. 10; Martens, *Precis du Droit*, § 40; Ortolan, *Diplom. de la Mer*, bk. 1, ch. 2, and bk. 2, ch. 7; 1 De Cussy, *Droit Marit.* tit. 2, § 40; Klüber, *Droit des Gens*, § 130. In measuring "four miles along the sea coast," under a fishery act, the measurement should follow the line of coast. *Tweed Commissioners v. Wood*, 46 J. P. 760.

<sup>1</sup> Hale, *De Jure Maris*, ch. 4; 4 Co. Inst. 140; Fitzherbert's Abr. 399; *Regina v. Cunningham*, Bell, C. C. 86; *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 394, 419; *Ins. Co. v. Dunham*, 11 Wall. 1; *The Fame*, 3 Mason, 147; *De Lovio v. Boit*, 2 Gall. 398; *Smith v. United States*, 1 Wash. Ter. 262; 1 Kent Com. 30; *post*, § 5.

<sup>2</sup> The following are among the more important passages upon this subject, in Hale's *De Portibus Maris*: "A haven is a place of a large receipt and safe riding of ships, so situate and secured by the land circumjacent, that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous or violent winds; as Milford haven, Plymouth haven, and the like. And these are some larger, some narrower. The smaller are sometimes made or at least helped by art; the greater are made only by nature. A port is an haven, and somewhat more. 1st, it is a place for arriving and unloading of ships and vessels. 2nd, it hath a superinduction of a civil

signature upon it—somewhat of franchise and privilege, as shall be shown. 3rd, it hath a *ville* or city or borough, that is the *caput portus*, for the receipt of mariners and merchants, and the securing and vending of their goods, and victualing their ships. So that a port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea whereby ships may conveniently come, safe situation against winds, where they may safely lie, and a good shore where they may well unlade; something that is artificial, as keys and wharfs and cranes, and warehouses and houses of common receipt, and something that is civil, viz., privileges and franchises, *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority. A port of the sea includes more than the bare place where the ships unlade, and sometimes extends many miles; as the port of London anciently extended to Greenwich, in the time of King Edward the First. . . . A creek is of two kinds; viz., creeks of the sea, and creeks of ports. The former sort are such little inlets of the sea, whether within the precinct or extent of a port or without, which are narrow little passages, and have shore of either side of them. The latter, viz., creeks of ports, are by a kind of civil denomination such. They are such, that though, possibly, for their extent and situation they might be ports, yet they are either members of, or dependent upon, other ports. And it began thus: The king could not



haven may be, and whatever protection to vessels it may afford, it is not a port unless it has been established as such by au-

conveniently have a customer and comptroller in every port and haven; but these custom officers were fixed at some convenient port; and the smaller adjacent ports became, by that means, creeks, or appendants of that where these custom officers were placed." Hale, *De Portibus Maris*, ch. 2; Hargrave's Law Tracts. 46-48. "It is a part of the *jus regale* or royalty of the Crown of England originally and *de novo* to erect publick ports in this kingdom. As all franchises within the kingdom are derived from the Crown, either immediately and explicitly; as by new erection, grant, or charter, or presumptively and consequentially, as by custom or prescription; so in a special manner are the ports and the franchises thereof." Id. ch. 3; Hargrave's Law Tracts, 53, 54. "In all publick sea-ports in England, there are three kinds of rights that meet; and though they are distinct one from another, yet they consist one with another, whether the ports belong in point of franchise or propriety to the king or to a subject. 1st, *Jus privatum*, interest of propriety or franchise. 2nd, *Jus publicum*, the common interest that all persons have to resort to or from publick ports, as publick seaports or markets, with their goods, and wares, and merchandises. 3rd, *Jus regium*, or the right of superintendency and prerogative that the king hath for the safety of the realm or benefit of commerce, or security of his customs. . . . The *jus privatum* takes in these several branches: 1st, The right of the lord or owner of the port. 2nd, The right of those that have the propriety of the shore contiguous to the port. 3rd, The right of the town, or ville, that is the

*caput portus*, and the inhabitants thereof. . . . Though of common right, the king is *prima facie* the owner and lord of every publick seaport, yet a subject may by charter or prescription be lord or owner of it. . . . The ownership of propriety is, where the king or common person by charter or prescription is the owner of the soil of a creek or haven where ships may safely arrive and come to the shore. This interest of propriety may, as hath been shown, belong to a subject. But he hath not thereby the franchise of a port; neither can he so use or employ it, unless he hath had that liberty time out of mind or by the king's charter." Id. ch. 6; Hargrave's Law Tracts, 72, 73. Id. ch. 4; Hargrave, 54, 55. "Though A. may have the propriety of a creek or harbour or navigable river, yet the king may grant there the liberty of a port to B. and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to A. for he hath what he had before, viz., the interest of the soil, and consequently the improvement of the shore and the liberty of fishing; and as the creek was free for any to pass in it against all but the king, for it was *publici juris* as to that matter before, so now the king takes off that restraint, and by his license and charter makes it free for all to come and unlade." Id. ch. 6; Hargrave, 73. . . . "When a port is fixed or settled by such means, though the soil and franchise or dominion thereof *prima facie* be in the king or by derivation from him in a subject; yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and for-

thority of the Crown.<sup>1</sup> Hence, in ports, not only is the ownership of the soil vested *prima facie* in the Crown, but there is the further prerogative right to determine what places shall be ports, and to grant the privilege of erecting them; and the king may first grant the soil to A, and afterwards grant the franchise of a port to B,<sup>2</sup> if the vested rights of A are not

eigners in peace with this kingdom are interested, by reason of common commerce, trade, and intercourse. And this publick right consists, among other things, principally in these: 1st, They ought to be free and open for subjects and foreigners to come and go with their merchandise. . . . 2nd, There ought to be no new tolls or charges imposed upon them without sufficient warrant, nor the old enhanced. . . . 3rd, They ought to be preserved from impediments and nuisances that may hinder or annoy the access or abode or recess of ships and vessels and seamen, or the unlading or relading of goods. Nuisances of ports are of two kinds: 1. Such as are immediately only nuisances to the private concernment of the lord of the franchise of the town that is *caput portus*. . . . 2. Such nuisances as are common to all men that have occasion to come, go, or stay at ports. I will give instances of some." [See §§ 92, 93, post.] "A port or publick passage may not be obstructed; nay, if it begins to be silted or stopped, yet it must be scoured, and cannot be wholly dammed or filled up, although another cut be made as beneficial as the former, without an inquisition by writ of *ad quod damnum* finding it to be no damage to the public, and the king's license thereupon obtained; as appears by the writ of *ad quod damnum* cited formerly to another purpose. Register 252. . . . As to the provisions by

the common law we are to observe, that as the common law hath intrusted the king with the patronage and protection of the *jura publica*, as highways, publick rivers, ports of the sea, and the like; so the care of preventing and reforming of publick nuisances therein is left to him, and his courts of justice, the prosecutions for them are in his name, and the fines for the defects or annoyances in them are part of his revenue." *Id.* ch. 7; Hargrave, 84-87.

<sup>1</sup> *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 266; L. R. 8 C. P. 584; *Nicholson v. Williams*, L. R. 6 Q. B. 682; *Case of the London Wharfs*, 1 Sir W. Black. 581; *Jenkins v. Harvey*, 1 C. M. & R. 877; *Falmouth v. George*, 5 Bing. 286; *Exeter v. Warren*, 5 Q. B. 773; *Yarmouth v. Eaton*, 8 Burr. 1402; Hale, *De Portibus Maris*, ch. 2; 2 Black. Com. 499.

<sup>2</sup> Hale, *De Portibus Maris*, ch. 6; *De Jure Maris*, ch. 5; Hargrave's *Law Tracts*, 88; *Holman v. Green*, 6 Can. Sup. Ct. 707. In *Price v. Livingstone*, 9 Q. B. D. 679, and *Garston Co. v. Hickie*, 15 Q. B. D. 580, the limits of the port of Cardiff were considered; and it was held that the word "port" in a charter-party must be construed in its commercial and not its fiscal sense, and that, in determining the limits of a port, a royal charter creating it, the natural configuration of the coast, and the recognized jurisdiction of the dock-master, are elements to be taken into consideration. The breakwater in Delaware Bay



impaired by the second grant.<sup>1</sup> Ports are for the receipt of goods and the collection of the customs, and a subject cannot lawfully land customable goods on his own land or in creeks or havens, or other places out of ports, unless it be in case of danger or necessity.<sup>2</sup> But goods that are not imported as merchandise pay no duty, as where they come in by accident, and especially wrecks at common law, which by that law were the king's, and not liable to pay customs on that account.<sup>3</sup> Ports have been styled the gates of the kingdom,<sup>4</sup> and are established and controlled by the sovereign as guardian of the realm.<sup>5</sup> Foreign merchant vessels, in the absence of treaty stipulations, are not exempt from the territorial jurisdiction of the harbor in which they lie.<sup>6</sup>

§ 5. Same — Bays and sounds.— With respect to the larger arms of the sea, such as bays, estuaries and sounds, the rule is that “that arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county.”<sup>7</sup> The rule, being dependent upon the eyesight, is

was held to be a “port” upon a claim for pilotage services in *The William Law*, 14 Fed. Rep. 792.

<sup>1</sup> *Exeter v. Warren*, 5 Q. B. 773.

<sup>2</sup> Per Holroyd, J., in *Blundell v. Catterall*, 5 B. & Ald. 268; *The Wharf Case*, 3 Bland Ch. 383; *post*, § 120; *Heron v. The Marchioness*, 42 Fed. Rep. 173.

<sup>3</sup> *Sheppard v. Gosnold*, Vaugh. 164; *Chapman v. Lamb*, 2 Strange, 943; 2 Barnard. 168.

<sup>4</sup> Ports are thus frequently characterized in the older authorities. 1 Black. Com. 264; 2 Feud. 1, 56; F. N. B. 113; Royal Fishery of the Banne, Sir John Davies, 149; Hale, *De Portibus Maris*, chs. 3, 7; Hargrave's Law Tracts, 50, 54; Bacon Abr. tit. Prerogative, D. 5; Com. Dig. tit. Navigation; Chitty's Prerogatives of the Crown, 100.

<sup>5</sup> *Ibid*.

<sup>6</sup> 15 A. G. Op. (U. S.) 178.

<sup>7</sup> Hale, *De Jure Maris*, ch. 4; 2 Hale, P. C. 16, 17, 54; Staunford, P. C. bk. 1, p. 51; Hawkins, P. C. pt. 2, ch. 9, § 14; 4 Inst. 140; Fitzherbert's Abr. Corone, 399; *Case of the Admiralty*, 12 Co. 79; 13 Co. 51; *Cunningham's Case*, Bell, C. C. 86; *Rex v. Bruce*, Russ. & Ry. 243, and 2 Leach, C. C. 1093; *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 394; *King v. Soleguard*, Andrew, 231; *Leigh v. Burley*, Owen, 122; *Regina v. Keyn*, 2 Ex. D. 63; *The Eleanor*, 6 Rob. Adm. 39; *The Public Opinion*, 2 Hagg. Adm. 398; *The Eliza Jane*, 3 id. 335; *United States v. Bevans*, 3 Wheat. 336, 337; *United States v. Grush*, 5 Mason, 290; *The Harriet*, 1 Story, 251; *United States v. New Bedford Bridge*, 1 Wood. & M. 401, 433; *Ballinger v. Nowland*, 5 Hughes, 387, 389; *Commonwealth*

somewhat difficult of application. The bay or inlet must be so narrow that persons and objects can be comprehended across it by the naked eye;<sup>1</sup> and while in each case it is a question of fact to be determined upon the evidence, yet the weather and the size and distinctness of the objects may cause variation and uncertainty.<sup>2</sup> This question does not depend upon the width of the bay inside of the enclosing headlands, and is distinct from that of the territorial jurisdiction of the nation,<sup>3</sup> which is determined by measuring three miles seaward from the exterior limit of the bay, and not by the line itself. Certain bays and estuaries of the sea, which are greater in width than six miles, or the double range of cannon, may be within the limits of counties and of the nation. Islands which lie within arms of the seas, and are also within the county, have been regarded as opposite shores within the

*v. Peters*, 12 Met. 887; *Dunham v. Lamphere*, 8 Gray, 268, 270; *People v. Supervisors*, 73 N. Y. 398, 396; 11 Hun, 306; *United States v. Robinson*, 4 Mason, 807; *De Lovio v. Boit*, 2 Gall. 898, 425; *United States v. Wiltberger*, 5 Wheat. 106; 2 Hawkins, P. C. ch. 9, § 14; 2 East, P. C. 804; Com. Dig. tit. Adm. E.; Bacon's Abr. tit. Admiralty, A.; 1 Kent Com. 866, 867. See *United States v. Ross*, 14 American Law Rev. 580; 2 Browne, Civ. & Adm. Law, 92. Hale thus refers to the same rule again in *De Portibus Maris*, ch. 7 (Hargrave's Law Tracts, 88): "By the book of 8 E. 2 Corone, every arm or creek of the sea within the points of the land, where a man may discern clearly from side to side, is within the body of the county. Yet the admiral hath used at least a concurrent jurisdiction in many such creeks and arms of the sea, up to the first bridges as to matter of nuisances, upon a mistake, perchance, of the words *les points* in the printed statute of 16 R. 2, ch. 8, whereas some read it *points*."

<sup>1</sup> *Rowe v. Smith*, 51 Conn. 266; *People v. Wilson*, 8 Parker Cr. Cas. 199; *People v. Sheriff*, 1 id. 659.

<sup>2</sup> *United States v. Bevans*, 8 Wheat. 836; *United States v. Grush*, 5 Mason, 290; *Commonwealth v. Peters*, 12 Met. 487; *Dunham v. Lamphere*, 8 Gray, 268. In the recent case of *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 894, 417, Lord Blackburn, referring to Coke and Hale (see *ante*, § 4, note), said: "Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or discerning. If it means to say what men are doing, so, for instance, that eye-witnesses on shore can say who was to blame in a fray on the waters, resulting in death, the distance would be very limited; if to discern what great ships were about, so as to be able to see their manœuvres, it would be very much more extensive. In either sense it is indefinite."

<sup>3</sup> *Ante*, § 4, and note 8, p. 16; *Manchester v. Massachusetts*, 189 U. S. 240; 152 Mass. 280.

foregoing rule,<sup>1</sup> and in treaties between nations,<sup>2</sup> and in the works of writers upon international law,<sup>3</sup> bays having a width of ten miles have been conceded to be a part of the territory of the nation by which they are enclosed. In *Regina v. Cunningham*,<sup>4</sup> the question was whether certain foreigners, who had committed a crime upon a foreign vessel lying in the Bristol Channel, were subject to the jurisdiction of the common-law courts in the county of Glamorgan. Although the place where the offense was committed was below low-water mark, beyond any river, and at a point where the sea was more than ten miles wide, it was held to be within the body of the adjacent county. It would necessarily be within the territory of England, since the counties cannot extend beyond the limits

<sup>1</sup> *Per Story, J.*, in *United States v. Grush*, 5 Mason, 290, 301; *McClain v. Tillson*, 82 Maine, 281.

<sup>2</sup> Thus, in the treaty of 1867, between England and France, as to Sea Fisheries, confirmed by act of Parliament in 1868 (31 & 32 Vict. ch. 45), it was provided that "the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland," and that these miles "are geographical miles, whereof sixty make a degree of latitude."

<sup>3</sup> Manning's *Law of Nations*, 120. In the law of nations, bays are regarded as part of the territory of the country when their dimensions and configuration are such as to show that the nation occupying the coast also occupies the bay as part of its territory. Wheaton's *Int. Law* (8th ed.), 255, 256, *n.*, 325; Grotius, *De Jure Belli*, bk. 2, ch. 3, §§ 7, 8; Vattel, bk. 1, ch. 3, § 290; Ortolan, *Diplom. de la Mer*, bk. 2, ch. 8; 1 Phillimore's *Int. Law*, § 200; 1 Kent Com.

28, 29; *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 894, 419. In this country, a territorial jurisdiction has been claimed over extensive portions of the sea, including waters within lines drawn from distant headlands. 1 Kent Com. 80. That Chesapeake Bay is not "high seas," see *Stetson v. United States*, 82 Alb. L. J. 484 (Court of Alabama Claims). The extension of the neutral zone of sea beyond the limits of three miles, to five or eight miles seaward, was urged by Mr. Seward, on behalf of the United States, in correspondence with the British Legation at Washington in 1864. 2 *Law Mag. & Rev.* (14th series), 310, note. As to the rights of the United States in Behring Sea, see Mr. E. P. Phelps' article in 82 *Harper's Monthly*, p. 766 (April, 1891), and that of Mr. T. B. Browning in 7 *Law Quarterly Review*, p. 128 (April, 1891); and the *Laura Simpson*, 2 *Saw.* 57; 19 *A. G. Op.* 432; 29 *Am. Law Reg.* N. S. 625. Upon the Canadian Fisheries Question, see 21 *Am. Law Rev.* 369, 431.

<sup>4</sup> Bell, C. C. 86.

of the nation.<sup>1</sup> In this case, the situation and condition of the place in question were considered, and the fact that it had always been treated as a part of the county of Glamorgan was regarded as a strong illustration of the principle that the whole of the Bristol Channel was within the adjacent counties.<sup>2</sup> It is established that the right of property in all the soil which is covered by tide water, and is also a part of the nation's territory, is *prima facie* in the Crown by the common law.<sup>3</sup>

**§ 6. Same — Royal fish — Wreck.**— The title to land under water is not changed when the soil becomes bare, and the Crown is entitled to land which is left by the sudden recession of tide waters within the realm, and to islands which arise therefrom.<sup>4</sup> In strictness, also, the Crown has the right of property in all things which are found upon the seashore between high and low-water mark, and have no acknowledged owner, such as seaweed, amber, jet, etc., and in minerals lying under the navigable waters of the kingdom.<sup>5</sup> The ancient

<sup>1</sup> Direct U. S. Cable Co. v. Anglo-American Telegraph Co., 2 App. Cas. 394, 419; Regina v. Keyn, 2 Ex. D. 63; Reg. v. City Court, 8 Q. B. D. 609. See Commonwealth v. Peters, 12 Met. 387; Commonwealth v. Alger, 7 Cush. 82; Commonwealth v. Roxbury, 9 Gray, 451, 494, 512, note; Commonwealth v. Manchester, 152 Mass. 230; 139 U. S. 240; Pollard v. Hagan, 3 How. 230.

<sup>2</sup> Bell, C. C. 86. Sir Robert Phillimore (1 Int. Law, 2d ed. 225) says that the exclusive right of the British Crown to the Bristol Channel, to the channel between Ireland and Great Britain, and to the channel between Scotland and Ireland, is uncontested. Compare Chase v. American Steamboat Co., 9 R. L. 419; *s. c. nom.* Steamboat Co. v. Chase, 16 Wall. 522, in which usage was relied upon as showing that Narragansett Bay is within the jurisdiction of the common-law courts of Rhode Island, and not of the admiralty exclusively.

Sherlock v. Alling, 93 U. S. 99, 104. The boundary between Connecticut and New York, through Long Island Sound, agreed upon by the joint commission of the two states, and established by the legislative acceptance of both, is regarded as presumably a designation and establishment of the pre-existing boundary line, and not of a new line, leaving the matter open to proof in special cases. Elphick v. Hoffman, 49 Conn. 331; Chappell v. Jardine, 51 Conn. 64. See, also, Mahler v. Norwich Transportation Co., 85 N. Y. 352; 87 Conn. 597; Keyser v. Coe, 9 Blatch. 82; The Sloop Elizabeth, 1 Paine, C. C. 10.

<sup>3</sup> *Ante*, § 4; Direct U. S. Cable Co. v. Anglo-American Telegraph Co., 2 App. Cas. 394; Regina v. Keyn, 2 Ex. D. 63.

<sup>4</sup> Hale, De Jure Maris, chs. 4, 6; Anon. Dyer, 326 b; Rex v. Yarborough, 2 Bligh, N. S. 162; Callis on Sewers, 45, 47.

<sup>5</sup> *Post*, § 10.

franchise of royal fish taken within the arms of the sea or in the narrow seas,<sup>1</sup> and the right to wreck, *i. e.*, to goods from a lost vessel which were thrown upon the shore,<sup>2</sup> also belonged to the Crown in virtue of the royal prerogative, and formed one of the ordinary branches of the king's revenue. But these rights, although originally associated with the dominion of the sea, were not enjoyed as appurtenant to the ownership of the sea or the seashore, for the king might grant them to a subject without granting the shore, or, he might grant the wreck to one person and royal fish to another, and the shore itself to a third person.<sup>3</sup> According to Hale and Coke, a grant by the Crown to an individual of the right to take wreck, raises a *prima facie* presumption that the seashore itself was also intended to pass, inasmuch as a ship cannot be a wreck, within the legal meaning of the term, without being stranded above low-water mark;<sup>4</sup> but the better

<sup>1</sup> *Post*, § 8. This prerogative was treated as not obsolete in 1831. *Lord Warden v. The King*, 2 Hagg. Adm. 438.

<sup>2</sup> Hale, *De Jure Maris*, ch. 7; Hargrave's *Law Tracts*, 37-41; 2 Co. Inst. 167; 1 Black. Com. 202, 283, 290; 3 *id.* 106; Callis on Sewers, 40; *Sir Henry Constable's Case*, 5 Co. 107; *Sir John Constable's Case*, Anderson, 86; Bracton, lib. 3, 120, § 5; Com. Dig. tit. Prerogative, D. and Wreck; Phear's *Rights of Water*, 99; 2 Kent Com. 321, 322; Woolrych on Waters, 11; Jerwood on the Seashore, 57; *The Pauline*, 2 Rob. Adm. 358; *Rex v. Forty-nine Casks of Brandy*, 3 Hagg. 257; *Rex v. Two Casks of Tallow*, *id.* 294; *Palmer v. Rouse*, 3 H. & N. 505; *Talbot v. Lewis*, 6 C. & P. 603; *Barry v. Arnaud*, 10 Ad. & El. 646; *Sutton v. Buck*, 2 Taunt. 355; *Hamilton v. Davis*, 5 Burr. 2732; *Blundell v. Catterall*, 5 B. & Ald. 268; *Dunwich v. Sterry*, 1 B. & Ad. 831; *Alcock v. Cooke*, 2 M. & P. 625; *Legge v. Boyd*, 1 C. B. 92; *Stackpoole v. The Queen*, Ir. R. 9 Eq. 620; *The Tilton*, 5 Mason, 477. The control

and management of wrecks was transferred in England to the Board of Trade in 1854 by the *Merchants' Shipping Acts*, 17 & 18 Vict. ch. 104, pt. 8.

<sup>3</sup> *Ibid.*; Anon. 6 Mod. 149; *Abbot of Strata Marcella's Case*, 9 Co. 25 b; *Scratton v. Brown*, 4 B. & C. 485; *Hall on the Seashore* (2d ed.), 80, 82; *Talbot v. Lewis*, 1 C. M. & R. 495; 5 Tyr. 1.

<sup>4</sup> Hale, *De Jure Maris*, ch. 6; Hargrave's *Law Tracts*, 27; *Constable's Case*, 5 Rep. 107; *Calmady v. Rowe*, 6 C. B. 861; *Rex v. Ellis*, 1 M. & S. 662; *Beaufort v. Swansea*, 3 Exch. 413; *Talbot v. Lewis*, 6 C. & P. 606; *Parsons v. Smith*, 5 Allen, 578. At common law, coal in a sunken vessel at the bottom of Lake Michigan is not wreck of the sea. *Murphy v. Dunham*, 38 Fed. Rep. 503. See *The Ann L. Lockwood*, 37 *id.* 233. The right given by a deed of partition to have "exclusively all the sea manure and drift stuff which lands on the west shore" does not embrace goods floated ashore from a wrecked vessel and having a known owner, but only

view appears to be that the right to wreck is a franchise which carries with it no right to the soil of the seashore.<sup>1</sup> A grant of the shore does not pass wreck of the sea without express words.<sup>2</sup>

§ 7. **Same—Adjacent seas.**—Prior to the decision in *Regina v. Keyn*,<sup>3</sup> the open seas around the coasts of Great Britain were considered to be the property of the Crown, and it was commonly said that the sea is not only under the king's dominion, but that it is his proper inheritance.<sup>4</sup> According to Selden and the writers of his time,<sup>5</sup> the king is lord of the great waste, both land and water. Lord Hale says<sup>6</sup> that the king is owner of this waste, and that the narrow sea adjoining the coast of England is "part of his dominions, whether it lie within the body of any county or not." In ancient times, it was declared<sup>7</sup> that the sea is within the legiance of the king, as of his crown of England; and in the Rolls of Parliament,<sup>8</sup> in the reign of Henry V., it appears that the Commons prayed that whereas the king and his progenitors have always been lords of the sea, and now it happens that the king is lord of the coasts of both sides of the sea, that therefore the king will lay an imposition upon strangers passing over the sea. Coke, Bacon, Blackstone, Chitty, and Woolrych,<sup>9</sup> writing at different periods, reassert the same doctrine; and Callis considers that,

such as the grantee of the right can legally appropriate. *Watson v. Knowles*, 13 R. L. 639.

<sup>1</sup> *Ibid.*; Phear's Rights of Water, 52; Hall on the Seashore (2d ed.), 20, 76, 81-99; *Dickens v. Shaw*, id. App. 54, 66.

<sup>2</sup> *Alcock v. Cooke*, 5 Bing. 340.

<sup>3</sup> 2 Ex. D. 63; *post*, § 11.

<sup>4</sup> Royal Fishery of the Banne, Sir John Davies, 149, 152; 16 Vin. Abr. tit. Prerogative, B.; 1 Roll. Abr. 528; 2 id. 168, 170; Com. Dig. tit. Prerogative; Molloy, De Jure Maritimo (9th ed.), 207; Sir John Constable's Case, 3 Leon. 71, 73.

<sup>5</sup> Selden, Mare Clausum, lib. 2, ch. 22, 24; Hall on the Seashore (2d ed.), 2; *ante*, § 3.

<sup>6</sup> Hale, De Jure Maris, ch. 4, 5; 1 Hale, P. C. 154; 2 id. 12-15.

<sup>7</sup> 6 Rich. II.; Fitzherbert, tit. Protection, 46; Royal Fishery of the Banne, Sir John Davies, 149, 152; Callis on Sewers, 89; Hale on Adm. Jurisdiction, cited in *Commonwealth v. McLoon*, 101 Mass. 1, 12, pl. 5.

<sup>8</sup> 1 Rot. Parl. 8 Hen. V. N. 6; 16 Vin. Abr. tit. Prerogative, B.; Woolrych on Waters, 19.

<sup>9</sup> Co. Litt. 107, 260 b, § 439; Bacon's Abr. tit. Court of Admiralty; 1 Black. Com. 110; 2 id. 264; Chitty's Prerogatives of the Crown, 142, 173, 206. See also Hall on the Seashore, 13; Schultes, Aquatic Rights, 1-5; Jerwood on the Seashore, *passim*.



by the common law, the king has, in the English seas, possession and rights of property as well as of jurisdiction.<sup>1</sup>

§ 8. Same — The modern rule.— The narrow seas were thus considered to be within the realm of England.<sup>2</sup> Although the Admiralty now has exclusive jurisdiction of questions arising upon the ocean, yet it appears that a concurrent jurisdiction was formerly exercised by the common-law courts in cases of felonies done upon these waters, although they were still regarded as high seas.<sup>3</sup> Under this theory, the Crown was entitled to royal fish which were captured in the British seas, though not to those taken in the seas beyond,<sup>4</sup> and to

<sup>1</sup> Callis (on Sewers, 39–41, 53) says: "Touching our Mare Anglicum, in whom the interest therein is, and by what law the government thereof is, is a fit question, and worth the handling. And in my argument therein I hope to make it manifest by many proofs and precedents of great worth and esteem, that the king hath therein these powers and properties, *videlicet*: (1) *Imperium regale*; (2) *Potestatem legalem*; (3) *Proprietatem tam soli quam aquæ*; (4) *Possessionem et profituum tam reale quam personale*. And all these he hath by the common laws of England."

<sup>2</sup> 1 Hale, P. C. 424; 2 id. 13–17; Hale, De Jure Maris, ch. 4; 1 Com. Dig. 369; 4 Inst. 134, 137; 2 East, P. C. 803; 6 Dane's Abr. 355; Attorney General v. Tomsett, 2 Cr. M. & R. 170, 174; The Twee Gebroeders, 3 C. Rob. 336; 1 Phill. Int. Law, chs. 6, 7.

<sup>3</sup> Ibid.; Commonwealth v. McLoon, 101 Mass. 1.

<sup>4</sup> Britton, ch. 17. "Touching royal fish, therefore called so, because of common right such fish, if taken within the seas parcell of the dominion and Crown of England, or in any creeks or armes thereof, they belong to the Crown; but if taken in the wide sea, or out of the precincts of the seas belonging to the Crown of

England, they belong to the taker 39 E. 3, 35, *per* Belknap. Touching the kind of these fishes that are called royal fish, there seem to be but three, viz.: sturgeon, porpoise, and *balaena*, which is usually rendered a whale. . . . But because they may be great fish that come under no known denomination, we find the claim of such under the name of *piscis regius*, or sometimes *grand pisce*, without any certain denomination. . . . But salmon or lamprey are not royal fish. By the common right of the king's prerogative these belong to the king, if taken within his seas or the armes thereof. Anciently the intire sturgeon belonged not to the king, but only the head and the tail of the whale, according to Bracton, cited by Staunford upon this chapter of the prerogative. According to the custom used in the admiralty, these great fish, if taken in the salt water within the king's seas, they were divided, and a moiety was allowed to the taker, the other moiety to the admiral in right of the king." De Jure Maris, ch. 7, 4, 6; Hargrave's Law Tracts, 42, 43; Woolrych on Waters, 63; Plow. 315. Swans, swimming in an open and common river, are royal fowl; but the owner of a manor may prescribe to have a game of swans

islands which arose from the waters.<sup>1</sup> So broad a claim has not been sanctioned by the acquiescence of other nations,<sup>2</sup> yet it is asserted by modern writers upon the common law,<sup>3</sup> and was insisted upon by the British government in the present century.<sup>4</sup>

**§ 9. Same — Property.**— It has been held by eminent judges that the Crown retains within the three-mile belt the rights which were formerly appropriated to it over entire seas. Thus, in the case of the *Whitstable Free Fisheries v. Gann*,<sup>5</sup> which involved the right to collect tolls for anchorage beyond low-water mark, Erle, C. J., laid down broadly that “the soil of the seashore, to the extent of three miles from the beach, is vested in the Crown.” When this case came before the House of Lords on appeal,<sup>6</sup> Lord Wensleydale appears to have assented<sup>7</sup> to that rule, as he also did upon another occasion;<sup>8</sup>

within his private waters, and to have them swim within another’s manor. *The Case of Swans*, 7 Co. 15 b.

<sup>1</sup> *Ante*, § 6.

<sup>2</sup> Ortolan, *Diplom. de la Mer*, tom. 1, liv. 2, ch. 15; Grotius, *Mare Liberum*; Vattel, *Droit des Gens*, liv. 1, ch. 23, § 289; Martens, *Precis du Droit des Gens*, liv. 2, ch. 1, § 42; 11 *Edinburgh Review*, art. 1, pp. 17–19; Klüber, § 132; Lawrence’s *Wheaton’s Int. Law* (2d ed.), pt. II, ch. 4, p. 328. According to an ancient record between Edward the First of England and Philip the Fair of France, all the maritime nations of Europe assented to the exclusive possession and dominion of the English kings in the seas of England. Selden, *Mare Clausum*, lib. 2, ch. 23; 4 Co. Inst. 142; 1 Roll. Abr. 528, pl. 2; 6 Vin. Abr. tit. Court of Admiralty, 2; 1 Molloy, *De Jure Maritimo* (9th ed.), ch. 5, pl. 14; Woolrych on Waters, 5.

<sup>3</sup> Chitty on the Prerogative, 143, 173, 206; Woolrych on Waters, 41; Hall on the Seashore (2d ed.), 2, 3, 154; Schultes on Aquatic Rights, 1–5.

<sup>4</sup> In 1803 the negotiations for a settle-

ment of the controversy between this country and England, as to the impressment of seamen by British cruisers from American merchant vessels, were broken off in consequence of the British government insisting that the “narrow seas” should be excepted out of the sphere over which the contemplated stipulations against impressment should extend. See Lawrence’s *Wheaton’s Int. Law* (2d ed.), pt. II, ch. 2, p. 211. Saluting the flag was the usual recognition of England’s dominion over the seas. 1 Phillimore’s *Int. Law* (2d ed.), 220. Mr. Hall refers to a regulation of the English Admiralty, as existing in 1805, by which English war vessels were directed to insist upon the salute of the flag over the sea south of England as far as Cape Finisterre. Hall’s *Int. Law*, 121.

<sup>5</sup> 11 C. B. N. s. 887, 413.

<sup>6</sup> 11 H. L. Cas. 192; see the same case before the Exchequer Chamber, 13 C. B. N. s. 853.

<sup>7</sup> p. 213.

<sup>8</sup> *Gammell v. Commissioners of Woods*, 3 Macq. 419, 465. Lord Wens-



but Lord Chelmsford, adverting more directly to the statement of Erle, C. J., and recognizing it so far as it related to territorial property and jurisdiction as against foreign powers, doubted its correctness with reference to the subjects of England.<sup>1</sup> So, according to Lord Cranworth,<sup>2</sup> Judge Story,<sup>3</sup> and Chief Justice Shaw,<sup>4</sup> the right of soil in the sea as well as the shore was in the Crown by the common law. In the case of *The Leda*,<sup>5</sup> Dr. Lushington, although not passing directly upon the Crown's right of property in the sea, held that the words "United Kingdom," as employed in a statute with reference

leydale here said that "the distance of three miles, by the acknowledged law of nations, belongs to the coast of the country." See *Regina v. Keyn*, 2 Ex. D. 63, 120, 124, 227.

<sup>1</sup> 11 H. L. Cas. 217, 218. Lord Chelmsford here said: "I do not think it can be assumed as an unquestionable proposition of law, that, as between the Crown and its subjects, the sea-shore, to the extent mentioned, is the property of the Crown in such an absolute sense as that a toll may be imposed upon a subject for the use of it in the regular course of navigation. Whatever power this may impart with respect to foreigners, it may well be questioned whether the Crown's ownership in the soil of the sea to this large extent is of such a character as of itself to be the foundation of a right to compel the subjects of this country to pay a toll for the use of it in the ordinary course of navigation." See *King v. Parish*, 1 Hawaiian, 36.

<sup>2</sup> *Attorney General v. Chambers*, 4 De Gex, Macn. & G. 206, 213.

<sup>3</sup> *The Brig Ann*, 1 Gall. 62. See *Church v. Hubbard*, 2 Cranch, 187, 234.

<sup>4</sup> *Commonwealth v. Roxbury*, 9 Gray, 451, 482; *Weston v. Sampson*, 8 Cush. 347, 351; *Commonwealth v. Alger*, 7 Cush. 53, 82; *Dunham v. Lamphere*, 3 Gray. 268.

<sup>5</sup> *Swabey's Adm.* 40; *Haliday v. Stott*, 2 Hawaiian, 395-6. In *Chase v. American Steamboat Co.*, 9 R. L. 419, 426, Potter, J., said, in discussing the admiralty jurisdiction under the Constitution of the United States: "Before the adoption of the Constitution, the State had jurisdiction over the bay (Narragansett Bay), and over the coasts of the sea, to the extent of the marine league. Lawrence's *Wheaton*, 321, 933; 6 Dane's Abr. 359, &c.; 3 Hagg. Adm. 290, 375; *De Lovio v. Boit*, 7 Gall. 398, 425. See opinion of Johnson, J., in *Ramsay v. Allegre*, 12 Wheat. 614. This jurisdiction was exercised by its courts of common law." Mr. Dane says that "the realm includes the narrow seas, and the coasts" (6 Dane's Abr. 356); and at the date of the Massachusetts charter (1691), the admiralty jurisdiction was "exclusive on the high seas, the common highway of nations, without the territorial line, usually cannon shot from the shore; concurrent with the common law on the coasts between the shore and that line, and without the bodies of counties, and within them only such admiralty limited jurisdiction the said prior statutes gave, and that was the colonial view of the subject." 6 Dane's Abr. 357.

to salvage, included both the land of the kingdom and three miles from the shore. In *Church v. Hubbard*,<sup>1</sup> in the Supreme Court of the United States, the question was whether an insurance company was liable for the loss of a vessel named the *Aurora*, which was seized and condemned some four or five leagues from the coast of Brazil for attempting to trade illicitly. Marshall, C. J., said: "That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act, which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory." In *United States v. Smiley*,<sup>2</sup> the defendant was indicted for the larceny of treasure lost from a wreck and buried in the sea sand within one hundred and fifty feet from the shore of Mexico. Field, J., held that the jurisdiction of that country over all offenses committed within a marine league from its shores, not on a vessel of another nation, was complete and exclusive, and that the United States had no jurisdiction over the place or the property.

**§ 10. Same — Minerals.**— In the present century the question arose in England as to the rights of the Queen and the Prince of Wales, as Duke of Cornwall, to the mines and minerals under the sea adjoining the coasts of Cornwall. This involved the right of property in minerals between high and

<sup>1</sup>2 Cranch, 187, 234; *Hudson v. Adela*, Gallaudet's Manuel, Int. Law, Gustier, 4 Cranch, 293; *The Brig* 117.  
Ann, 1 Gall. 62; *United States v. Kessler*, Bald. C. C. 15; *United States v. Davis*, 2 Sumner, 482; *Montgomery v. Henry*, 1 Dall. 49; *People v. Tyler*, 7 Mich. 161; 8 Mich. 320; *The* <sup>2</sup>6 Sawyer, 640. A vessel wrecked upon the shore is still upon the sea so as to be within the jurisdiction of the admiralty. *United States v. Pitman*, 1 Sprague, 196.

low-water mark around the coasts of that county, and also the right of property in minerals below low-water mark, won by an extension of workings begun above low-water mark, and was determined by arbitration.<sup>1</sup> It appeared that the Prince was in possession, and had worked the mines from land which was his own. With respect to the title beyond low-water mark, it was contended, on behalf of the Crown, that the bed of the sea was its property; and on behalf of the Prince it was insisted, first, that under the terms of the original grant from the Crown, the Duke of Cornwall acquired everything adjoining and connected with the county, and that, even if the bed of the sea elsewhere belonged to the Crown, it had passed to the Duke in the seas adjoining Cornwall;<sup>2</sup> second, that the bed of the sea did not belong to the Crown by the common law, but that the Prince was entitled to the mines as first occupant. The decision of the arbitrator was that all the mines and minerals lying under the seashore between high and low-water marks, and under the estuaries, tidal rivers and other places beyond low-water mark, which were within the county, belonged to the Prince as part of the soil and territorial possessions of the Duchy of Cornwall; but that the right to all mines and minerals beyond low-water mark, under the tide waters adjacent to, but not part of, the county, was vested in the Queen in right of her Crown, although won by workings commenced above low-water mark and extended below it.<sup>3</sup> An act of Parliament was passed to

<sup>1</sup> This arbitration is reviewed in *Regina v. Keyn*, 2 Ex. D. 63, at pages 121, 155-158, 199-202. See, also, 6 Law Mag. & Rev. 113. The reference was made by Lord Chancellor Cranworth on the part of the Queen, and by Lord Kingsdown, then Chancellor of the Duchy of Cornwall, on the part of the Prince of Wales, to the arbitration of Sir John Patteson. A further question involving the construction of the Act of Parliament referred to in the text, was afterwards referred to the arbitration of Sir John Coleridge. See opinion of Coleridge, C. J., in *Regina v. Keyn*,

2 Ex. D. 63, 155-157. Lord Coleridge here says that all the proceedings in both references were in writing, that he was furnished with copies of the whole of them, and that most of the authorities cited in the case then before the court were cited there, as well as some others of considerable importance.

<sup>2</sup> See *Trematon Case*, Wightwick, 167; *Attorney General v. St. Aubyn*, id. 270; *Penryhn v. Holm*, 2 Ex. D. 328; *Regina v. Keyn*, 2 Ex. D. 63; *The Prince's Case*, 8 Co. 31; *Stannaries Case*, 12 Co. 10.

<sup>3</sup> 21 & 22 Vict. ch. 109.

give effect to this decision in favor of the Crown, by which it was declared and enacted that all' mines and minerals lying below low-water mark under the open sea adjacent to but not being part of the county of Cornwall were, as between the Queen, in right of her Crown, and the Prince, in right of his Duchy of Cornwall, vested in the Queen "in right of her Crown as part of the soil and territorial possessions of the Crown." It would seem that the Prince, being owner of the shore between high and low-water marks around the county, would control the access from the land to the bed of the sea; and that, as he was the first occupant of the mines, the Crown could be held to be the owner of the *fundus maris* beyond the limits of the county, independently of a title to the shore, only under the supposed rule of the common law, while the Crown's rights in the sea-bottom adjacent to but beyond the limits of Cornwall would, according to this arbitration and statute, be similar to those which it had been thought to possess around all the coasts of the kingdom.<sup>1</sup>

§ 11. **Same — Regina v. Keyn — Jurisdiction.**— In *Regina v. Keyn*,<sup>2</sup> it appeared that the *Franconia*, a German vessel, while proceeding from one foreign port to another, negligently came in collision with an English vessel off Dover, at a point less than three miles distant from the coast of England. It was held that the defendant, who was in command of the *Franconia*, and was charged with manslaughter for causing the death of a passenger upon the English vessel, was not subject to the jurisdiction of the English admiralty, the extent of which jurisdiction was the only point really in issue.<sup>3</sup> The judges who dissented from this conclusion were of the opinion that the territory of England and the jurisdiction of the

<sup>1</sup> See the judgment of Amplett, J. A., and Lord Coleridge, C. J., in *Regina v. Keyn*, 2 Ex. D. 63, 121, 155-158, and the criticism upon this arbitration by Cockburn, C. J., in the same case, 2 Ex. D. 199-202. See *post*, § 12.

<sup>2</sup> 2 Ex. D. 63.

<sup>3</sup> The trial was in the Central Criminal Court, to which the jurisdiction of the admiral over crimes was trans-

ferred by Stat. 4 & 5 Will. 4, ch. 36; Stat. 7 & 8 Vict. ch. 2. The judge who presided at the trial reserved the question of jurisdiction for the Court for Crown Cases Reserved. The case was argued a second time in this court before fourteen judges. Archibald, J., one of this number, died before judgment, but agreed with the majority. See, also, *Reg. v. Carr*, 10 Q. B. D. 76; 62 L. T. 46.

Crown and the Admiral, included the waters within the three-mile belt, and the fact that the passenger's death occurred upon an English vessel was regarded by Lord Coleridge, C. J., and Denman, J., as sustaining the jurisdiction.<sup>1</sup> It was also held that express legislation is necessary to confer upon the courts jurisdiction over foreign vessels passing near the coast; that, with respect to both property and jurisdiction, the territorial seas and the ocean beyond are alike high seas, open to the peaceful navigation of all nations,<sup>2</sup> and that the territory of England extends only to low-water mark on the external coast.<sup>3</sup>

§ 12. *Same — Same.*— Of the opinions delivered in *Regina v. Keyn*, that of Cockburn, C. J., contains the fullest discussion of the questions considered and of the Crown's property in the sea. The learned judge, adverting to the fact that Selden, Hale, and other early writers who assert an unrestricted sovereignty over the sea,<sup>4</sup> wrote at a period when the three-mile rule was altogether unknown, and in support of England's dominion over the whole of the narrow seas, concluded that,

<sup>1</sup> See *Reg. v. Coombes*, 1 Leach, C. C. 388; *Commonwealth v. Macloon*, 101 Mass. 1; *Reg. v. Moore*, 8 Quebec L. R. 9. The admiralty has no jurisdiction of an offense committed by a foreigner upon a foreign vessel upon the high seas beyond the three-mile belt, even when the offense is committed against English subjects. *Reg. v. Serva*, 1 Den. C. C. 104; *Reg. v. Lewis*, 1 Dearsley & Bell, C. C. 182; *Regina v. Keyn*, 2 Ex. D. 63.

<sup>2</sup> *Regina v. Keyn*, 2 Ex. D. 63, 70, 77, 82, 91, 119, 206, 217; *The Saxonia*, 1 Lush. 410; 11 H. L. Cas. 192; L. R. 4 H. L. 266; *The Twee Gebroeders*, 3 C. Rob. 336, 352; *The Vigilantia*, 1 C. Rob. 1; *The Catharina*, 5 C. Rob. 161; *The Success*, 1 Dodd's Adm. 131; *United States v. Kessler*, 1 Bald. C. C. 15, 17.

<sup>3</sup> In *Manning's Law of Nations* (Amos's ed.), 119, the purposes for which jurisdiction over the sea may

be exercised under the law of nations are said to be: (1) the regulation of fisheries; (2) the prevention of frauds on custom laws; (3) the exaction of harbor and lighthouse dues; and (4) the protection of the territory from violation in time of war between other states. This passage was noticed and apparently approved in *Regina v. Keyn*. See, also, *Reg. v. Forty-nine Casks of Brandy*, 3 Hagg. Adm. 247, 289; *Merlin*, *Rep. de Juris*, vol. 10, p. 135; *Ortalan*, *Diplom. de la Mer*, vol. 1, pp. 157, 174–177; *United States v. Kessler*, 1 Bald. C. C. 34; *The Leda*, Swa. Adm. 40; *General Iron Co. v. Schurmanns*, 1 J. & H. 193; *Wheaton's Int. Law*, pt. II, ch. 4, §§ 6–10; 1 *Kent Com.* (12th ed.), 28; *Kent, Int. Law*, 115; *Manning's Law of Nations* (Amos's ed.), 119; *Vattel*, lib. 1, ch. 23, § 295; *Church v. Hubbard*, 2 Cranch, 234.

<sup>4</sup> *Ante*, § 7.

as this theory is now exploded, the unlimited jurisdiction and the rights of property maintained by these writers cannot be revived so as to attach to the distinct dominion since acquired over the territorial seas; that no distinction being suggested by them between one part of those seas and another, no time can be designated when the three-mile zone became part of the realm; that the assertions of publicists and jurists, even if in harmony, could not add to the territory of a nation or confer jurisdiction upon its courts; that the right to erect wharves, piers, breakwaters, forts, etc., upon the open sea-coast below low-water mark, would be determined merely by the prior occupancy of the space covered by them; and that, while such encroachments, being commonly in aid of navigation, are readily acquiesced in,<sup>1</sup> it would be worthy of consideration, if the case arose, whether there would not be just cause for complaint if they obstructed navigation by foreign vessels.

**§ 13. Same — Authority of *Regina v. Keyn*.**— The decision in *Regina v. Keyn* was that of a bare majority of a court composed of thirteen judges, and it is uncertain how far it may be approved in this country.<sup>2</sup> Lord Hale thought it no objection to the theory of sovereignty over the sea that it extended the rights and jurisdiction of the king beyond the counties,<sup>3</sup> and, under that theory, the sea and the land appear to have been regarded as distinct territories.<sup>4</sup> If, as Cockburn, C. J.,

<sup>1</sup> If erected for purposes of defense, they are within the principle that a nation may do what is necessary for the protection of its own territory. *Per* Cockburn, C. J., 2 Ex. D. p. 199.

<sup>2</sup> The decision in *Regina v. Keyn* is binding upon all the English courts. *Harris v. The Franconia*, 2 C. P. D. 173. See *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 394. In *Blackpool Pier v. Fyde Union*, 46 L. J. M. C. 189, the part of a pier which was beyond low-water mark was held to be beyond the realm, and not ratable as an extra-parochial place, under 31 & 32 Vict. ch. 122, § 7.

<sup>3</sup> “The narrow sea adjoining to the

coast of England is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not.” *De Jure Maris*, ch. 4; Hargrave’s *Law Tracts*, 10. See also Hale’s unpublished treatise on Admiralty Jurisdiction, quoted by Gray, J., in *Commonwealth v. Macloon*, 101 Mass. 1, 12, pl. 5.

<sup>4</sup> In 1 Molloy, *De Jure Maritimo* (9th ed.), ch. 5, pl. 14, note, it is said, with reference to the four seas: “The right unto the sea ariseth not from the possession of the shores; for the sea and land make distinct territories, and by the laws of England, the land is called the realm, but the



suggests,<sup>1</sup> the three-mile rule was adopted as a compromise of the earlier diverse claims, there would, perhaps, be no inconsistency in maintaining that it limited this dominion in extent but did not change its character, which, by the common law, if not by the law of nations, included rights of property as well as of jurisdiction.<sup>2</sup> In this country, counties are dependent for their existence upon the consent of the legislature, which may change their boundaries at pleasure, if not restricted by express constitutional provisions;<sup>3</sup> and to declare that the external bounds of a State upon the sea-coast are limited by those of its counties, is but another form of saying that both depend upon the will of the legislature. According to the decisions in the American courts, these boundaries are not necessarily identical.<sup>4</sup> Thus, in *Schooner Norway v. Jen-*

sea the dominion; and as the loss of one province doth not infer that the prince must resign up the rest, so the loss of the land territory doth not by concomitancy argue the loss of the adjacent sea."

<sup>1</sup> 2 Ex. D. 63.

<sup>2</sup> *Ante*, §§ 7-10.

<sup>3</sup> *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Whallon v. Ingham Circuit Judge*, 51 Mich. 503; *Burns v. Clarion Co.*, 62 Penn. St. 425; *Windham v. Portland*, 4 Mass. 589; *Opinion of the Justices*, 6 Cush. 578; *Stone v. Charlestown*, 114 Mass. 214; *Eagle v. Beard*, 33 Ark. 497; *Dodson v. Fort Smith*, *id.* 508; *Bittle v. Stuart*, 34 Ark. 224, 231; *Reynolds v. Holland*, 35 Ark. 56; *Albernathy v. Dennis*, 49 Mo. 468; *State v. Shortridge*, 56 Mo. 126; *Opinion of Supreme Court*, 55 Mo. 295; *Woods v. Henry*, *id.* 560; *Baltimore v. State*, 15 Md. 376; *Groff v. Frederick City*, 44 Md. 67; *Frederick v. Goshon*, 30 Md. 436; *Wade v. Richmond*, 18 Gratt. 583; *Manly v. Raleigh*, 4 Jones Eq. 370; *Love v. Schenck*, 12 Ired. 304; *Wallace v. Trustees*, 84 N. C. 164; *Dare County Com'rs v. Currituck County Com'rs*, 95 N. C. 189; *People v. Hill*,

7 Cal. 97; *San Francisco v. Canavan*, 42 Cal. 541; *State v. Branin*, 3 Zab. 485; *Pell v. Newark*, 40 N. J. L. 71; *Detroit v. Blackeby*, 21 Mich. 84; *Barner v. District of Columbia*, 91 U. S. 540; *Beckwith v. Racine*, 7 Biss. 142.

<sup>4</sup> *Mahler v. Norwich Transportation Co.*, 35 N. Y. 358; 45 Barb. 226; 30 How. 237; *Manley v. People*, 7 N. Y. 295, 299, 303; *Dunham v. Lamphere*, 3 Gray, 268, 270; *Commonwealth v. Roxbury*, 9 Gray, 451, 494; *Keyser v. Coe*, 37 Conn. 597, 613; *Powers v. Larrabee*, 1 Wis. 200; *State v. Cameron*, 2 Chand. (Wis.) 172; *Hart v. Rogers*, 9 B. Mon. 418, 422; *Morris County v. Hinchman*, 29 Kansas, 90; *United States v. Bevens*, 3 Wheat. 336, 386; *Montgomery v. Henry*, 1 Dall. 49; *Tyler v. People*, 8 Mich. 320; 7 Mich. 161; 11 Am. L. Rev. 625. In this article in the American Law Review by Hon. Dwight Foster, it is said with reference to a *nisi prius* case tried in the Superior Court of Massachusetts in Barnstable County: "In the course of the trial, the presiding judge remarked: 'If the jurisdiction of the State extends to the distance of a marine league from the shore,

sen,<sup>1</sup> in Illinois, Breese, C. J., said, with reference to the western part of Lake Michigan: "It is true, no portion of this vast body of water has been assigned to the counties bordering upon it, or received in any manner the attention of the legislature, yet it is, nevertheless, a portion of the navigable waters of this State and of our territory." And in the recent case of *Manchester v. Massachusetts*,<sup>2</sup> Blatchford, J., says: "There is no indication that the customary law of England in regard to the boundaries of counties was adopted by the constitution of the United States as a measure to determine the territorial jurisdiction of the States." The right of fishing within the distance of one marine league from the shore was not considered in *Regina v. Keyn*, and appears to belong exclusively to the inhabitants of the littoral state,<sup>3</sup> subject to the regulations of its legislature.<sup>4</sup>

as I suppose it does, it does not follow, as a matter of course, that the jurisdiction of the county of Barnstable extends to that distance. I do not find any authority to that effect.' This *nisi prius* ruling was made by one of the ablest men of his day (Charles Allen of Worcester), who shortly after declined the place of Chief Justice of Massachusetts, upon the resignation of Shaw, C. J. But we refer to it, chiefly because it led to the immediate passage of the Massachusetts statute cited above." In *The King v. Forty-nine Casks of Brandy*, 3 Hagg. Adm. 275, 290, Sir John Nicholl said: "No person ever heard of a land jurisdiction of the body of a county which extended to three miles from the coast." In Maine, it is held that every part of the State is within some one of its counties. *State v. Wagner*, 61 Maine, 179.

<sup>1</sup> 52 Ill. 373, 181. See *Murphy v. Dunham*, 38 Fed. Rep. 503; *Thorson v. Peterson*, 10 Biss. 530; *Dunlap v. Commonwealth*, 108 Penn. St. 607;

*Illinois v. Illinois Central R. Co.*, 38 Fed. Rep. 721.

<sup>2</sup> 139 U. S. 240; 11 S. Ct. 559, 564; 152 Mass. 230.

<sup>3</sup> See *Gammell v. Commissioners of Woods and Forests*, 8 Macq. 419; *Dunham v. Lamphere*, 8 Gray. 268; Schultes, *Aquatic Rights*, 3; Chitty on the Prerogative, 100; Vattel, tit. 1, ch. 23; Puffendorf, IV, 4; VII, 8; Craig, *Jus Feud. lib. 1, 15, § 13*; Lawrence's *Wheaton's Int. Law*, pt. II. ch. 4; Martens, *Precis du Droit*, § 153; Hall's *International Law*, 125. In *Coulson and Forbes on Waters* (pp. 2, 4, 11) it is said that a nation may bind itself by treaty, and perhaps by non-user, from participating in the common right of fishing at certain places in the sea in favor of other nations; and that "there can be no doubt but that by treaty, or by the implied assent of nations, the right of fishing within three miles of the coast of the United Kingdom is vested exclusively in the inhabitants subjects of her Majesty."

<sup>4</sup> *Ibid. post*, § 16; *Dogerty v. Power*, 1 Russell Eq. (Nova Scotia), 419, 422.



§ 14. **Same—Town boundaries on the shore.**—All political bodies are not limited by the lines which bound their subdivisions.<sup>1</sup> Counties are made up of towns, cities or parishes, and yet the seashore between high and low-water mark, though within the county at low tide,<sup>2</sup> is presumed to be extra-parochial with respect to jurisdiction.<sup>3</sup> This presumption applies to the shore of an arm of the sea<sup>4</sup> and of a tidal river<sup>5</sup> as well as to the shore of the external coast. In the West the jurisdiction of townships bordering on the great lakes does not extend beyond the boundaries established by the official surveys, and these do not include territory outside of the shore lines.<sup>6</sup>

§ 15. **Same—Power of Parliament.**—In *Regina v. Keyn*, Kelly, C. B., and Sir R. Phillimore doubted whether Parliament could, consistently with a due regard to the rights of other nations and the principles of international law, create a general jurisdiction over the three-mile belt. It appears, however, to admit of little doubt that there is no legal restraint upon the legislature to assert and exercise such power.<sup>7</sup> The subject was discussed in Parliament shortly after the above decision, and a statute was enacted by which foreigners passing in foreign vessels within three miles of the shore were made subject to the criminal law of England.<sup>8</sup> This statute appears to extend the jurisdiction only.

<sup>1</sup> *Embleton v. Brown*, 3 El. & El. 284; *ante*, § 13.

<sup>2</sup> *Ante*, § 4; *Regina v. Musson*, 8 El. & Bk. 900; 4 Jur. N. S. (Q. B.), 111; *Waterloo Bridge Co. v. Cull*, 28 L. J. Q. B. 75; 5 Jur. 1288. See Hale, *De Jure Maris*, ch. 6, I; *Calmady v. Rowe*, 6 C. B. 880; *Reg. v. Gee*, 1 El. & El. 1068; *McCannon v. Sinclair*, 2 id. 53; *Perrott v. Bryant*, 2 Y. & C. 61, 69; 31 & 32 Vict. ch. 122, § 27; *Blackpool Pier Co. v. Fylde Union*, 46 L. J. M. C. 189; 36 L. T. 251; *Reg. v. Newport*, 31 L. J. M. C. 267.

<sup>3</sup> *Ipswich Dock Commissioners v. St. Peter*, 7 B. & S. 310.

<sup>4</sup> *Bridgewater Trustees v. Bootle-*

*cum-Linacre*, L. R. 2 Q. B. 4; 7 B. & S. 348; *Cory v. Bristow*, 2 App. Cas. H. L. 262. *Rex v. Landulph*, 1 Mod. & Rob. 393, seems to apply to parishes bordering on private streams. See *post*, § 202.

<sup>5</sup> *Post*, ch. 3.

<sup>6</sup> *People v. Bouchard* (Mich.), 46 N. W. 233.

<sup>7</sup> See *Regina v. Keyn*, 2 Ex. D. 63.

<sup>8</sup> 41 & 42 Vict. ch. 73, entitled *The Territorial Waters Act*, which declared that "for the purpose of any offense declared by this act to be within the jurisdiction of the admiral any part of the open sea within one marine league of the coast, meas-

§ 16. Same — Legislation.— The effect of legislation relating to territorial waters has also been brought in question. In *Regina v. Keyn*,<sup>1</sup> the provision of the Merchant Shipping

ured from low-water mark, shall be deemed to be open sea within the territorial waters of her Majesty's dominions." In the House of Lords, the Lord Chancellor (Lord Cairns), in discussing the proposed legislation, said: "The jurisdiction to which he had to call attention was not over rivers, bays, or harbours, because in respect of that no controversy had ever arisen, but the jurisdiction over the territorial waters in that belt or zone of the high seas which more or less surrounded the shores of the empire. This, at first sight, would appear to be a question of law. No doubt it was a question of law, but he rather thought of that which had been described as the first law of nature — the law of self-preservation. It was necessary, to some extent and in some measure, that there should be a territorial jurisdiction over the high seas surrounding the seaboard. No empire which had a seaboard could be allowed to remain without a jurisdiction of that kind. If in the case of such an empire it was held that the jurisdiction of the kingdom ended with the dry land, the consequence would be that the subjects of that kingdom in the presence of foreigners would be absolutely without defense from the moment they entered the sea for the purpose of bathing, or fishing, or for any other purpose. Not only so, but when on dry land they would be without a protection, because if no jurisdiction from the land extended to the sea surrounding the seaboard, people from all parts of the world might come to the part of the high sea contiguous to the land and resort to practices which

might be of the most serious character to people on shore. So, again, in the case of war, hostilities carried on by belligerents outside the shore might expose a neutral power to the greatest danger. It might be asked whether the question was not solved, so far, at all events, as to the low-water mark to which unquestionably the territorial jurisdiction extended. With regard to the low-water mark, it must be remembered that there were parts of the coasts where there were considerable intervals between high and low-water marks, and also there were in the kingdom, as their lordships knew, many places where the sea came so close to the cliffs that there was absolutely no horizontal interval between high and low-water mark. It had been suggested, or might be suggested, that if the jurisdiction of this country extended over the part of the high seas immediately adjoining the shore, inasmuch as the right of passage over that part was allowed to foreign ships, it would be unfair to claim such jurisdiction as against them. He was quite willing to concede the right of passage contended for, but he had imagined that it was to be conceded on this footing and this footing only — that those who availed themselves of the rights of passage should not expose themselves to any complaint of a violation of the rights of those by whom the right of passage was conceded. In truth, any such exemption would apply to the case of foreign ships coming into one of our bays." With respect to the decision in *Regina v. Keyn*, the Lord Chancellor said: "One of the learned judges,

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<sup>1</sup> 2 Ex. D. 68.

Act,<sup>1</sup> authorizing the detention of a foreign vessel which had caused injury to the property of English subjects in any part of the world, if at any time thereafter such ship was found in

for whom they all had the greatest respect, and whose judgment, from his experience in criminal cases, was of the greatest weight—Mr. Justice Lush—stated that though he concurred with the Lord Chief Justice in that learned judge's view of the case, yet he wished to guard himself in this particular case with respect to the limits of the high seas." He then quoted the passage in the opinion of Lush, J., in which that judge declined to adopt any expressions implying a doubt as to the competency of Parliament to legislate for these waters, and proceeded: "As he understood these words, if Sir Robert Lush had found that in the particular place Parliament had stepped in and said that portion of the water was part of the United Kingdom, he would have been of opinion that the Crown had territorial jurisdiction over it, and the conviction ought not to be quashed. It was fortunate for the prisoner in the 'Franconia' case, though not fortunate for the vindication of the law, that Mr. Justice Lush was under the impression that that had not been done which really had been done. It appeared that in an Act of 1848 for the regulation of customs there was a provision authorizing the Lords of the Treasury to establish ports in many places where ports were required, and to define their limits. Under that provision the Lords of the Treasury issued a warrant, which was inserted in the London Gazette of the 3rd of March, 1848. In that warrant were these paragraphs: 'That the limits of the port of Dover shall commence at St. Margaret's Bay aforesaid, and continue along the said coast of Kent

to Cape Point in the said county. That the limits of the port of Folkestone shall commence at Cape Point aforesaid, and continue along the coast to Dungeness, in the said county.' 'And we, the said Commissioners of Her Majesty's Treasury, do further declare that the limits seaward of the said ports shall extend to a distance of three miles from low-water mark, out to sea, and that the limits of such ports shall include all islands, bays, harbours, rivers, and creeks within the same respectively.' So that under Parliamentary powers the proper authorities had declared, long before the 'Franconia' case, that the limits of the Port of Dover extended three miles out to sea. He understood the view of the majority of the judges to be this: there was one jurisdiction by land and the other by sea; that the jurisdiction by land was one limited by the limits of counties, taking into the county the low-water mark, and the harbours and rivers within the county; and the jurisdiction by sea, the old jurisdiction of the Lord High Admiral now exercised by the Central Criminal Court; that the jurisdiction of the Lord High Admiral extended to the high seas, but the persons over whom it was exercised must be British subjects, not foreigners; and that the Central Criminal Court had no jurisdiction over the persons of foreigners beyond the low-water mark. That he understood to be the common ground on which the majority of the judges acted in quashing the conviction. And taking that as the *ratio decidendi* of the judges in a decision which he accepted, it would

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<sup>1</sup> 17 & 18 Vict. ch. 104, § 527.

any port or river of the United Kingdom, or within three miles of the coast, was considered insufficient to include the three-mile belt within the realm, and Cockburn, C. J., doubted whether it would apply to a ship on a foreign voyage. In 1794, Congress recognized the three-mile rule by authorizing the district courts to take cognizance of complaints in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.<sup>1</sup> In the case of the *Brig Ann*,<sup>2</sup> a seizure was made off Newburyport, and within three miles of the shore, for violation of the embargo acts. Story, J., held that, as a principle of public law, the waters within the three-mile belt form part of the nation's territory;<sup>3</sup> and that, as the acts in question extended to all places within the jurisdiction of the United States, these waters, as well as ports and rivers, were within the operation

at first sight appear that there was nothing more for him to do than to ask the favorable consideration of their lordships for a Bill to amend the law; but there fell some observations from Sir Robert Phillimore, the Lord Chief Baron, and the Lord Chief Justice, whose judgment was the most elaborate, and might be regarded as the leading judgment of the majority, and which contained a principle that seemed to challenge the right of Parliament to legislate on this subject. Expressions of the Lord Chief Justice would certainly seem to imply that we could not legislate with respect to the high seas even within the limits of the belt or zone to which he had referred without the consent of foreign nations, or until after communication with foreign nations. This was a very serious question. If the judgments of those learned judges amounted, as they were supposed to do, to a proposition of that kind, of course Parliament would be exceeding its powers if it entered into legislation applying to that belt or zone with the view of

making foreigners answerable to our law. But he would ask their lordships to consider whether there was any foundation for that principle. He ventured to think there was not, and he thought it would be a very serious thing if there were." *London Times*, Feb. 15, 1878, reprinted in 2 *Halleck's Int. Law* (Baker's ed.), 559. *Blackpool Pier v. Fylde*, 46 L. J. M. C. 189. On March 30, 1882, in reply to a question in reference to the projected channel tunnel, in the House of Commons, Mr. Joseph Chamberlain, president of the Board of Trade, said that the chairman of the South-eastern Railway had been warned that the government claimed the bed of the sea for three miles below low-water mark, and held themselves free to use any powers at their disposal as Parliament may direct, or the national interest may require.

<sup>1</sup> 1 *Stats. at Large*, p. 384, ch. 50, § 6; 1 *Kent Com.* 26-30.

<sup>2</sup> 1 *Gall.* 62.

<sup>3</sup> Citing *Church v. Hubbard*, 1 *Cranch*, 187, 234.

of the statutes. In *Dunham v. Lamphere*,<sup>1</sup> Shaw, C. J., expressed the opinion that, by virtue of a statute of Massachusetts, which prohibited fishing with a seine within one mile of the shores of Nantucket and other small islands, that extent of sea was within the territorial limits of the State. It is now provided by statute, in this and other States, that the territorial limits of the State extend three miles seaward from the shore.<sup>2</sup>

<sup>1</sup>*Dunham v. Lamphere*, 8 Gray, 268, 269. See *Manchester v. Massachusetts*, 139 U. S. 240; 11 S. Ct. 559, 564; 152 Mass. 230.

<sup>2</sup>In Massachusetts, "the territorial limits of this commonwealth extend one marine league from its seashore at low-water mark;" "the boundaries of counties bordering on the sea extend to the line of the State as above defined;" and "the sovereignty and jurisdiction of the commonwealth extend to all places within the boundaries thereof." St. 1859, ch. 289; Gen. Sts. (1860) ch. 1, §§ 1, 2. And the boundaries of cities and towns bordering upon the sea extend to the State line. St. 1881, ch. 196. See also Pub. Sts. ch. 213, § 19. In Rhode Island there is a similar statute, the line being, however, one league from the seashore at *high-water mark*. Pub. Sts. (1882), ch. 1, §§ 1, 2. See Rev. Sts. of R. I. (1857), ch. 7, 8. In the Constitution of California, Art. 12, the State is bounded on the south along the boundary line between the United States and Mexico "to the Pacific Ocean, and extending therein three English miles;" and in the Political Code of that State it is provided, with respect to county boundaries (Sec. 8907), that "the words 'in,' 'to,' or 'from' the ocean shore mean a point three miles from shore. The words 'along,' 'with,' 'by,' or 'on' the ocean shore, mean a line parallel with and three miles

from the shore." Thus the boundary of Del Norte County, which is the northerly sea-coast county of that State, begins at a point in the Pacific Ocean, at the southern line of Oregon, and runs "thence southerly *by ocean shore*," &c. Code, § 8909. See, also, Constitution of Alabama, Art. 2, § 1, and Code 1876, § 12 (16). As to the rights of New York and Connecticut in Long Island Sound, see *Mahler v. Norwich Transportation Co.*, 35 N. Y. 352, 360; *Rowe v. Smith*, 48 Conn. 444; *Elphick v. Hoffman*, 49 Conn. 381. The Republic of Texas defined its southern boundary as extending from "the mouth of the Sabine River and running west along the Gulf of Mexico, *three leagues* from land to the mouth of the Rio Grande," and after the annexation of Texas, the State reaffirmed this right of jurisdiction. In *Galveston v. Menard*, 28 Texas, 349, 391, it is said that the admission of this claim by other nations might depend upon the power of the littoral state to enforce it, but that the boundary thus established was conclusive between its own citizens with respect to the right of soil. By the treaty between the United States and Mexico (9 St. at Large, 926, § 5), it was provided that the boundary line between the two countries should commence in the Gulf of Mexico three leagues from land opposite the mouth of the Rio Grande River, and run northward with the

§ 17. Same — *Jus publicum* — *Jus privatum*.— The rights of the Crown in tide waters are classed among the *regalia* or prerogative rights, like the right to treasure trove, to wreck, and the privilege of appointing ports and havens. Such privileges are accorded to the king by the common law, as incident to the powers of government, for the protection of the realm, the regulation of the marine revenues, and in the interest of commerce.<sup>1</sup> According to the treatise *De Jure Maris*, commonly ascribed to Lord Hale, and other authorities of the seventeenth century, which refer to early precedents, the Crown's interest in navigable waters is of a two-fold nature: first, the

middle of the river. See *The Peterhoff*, 5 Wall. 28, 51.

<sup>1</sup> 1 Black. Com. 263, 264; 2 id. 14, 105, 204; Selden, *Mare Clausum*, lib. 2. ch. 22, 24; Callis on Sewers, 39–41; Chitty's *Prerogative of the Crown*, 142, 173, 206; Com. Dig. tit. *Prerogative D.*, and *Navigation B.*; Bacon's *Abr. tit. Court of Admiralty A.*, and *Prerogative B.* 1, 3; 2 Roll. *Abr.* 168; Co. Litt. 1 *b*, 65 *a*; 3 Kent Com. 487; *Woodward v. Fox*, 2 Ventris, 267; Bracton, lib. 3, § 120; Hall on the *Seashore* (2d ed.), 6. "The king being to look to the sea as well as to the dry land, and being to defend his subjects both by sea and land, the law, therefore, gives him many prerogatives both upon the one and the other. As thus: (1) That the king, as supreme, is *custos totius regni Angliæ*, and to take care both of sea and land, of both which he, not only as to protection, but as to propriety, is said to be the lord. And therefore that the four seas, being as the walls of the kingdom, and havens, creeks, and ports adjoining to the sea, being the gates and posterns of it, are said by law to belong to him, and he is to name and appoint the officers for the custody thereof. . . . (4) That in cases where the sea-banks be broke or the sewers or gutters thereof not secured, the king might heretofore

(by the common law) have appointed commissioners of sewers, and have given them commission to inquire of and to have punished the defaults, and to have ordered the repairs of the passages, gutters, and rivers that lead into the sea. The which is now further provided for by the statutes of 23 Hen. 8, cap. 5, and 13 Eliz. cap. 9, and 1 Mar. cap. 11, with many others. (5) That the king may, upon special occasion, arrest ships within the seas for the voyages of the realm. (6) That he may by law, for his enablement and encouragement herein, and to help to maintain his navy, have and take divers privileges and advantages in, upon, and about the sea and rivers thereunto belonging. For (1) the soil, banks, and shores, as high as they flow and reflow, belong to him. (2) He is to have all the havens, ports, and creeks thereof. (3) He is to have all the navigable rivers and breaches of the sea, as Thames and Lee and the rest, which are his streams: and he hath, and is to have in them, the same prerogative, so high as the sea floweth and refloweth in them, as he hath *in alto mari*. And therein the fishing, *rigore juris*, as a royal fishery, doth belong to him." Shepperd's *Abridg.* (2d ed.), tit. *Prerogative*, pt. 8, p. 97.



*jus publicum*, a right of jurisdiction and control for the benefit of its subjects, which is similar to the jurisdiction over public highways by land, though the right of soil may be in the owners of the adjoining estates, and for the protection of which the king, as the head of the realm, may interpose when the rights of the public are impaired;<sup>1</sup> second, the *jus privatum*, or right of private property, which is subject to the *jus publicum*, and which cannot be used by the Crown or conveyed to a subject discharged of this public trust, or so as to justify any interference with the public rights of navigation and fishery. In the case of Attorney General *v.* London,<sup>2</sup> Sergeant Merewether presented an elaborate argument,<sup>3</sup> in which he contended that, upon an examination of the early authorities, including the Saxon charters and laws, Domes-day Book, in which the king's lands are enumerated,<sup>4</sup> the works of Bracton, Glanville, Fleta, and Britton, and the ancient decisions, no trace of a private interest in the Crown was found, but that, on the contrary, there were traces of a territorial right to the shores of tide waters as belonging to the adjacent lands; that the treatise *De Jure Maris*, which had been accepted as the repository of ancient learning upon this and kindred subjects, was not with good reason ascribed to Lord Hale, the use of whose name had given an undue weight to the statements there made;<sup>5</sup> that the theory of a *jus privatum* had its rise in the arbitrary reigns of the Stuarts, from which period precedents

<sup>1</sup> Hale, *De Jure Maris*, ch. 6; Hargrave, 36.

<sup>2</sup> Reported in 2 Ha. & Tw. 1; 8 Beav. 870; 14 L. J. Ch. 805; 12 Beav. 8, 171, 217; 2 Mac. & G. 247; 1 H. L. Cas. 440.

<sup>3</sup> Published in the Appendix to Hall on the Seashore (2d ed.). See Jerwood on the Seashore, which contains a reply to this argument.

<sup>4</sup> In early decisions it was held that "ancient demesne" is land under the title of *terra regis* in Domes-day Book and none other; and that it must be averred by that book as a record. *Hunt v. Burn*, Salk. 57; s. c. Holt, 60.

<sup>5</sup> Certain of the ancient charters contained express grants of the seashore, salt marshes, etc., accompanying the grant of the lands included in the charters. Thus Hale refers to a grant of King Canute "de terra insulæ Thanet, tam in terra quam in mari et litore;" and to another of William the First, "de tota terra Estanore, et totum litus usque medietatem aquæ." *De Jure Maris*, ch. 5. The earlier chapters of Moore on the Foreshore (London, 1888) contain a valuable and exhaustive review of these ancient precedents.

for such a doctrine should be taken with caution; and that, while the Crown had confessedly certain rights in the sea and its shores, including dominion and jurisdiction over them by its courts, and the duty to care for them in the interests of navigation and for the public benefit, the proposition that it had also a private and beneficial interest, and a right to take the fruits of the seashore, independently of any title to the adjoining lands, had been asserted rather than controverted and adjudged.

§ 18. **Same — Hale's De Jure Maris.**—The case in which this argument was delivered appears to have been decided upon other grounds, and the later English decisions support the title of the Crown in accordance with the statements of the treatise *De Jure Maris*.<sup>1</sup> It seems to admit of little doubt that this celebrated treatise was written by Sir Matthew Hale, and it is uniformly ascribed to him in the decisions of the English and American courts.<sup>2</sup> But the reported cases, which

<sup>1</sup> In *Lord Advocate v. Blantyre*, 4 App. Cas. 770, 773, note, Lord Currie-hill, Lord Ordinary, said in the court below: "There is no longer any doubt, if such ever existed, that the foreshore of the sea and of navigable rivers, though belonging to the Crown, subject to certain public uses connected with navigation and the like, are nevertheless alienable by the Crown subject to such public uses." In *Gann v. Whitstable Free Fishers*, 11 C. B. N. S. 387, Erle, C. J., said that there is no rule of law which prevents the Crown from granting to a subject that which is vested in itself.

<sup>2</sup> See *Regina v. Betts*, 4 Cox, C. C. 213; *Attorney General v. Chambers*, 4 De Gex & J. 55, 71; *Calmady v. Rowe*, 6 Man. G. & S. 878, note; *Exeter v. Warren*, 5 Q. B. 773, 801; *Ipswich Dock v. St. Peter*, 7 B. & S. 310, 344; *King v. Ward*, 4 Ad. & El. 384, 406; *King v. Yarborough*, 3 B. & C. 91; 2 Bligh, N. S. 147; 1 Dow, N. S. 176; *Bolt v. Stennett*, 8 T. R. 606; *Aldnutt v. Inglis*, 12 East, 527,

537; *Attorney General v. St. Aubyn*, Wightwick, 262; *Murphy v. Ryan, Jr.* R. 2 C. L. 143; *Blundell v. Catterall*, 5 B. & Ald. 268; *Ex parte Jennings*, 6 Cowen, 536, note; *Per Waite*, C. J., and Field, J., in *Munn v. Illinois*, 94 U. S. 113, 126, 149; *Per Gray, J.*, in *Nichols v. Boston*, 98 Mass. 39, 41, and *Haskell v. New Bedford*, 108 Mass. 208, 215; *Berry v. Snyder*, 3 Bush, 266, 275; *Phear's Rights of Water*, 47, note *m*; *Jerwood on the Seashore*, 31, 94, 118; *Moore on the Foreshore*, chs. 14, 15. Lord Hale's views appear in his judgment as Chief Justice in *Lord Fitzwalter's Case*, 3 Keb. 242; 1 Mod. 105 (s. c. 3 Keb. 459, 465, 485, 519, 555; 2 Lev. 139; 1 Freem. 414), and by his position as counsel in *Johnson v. Barrett*, Aleyn, 10, referred to in the next note. Sir Matthew Hale died in 1676, and the treatise *De Jure Maris*, though probably written about the middle of the seventeenth century, was not published until 1787. See *post*, § 49.



came before the English courts in the seventeenth century, tend to show that the doctrine was not then fully recognized;<sup>1</sup> and, as the American colonies were settled from England at that time, those cases and the argument of Sergeant Merewether appear to have a significance in this country, where, as will be hereafter seen,<sup>2</sup> the ancient usages of most of the original States allow to the owners of the adjoining lands rights in the soil below the high-water mark of tide waters, which are unknown to the common law of England, and where, in accordance with the *dicta* of the earlier English decisions,<sup>3</sup> the view generally accepted has been that the Crown

<sup>1</sup> Merewether argues that the *jus privatum* was not acknowledged in the English law prior to the case of *Bulstrode v. Hall*, Sid. 182, decided in 1663. He refers particularly to *Johnson v. Barrett*, Aleyn, 10 (1646). This was an action of trespass for carrying away soil and timber, in which it appeared that the bailiff and burgesses of Yarmouth had destroyed a wharf erected in that town. Rolle, the presiding justice, stated that if it were erected between the high and low-water mark it belonged to the owner of the adjoining land, while Hale, who was counsel in the case, earnestly affirmed that it belonged to the Crown of common right. But it was clearly agreed that if it were erected beyond the low-water mark, it belonged to the king. Merewether argues that Hale would have cited this case in which he was counsel, if he were the author of the treatise *De Jure Maris*, or that, the case not being referred to in that treatise, it was decided against his doctrine. Woolrych (on Waters, 20) says of this case that "if it were understood that the soil between high and low-water mark might belong to a subject by grant or prescription, as might well be the fact, and that the soil below low-water mark belonged to the Crown, as being of little or no value

as the subject of a grant, there would be no difficulty in reconciling the opinions of the great lawyers who differed upon that occasion." It appears that the plaintiff afterwards had judgment. 2 Rol. Abr. 250, pl. 7. See *Boston v. Richardson*, 105 Mass. 371, 362; *Barnstable v. Thacher*, 3 Met. 239, 243; *Jerwood on the Seashore*, 61. In *Anon. Dyer*, 326 b (15 & 16 Eliz.), it was doubted whether the king was entitled to land left by the sea; and in *Attorney General v. Farmen*, 2 Lev. 171, it was debated whether such land belongs to the Crown as a thing of inheritance or of prerogative, and it was held that no patent could be made of the soil under the sea until it had become convertible or derelict. See, also, *Attorney General v. Turner*, 2 Mod. 106; 2 Lev. 171; *Whitaker v. Wise*, 2 Keb. 759. Lilly, who, although not a writer of high authority, perhaps shows the popular understanding prior to the publication of the *De Jure Maris*, says: "Lands between the high-water and low-water mark belong to the lord of the manor next adjoining, as part of his manor; and he can claim by prescription to have wreck and fishing there." 2 Lilly's Practical Register, tit. Rights.

<sup>2</sup> *Post*, §§ 32, 168, *et seq.*

<sup>3</sup> *Blundell v. Catterall*, 5 B. & Ald.

holds this property solely as a trustee for the public, and cannot, since Magna Charta, convey it to a subject.<sup>1</sup>

§ 19. **Same—Jus privatum.**—Various reasons are assigned for the exercise of a *jus privatum* in the Crown. Under the fiction of the feudal law, by which all lands in the kingdom were derived from the king as lord paramount, and held by his bounty, the shores and bed of tide waters, having no other acknowledged owner, are said to remain vested in him in all cases where he has not expressly granted them away.<sup>2</sup> One writer

268; *Somerset v. Fogwell*, 5 B. & C. 375, 884; *Attorney General v. Farman*, 2 Lev. 171; T. Raym. 241; 2 Mod. 106.

<sup>1</sup> *Per* Kirkpatrick, C. J., in *Arnold v. Mundy*, 1 Halst. 1, 12, 77, 78; *Nevins, J.*, in *Bell v. Gough*, 23 N. J. L. 624, 684, 688; *per* Bellows, J., in *Clement v. Burns*, 43 N. H. 609, 616; *Martin v. Waddell*, 16 Peters, 367, 410; *Pollard v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 9 How. 471; *Barney v. Keokuk*, 94 U. S. 324; *Commonwealth v. Wright*, 8 Am. Jur. 183; *Hatfield v. Grimstead*, 7 Ired. 139; *Galveston v. Menard*, 23 Texas, 349; *Chapman v. Kimball*, 9 Conn. 38; *McManus v. Carmichael*, 3 Iowa, 1, 29. In *Barker v. Bates*, 13 Pick. 255, 259, Shaw, C. J., speaking of the law of England, said: "There the rule is that the right of property to high-water mark is in the Crown, but it is deemed to be so held in trust for the use and benefit of all the king's subjects, and therefore such right of property cannot be granted by the Crown to a subject." See the opinions of the same judge in *Commonwealth v. Alger*, 7 Cush. 53, 89-94; *Weston v. Sampson*, 8 Cush. 347, 352; *Commonwealth v. Roxbury*, 9 Gray, 451, 483.

<sup>2</sup> In *Commonwealth v. Alger*, 7 Cush. 53, 90, Shaw, C. J., said: "By the general rule of the common law, all real property capable of use and

possession, and having no other acknowledged owner, is, in theory, vested in the king, as the head and sovereign representative of the nation. The sea-shore," &c., "are deemed vested in and held by the king." In a recent case in Rhode Island, Potter, J., said: "It was the policy of the English law, and especially of the feudal system, to consider the king as the original owner of all the lands in the kingdom. Hence he was the owner of all vacant lands, derelict, &c. All was held of him and escheated to him. So he is spoken of as the owner of the shore." *Providence Steam-Engine Co. v. Providence Steamship Co.*, 12 R. I. 348, 358. In *Attorney General v. Chambers*, 4 De Gex, M. & G. 206, Ld. Ch. Cranworth said: "The principle which gives the shore to the Crown is that it is land not capable of ordinary cultivation or occupation, and so in the nature of unappropriated soil. Lord Hale gives, as his reason for thinking that lands only covered by the high spring tides do not belong to the Crown, that such lands are for the most part dry and manoriable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the Crown's right is limited to land which is, for the most part, not dry or manoriable."

suggests that at the time of the Norman Conquest, William I., having acquired by confiscation all the estates in England, retained in his own seisin those lands, including the shore, which were not distributed among his followers.<sup>1</sup> The Crown's right of private property in tide waters within the realm formed part of the theory of its dominion upon the sea.<sup>2</sup> Lord Hale<sup>3</sup> considers the king's ownership of the shore to be one of the evidences of his ownership of the sea, and Callis says<sup>4</sup> that the *litus maris*, or shore, taketh its name wholly from the sea, as partaking most of its nature, and that, in point of property and ownership, it is the king's as lord of the seas. Blackstone assigns to the king, as lord of the sea, the lands which it leaves when it suddenly recedes.<sup>5</sup> So it is said that navigable rivers, so far as the tide ebbs and flows in them, belong to the king,<sup>6</sup> because they partake of the nature of the sea, which is his proper inheritance, and that he hath the same property in them as *in alto mare*.<sup>7</sup> The doctrine of the Crown's title as universal occupant appears to be at variance with a recent decision in the House of Lords. In that case<sup>8</sup> the plaint-

<sup>1</sup> Jerwood on the Seashore, 20-29. "Sir, we tell you that, at the time of the Conquest, the manors with the franchises appurtenant, were given to those who could lay hold of them" (per curiam). A. D. 1292. Year Books, 20 & 21 Edw. I. (Horwood's ed.), p. 112.

<sup>2</sup> *Ante*, §§ 3, 7.

<sup>3</sup> De Jure Maris, ch. 4.

<sup>4</sup> Callis on Sewers, 54. If the kings of England possessed the sea, "it follows that they possessed the shore as well as the sea, for if they have owned the sea, they have it at high water as well as low." Jerwood on the Seashore, 19, 20.

<sup>5</sup> 2 Black. Com. 261.

<sup>6</sup> Hale, De Jure Maris, ch. 4. "The king hath not only dominion at sea, but he is '*dominus maris Anglicani*;' he is both owner of the sea and of the soil under the sea. And so it was resolved lately, by my Lord Chief Baron, and the rest of the bar-

ons of the Exchequer, in the case of Sutton Marsh (Mich. 13 Car.), that the soil of the land, so far as the sea floweth, is the king's, and the king is seized thereof, *jure coronæ*." 3 Howell's State Trials, 1023. See, also, the passage from Sheppard's Grand Abr., *ante*, § 17, note.

<sup>7</sup> Royal Fishery of the Banne, Sir John Davies, 149; Com. Dig. tit. Prerogative, D. and Navigation, B.; 2 Roll. Abr. 170; Vin. Abr. 574, B. a. "If a river, so far as there is a flux of the sea, leaves its channel, it belongs to the king; for the English sea and channels belong to the king, and he hath the property in the soil, having never distributed them out among his subjects." Bacon's Abridg. tit. Court of Admiralty, A. and Prerogative, B. 3.

<sup>8</sup> Bristow v. Cormican, 3 App. Cas. 641; *post*, § 80. The plaintiffs in this case had never been in actual possession, but, in support of their claim to

iff proved, in support of his claim of title to a non-tidal lake, an ancient royal grant, but did not prove the title of the Crown; and although there was no suggestion that the title could be legally vested in any other than the Crown, it was held that it was necessary to prove the grantor's title, as in the case of a private grant, and that there was no presumption in favor of the Crown's title to vacant land like the bed of a lake. Such presumption exists with respect to the shore and the soil under tide waters;<sup>1</sup> and if the Crown's private rights in the bed of navigable waters within the realm were originally part of the obsolete theory of dominion over the narrow seas, it is, perhaps, probable that they now depend upon prescription.<sup>2</sup>

§ 20. Same — Public rights — Navigation — Fishery.—

“All prerogatives,” says Bacon,<sup>3</sup> “must be for the advantage and good of the people; otherwise they ought not to be al-

a several fishery over the whole of the lake, introduced documentary evidence of title, commencing with a royal grant from Charles II. in 1660, and continuing by leases and other documents. The defendants set up a claim of right in favor of and also user by the public. No evidence was given of the Crown's title. The judge at the trial withdrew the case from the jury and directed a verdict for the plaintiffs. The House of Lords held this to be erroneous, the question being one of fact and not of law. See *Doe v. Redfern*, 12 East, 96; 2 Black. Com. 258, 261; *Crane v. Reeder*, 21 Mich. 24.

<sup>1</sup> The right to the soil between high and low-water mark is *prima facie* in the Crown, and although it may be in a subject according to the terms of the grant, yet the burden is upon those who set up an adverse title. *Attorney General v. Richards*, 2 Anst. 606; *Scratton v. Brown*, 4 B. & C. 485; *Somerset v. Fogwell*, 5 id.; *Dickens v. Shaw*, reported in Hall on the Seashore, Appendix, p. 283; *Blundell v. Catterall*, 5 B. & Ald. 268; *Attorney General v. Parmenter*, 10 Price,

378; s. c. *nom. Parmenter v. Gibbs*, id. 412; *Attorney General v. Burridge*, id. 350; *Lopez v. Andrew*, 3 Man. & Ryl. 329; *Levett v. Wilson*, 3 Bing. 115; *post*, § 27.

<sup>2</sup> See Chitty on the Prerogative, 142, 206; Sheppard's Grand Abr. pt. 3, p. 46; 1 Molloy, De Jure Marimo (9th ed.), 125, 126. Every prerogative contains in itself a prescription. Plow. 322. “Every government that is not established by military force, or founded on the express consent of the people, must derive its authority from positive law or from long-continued usage. . . . No one will pretend that any prerogative of the king of England is founded either on military force or on the express consent of the people. Every prerogative of the Crown must, therefore, be derived from statute or from prescription; and, in either case, there must be a legal and established mode of exercising it.” Allen on the Prerogative (1st ed.), 166.

<sup>3</sup> Bac. Abr. tit. Prerogative, p. 1; Bracton, l. 2, ch. 5, § 7; Id. l. 3, t. 1, ch. 9; Hale, De Jure Maris, ch. 2, pl. 8; Hargrave's Law Tracts, 11, 19, 20;

lowed by law." "Many of the king's rights," says Bayley, J.,<sup>1</sup> "are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation and of fishing." So far as the use of tide waters is necessary for these purposes, the public are invested with rights which are as clearly established as those of the Crown, and its private right is burdened with a trust or charge in favor of the public. The king has the property, but the people have likewise the use necessary.<sup>2</sup> This has been compared to the waste of a manor,<sup>3</sup> wherein the title is in the lord, but the common right of user is possessed by all the tenants, and to the king's highway, in which, though the title may be in the owners of the adjoining lands, yet the king, as guardian and protector of the public interests, has the power to prevent obstructions, and the people have the common right of passing and repassing.<sup>4</sup> Certain incidental privileges necessary to the exercise of the public rights of navigation and fishery are allowed by law, which involve the use of the soil beneath the water as well as the water itself. The right of anchorage is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right,<sup>5</sup> and if reasonably and properly exercised,<sup>6</sup> it is protected like the principal right, though it involves a temporary disturbance of the soil, or an unavoidable injury to an oyster bed there planted.<sup>7</sup> If a river is navigable, it is so whether the tide is in or out, and a vessel which cannot reach its destination in a single tide may remain aground till the tide serves.<sup>8</sup>

Finch, L. 84, 85; Craig, *Jus Feudale*, L. 1; Schultes, *Aquatic Rights*, 1-5; *Rorke v. Dayrell*, 4 T. R. 402, 410.

<sup>1</sup> *Blundell v. Catterall*, 5 B. & Ald. 268.

<sup>2</sup> *Callis on Sewers*, 55, 74.

<sup>3</sup> Hale, *De Jure Maris*, ch. 4, pl. 1.

<sup>4</sup> Hale, *De Jure Maris*, ch. 2, pl. 3, and ch. 6; Hargrave's *Law Tracts*, p. 36; *Blundell v. Catterall*, 5 B. & Ald. 268.

<sup>5</sup> *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; 20 C. B. N. S. 1; *Colchester v. Brooke*, 7 Q. B. 339; *Stephen v. Costor*, 2 Burr. 1408.

<sup>6</sup> The right of passage is locally unlimited, and extends to every part of a navigable river as well as of the sea; *Rex v. Ward*, 4 Atk. 384; *post*, § 55; but the right to anchor is confined to such places as are usual and reasonable; having regard to the condition of the particular place. *Williams v. Wilcox*, 8 Ad. & El. 314; *Rose v. Miles*, 4 M. & S. 101; *Colchester v. Brooke*, 7 Q. B. 339; *post*, § 96.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Colchester v. Brooke*, 7 Q. B. 339; *Hall on the Seashore* (2d ed.), 43, note.

So the right to take shell-fish below high-water mark, as well those which are imbedded in the soil as those which lie upon its surface, is a part of the public right of fishery, and, in the exercise of this right, the public may dig or rake the soil.<sup>1</sup>

§ 21. Same — Purprestures — Nuisances.— The Crown may grant to a subject the soil of tide waters, and in ancient times it could pass exclusive rights of fishery in such waters.<sup>2</sup> According to Lord Hale, the shore between the high and low-

A vessel thus grounded is not a nuisance, and another vessel will not be justified in running into it negligently or maliciously. *Id.*; *Cummins v. Spruance*, 4 Harr. (Del.) 315.

<sup>1</sup> *Bagott v. Orr*, 2 Bos. & Pul. 472; *Blundell v. Catterall*, 5 B. & Ald. 268, 299; *Hall v. Whillis*, 14 Sc. Ct. of Ses. (2d series), 324; *Martin v. Waddell*, 16 Peters, 410; *Den v. Jersey City*, 15 How. 132; *McCready v. Virginia*, 94 U. S. 391; *Fleet v. Hegeman*, 14 Wend. 42; *Paul v. Hazelton*, 37 N. J. L. 106; *State v. Taylor* 27 id. 117; *Gulf Pond Oyster Co. v. Baldwin*, 42 Conn. 255; *Peck v. Lockwood*, 5 Day, 28; *Parker v. Cutler Mill-dam Co.*, 20 Maine, 353; *Moulton v. Libbey*, 37 Maine, 472; *Porter v. Shehan*, 7 Gray, 435. "The right of fishing in the sea or rivers of any town in this commonwealth, either for swimming-fish or for shell-fish, is a public right which belongs to all the inhabitants of the town, unless restricted by acts of the legislature or of the town, inconsistent therewith, or by prescription; and a grant by the legislature to a town of the title in the bed of a river, or in flats covered by tide water, within its limits, does not convey by implication the right of fishing to the town as its own property; for the right of fishing, not being an incident to the right of property in the soil, but a public right to take the fish, which, whether moving in the water or imbedded in the mud cov-

ered by it, depend upon the water for their nourishment and existence, is unaffected by the question whether the title in the land under the water is in the Commonwealth, in the town, or in private persons." Gray, J., in *Proctor v. Wells*, 103 Mass. 216, citing *Coolidge v. Williams*, 4 Mass. 140; *Randolph v. Braintree*, id. 315; *Dill v. Wareham*, 7 Met. 438; *Weston v. Sampson*, 8 Cush. 347; *Lakeman v. Burnham*, 7 Gray, 437; *Commonwealth v. Bailey*, 13 Allen, 541. An individual has no private right to dig quahaugs. *Commonwealth v. Manimon*, 136 Mass. 456.

<sup>2</sup> Weirs in navigable rivers are legal in England, if erected before the reign of Edward I. *Williams v. Wilcox*, 8 Ad. & El. 314; *Rex v. Westham*, 10 Mod. 159; *Rex v. Bristol Dock Co.*, 6 B. & C. 181; *Lord Fitzwalter's Case*, 1 Mod. 105; *Carter v. Murcot*, 4 Burr. 2162; *Anon.* 6 Mod. 73; *Rex v. Clark*, 12 Mod. 615; *Case of Chester Mill*, 10 Rep. 137; *Robson v. Robinson*, 3 Dougl. 307; *Warren v. Matthews*, 1 Salk. 357; *Somerset v. Fogwell*, 5 B. & C. 875, 884; *Blundell v. Catterall*, 5 B. & Ald. 268; *Weld v. Hornby*, 7 East, 195; 2 Black. Com. 39; 16 Vin. Abr. tit. Piscary, B. 1; Hale, *De Jure Maris*, ch. 5; *Hargrave's Law Tracts*, 85; *Phear*, 50; *Browne v. Kennedy*, 5 Har. & J. 203; *Weston v. Sampson*, 8 Cush. 347, 352; *Bulbrook v. Goodere*, 8 Burr. 1768; *Colchester v. Brooke*, 7 Q. B. 339;



water mark, "may be, and commonly is," parcel of the manor adjacent,<sup>1</sup> and a subject may possess the creeks or smaller arms of the sea, but not those portions of the sea which would require a naval armament for their defense against foreign powers.<sup>2</sup> It is incompetent for the Crown in modern times to abridge or destroy, by its own act, the public rights either of navigation or fishery, and it cannot confer upon its grantee a greater power in this respect than that with which it is itself invested.<sup>3</sup> This subject was reviewed in certain cases in the Ex-

*Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Allen v. Donnelly*, 5 Ir. C. L. 292; *O'Neill v. Allen*, 9 id. 183; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; *Lord Advocate v. Hamilton*, 1 Macq. H. L. 47; *Seebkristo v. East India Co.*, 10 Moo. P. C. 140; *Wenman v. Mackenzie*, 5 El. & Bk. 447; 25 L. J. Q. B. 44; *Meisner v. Fanning*, 2 Thom. (Nova Scotia), 97.

<sup>1</sup> Hale, *De Jure Maris*, ch. 4, II, 8.

<sup>2</sup> *Ibid.* ch. 6; *ante*, § 3, note. Mr. Hall (on the Seashore, 2d ed. 106) considers that the statute, 1 Anne, ch. 7, § 5, by which royal grants of the demesnes and landed possessions of the Crown are prohibited, restrains the alienation of the seashore. See 1 Black. Com. 286; *Doe v. York*, 14 Q. B. 81. In England, the regulation and control of the seashores, etc., are now entrusted to commissioners under acts of Parliament. By 29 & 30 Vict. ch. 62, § 7, the management of the Crown's interests in the shores and bed of the sea and the tidal rivers of the United Kingdom was transferred from the Commissioners of Woods and Forests to the Board of Trade, and the duties of the Board are, *inter alia*, to protect the Crown's rights, to ascertain in what parts of the coast the Crown has parted with its rights, in what parts the rights of the Crown are undoubted, and in what parts the title is doubtful; to prevent encroachments on the foreshore, to protect navigation and other

public interests, and to sell, lease or license the use of and otherwise deal with the soil, when expedient so to do, under the powers contained in earlier statutes. See also 37 & 38 Vict. ch. 40; Hall on the Seashore (2d ed.), 4, *n.*; *Vyner v. Mersey Docks*, 14 C. B. N. S. 753; Moore on the Foreshore, 592, 670.

<sup>3</sup> *Ibid.*; *Fitzpatrick v. Robinson*, 1 Hud. & Br. (Ir.), 585; *Devonshire v. Hodnett*, id. 322; *Williams v. Wilcox*, 8 Ad. & El. 314; *Lord Advocate v. Sinclair*, L. R. 1 H. L. 174; *In re Hull v. Selby Railway Co.*, 5 M. & W. 827; Hale, *De Jure Maris*, ch. 5, 6; 2 Roll. Abr. 107, 170; *Sir Henry Constable's Case*, 5 Rep. 107; *Dickens v. Shaw*, in Hall on the Seashore (2d ed.), App.; *Chad v. Tilsed*, 2 Brod. & B. 408; 5 Moore, 185; *Scratton v. Brown*, 4 B. & C. 485; *King v. Montague*, 4 B. & C. 598; *Beaufort v. Swansea*, 3 Exch. 412; *King v. Ward*, 4 Ad. & El. 384; *Warren v. Matthews*, 6 Mod. 73; *Grosvenor's Case*, 2 Starkie, 511; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192, 217; 11 C. B. N. S. 301; *Hastings v. Ival*, L. R. 19 Eq. 558; *Colchester v. Brooke*, 7 Q. B. 373; *Nichols v. Boston*, 98 Mass. 41; *Rogers v. Jones*, 1 Wend. 237; *Brookhaven v. Strong*, 60 N. Y. 56; *Furman v. New York*, 5 Sandf. 16; *Browne v. Kennedy*, 5 H. & J. 195; *Baltimore v. McKim*, 3 Bland Ch. 453; *Casey v. Ingloes*, 1 Gill, 430.

chequer relating to Portsmouth Harbor. In *Attorney General v. Burridge*,<sup>1</sup> it was held that while the Crown may grant a town or burrough, which is *caput portus*, and all the land between high and low-water mark, yet the subject-matter of the grant remains subject to the right of the king and his people to pass and repass. *Attorney General v. Parmenter*<sup>2</sup> decides that where a part of the shore is granted to a subject for uses, or to be enjoyed so as to be detrimental to the *jus publicum* therein, such grant is void as to such parts as are open to that objection, if acted upon so as to work an injury to the public right, or it is a grant which does not divest the Crown or invest the grantee. In the earlier case of *Attorney General v. Richards*,<sup>3</sup> it appeared by the information that the defendants had built certain permanent structures in the harbor between high and low-water mark, which prevented vessels from passing over the spot or mooring there, and also endangered the navigation of the harbor by preventing the current of water from carrying off the mud. The defendants claimed under letters-patent from the Crown, which did not convey the soil at the place in question. There was held to be an invasion of both the *jus publicum* and the *jus privatum*, and the defendants were restrained from making further erections, and ordered to abate those already built. There is a broad distinction between a violation of the public right and an invasion of the proprietary interest of the Crown. The one creates a public nuisance; the other a purpresture. Any encroachment upon the king, either upon part of the demesne lands, or in public rivers, harbors, or highways, is called a purpresture.<sup>4</sup> If a

<sup>1</sup> 10 Price, 850. In England the prerogative of the Crown to intervene in actions affecting the rights or revenues of the sovereign, was not affected by the Judicature Acts; and in such matters the Exchequer Division of the High Court of Justice has all the powers formerly possessed by the Court of Exchequer. *Attorney General v. Barker*, L. R. 7 Ex. 177; *Attorney General v. Constable*, 4 Ex. D. 172.

<sup>2</sup> 10 Price, 878, 412.

<sup>3</sup> 2 Anst. 608.

<sup>4</sup> 2 Inst. 88, 272; Co. Litt. 277 b; Spellman's Glossary, tit. Pourpresture; 2 Story Eq. Jur. § 921; 4 Black. Com. 167; Termes de la Ley, tit. Purpresture; *Attorney General v. Shrewsbury Bridge Co.*, 21 Ch. D. 752. "Purpresture in a forest is every encroachment upon the king's forest, be it by building, inclosing, or using of any liberty without a lawful warrant so to do." Ibid.; Glanville (Beames' ed.), 238. A bathing-house, erected on piles driven into the bed of a navigable river below low-water mark,



littoral proprietor, without grant or license from the Crown, extends a wharf or building into the water in front of his land it is a purpresture,<sup>1</sup> though the public rights of navigation and fishery may not be impaired.<sup>2</sup> If such a structure causes injury to the public right, it is a common nuisance and abatable as such, even though erected under license from the king, for he cannot license a common nuisance.<sup>3</sup> It is not every building below the high-water mark, nor every building below the low-water mark, that is *ipso facto* a nuisance, but nuisance or not nuisance is a question of fact.<sup>4</sup> The remedy for a purpresture is either by an information of intrusion at common law,<sup>5</sup> or by information in equity at suit of the attorney general.<sup>6</sup> The effect of a judgment at law is the abatement of the erection complained of, whether it be a nuisance or not.<sup>7</sup> When the structure is both a purpresture and a nuisance, the injury to the rights of the king and of his subject may be redressed in the same proceeding. A common nuisance is abatable at suit of the Crown by virtue of its power of superintendence and control over public rights, and the attorney

such bed belonging to the government, is, as between individuals, personal property. *Marcy v. Darling*, 8 Pick. 283.

<sup>1</sup> Hale, *De Portibus Maris*, ch. 7; Hargrave's *Law Tracts*, 84; Callis on *Sewers*, 174, 175; Woolrych on *Waters*, 193; 2 Story *Eq. Jur.* §§ 921-925; Eden on *Injunctions*, 259; Beames's *Glanville*, 239, note; 3 Kent *Com.* 482.

<sup>2</sup> *Ibid.*; *New Orleans v. United States*, 10 Peters, 623; *Hart v. Mayor*, 9 Wend. 571; *Commonwealth v. Wright*, 3 Am. Jur. 185; *Watertown v. Cowen*, 4 Paige, 510; *Attorney General v. Cohoes Co.*, 6 Paige, 133; *Mohawk Co. v. Railroad Co.*, *id.* 554; *Davis v. Mayor*, 14 N. Y. 526; *People v. Vanderbilt*, 28 N. Y. 376.

<sup>3</sup> Hale, *De Portibus Maris*, ch. 7; Hargrave's *Law Tracts*, 85; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; *Williams v. Wilcox*, 8 Ad. & El. 314; *Colchester v. Brooke*, 7

Q. B. 339; *Rex v. Tindall*, 1 N. & P. 723.

<sup>4</sup> Hale, *De Portibus Maris*, ch. 7; *post*, § 92; Hargrave's *Law Tracts*, 85; *Attorney General v. Richards*, 2 Anst. 603, 615; *Attorney General v. Burrige*, 10 Price, 350; *Reg. v. Betts*, 16 Q. B. 1022; *Reg. v. Randall*, 2 Car. & M. 496; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Attorney-General v. Evart Booming Co.*, 34 Mich. 462; *People v. St. Louis*, 5 Gilman, 351; *Diedrich v. North Western Railway Co.*, 42 Wis. 248; *Folsom v. Freeborn*, 18 R. L. 200, 208.

<sup>5</sup> *Attorney General v. Perry*, 15 C. P. (Can.) 329.

<sup>6</sup> Eden on *Injunctions*, 223; 2 Story *Eq. Jur.* § 922; 2 Dan. Ch. Prac. (4th ed.) 1481; *State v. Arledge*, 1 Bailey (S. C.), 551; *Re Lowestoft*, 24 Ch. D. 253.

<sup>7</sup> *Ibid.*; *Milford*, *Eq. Pl.* 145; *Attorney General v. Richards*, 2 Anst. 606.

general, on the part of the Crown, may proceed by information in equity for the protection of either the *jus privatum* of the king from the purpresture, or the *jus publicum* of his subjects from the nuisance.<sup>1</sup> The terms purpresture and nuisance are sometimes used interchangeably. But, in strictness, that which is simply a purpresture is not subject to indictment, although abatable by the Crown.<sup>2</sup> If the structure is both a purpresture and a nuisance, or if, being authorized by the Crown, it is a nuisance and not a purpresture, it is also liable to indictment,<sup>3</sup> and to a private action in favor of individuals who sustain an injury distinct from that suffered by other members of the public.<sup>4</sup> The mode of proceeding at common law to authorize the erection of wharves and other structures on the shores of the sea or of navigable rivers, where the property remained in the Crown, was to sue out a writ of *ad quod damnum*, and upon the return of an inquest by a jury, finding that no injury would result to the king or others from the grant, the Crown licensed what would otherwise be a purpresture.<sup>5</sup> Although a royal grant or license would not protect

<sup>1</sup> *Attorney General v. Parmenter*, 287; 28 N. Y. 396; 38 Barb. 282; 10 Price, 378, 412; *Attorney General v. Burridge*, id. 350; *Attorney General v. Chamberlaine*, 4 K. & J. 292; *Attorney General v. St. Aubyn*, Wightw. 167; *Attorney General v. Richards*, 2 Anst. 603; *Attorney General v. Johnson*, 2 Wils. Ch. 87; *Attorney General v. Philpot*, cited 2 Anst. 607; *Bristol Harbor Case*, cited 18 Ves. 214; *Attorney General v. Tomline*, 12 Ch. D. 214; *Attorney General v. Cleaver*, 18 Ves. 218; *Attorney General v. Forbes*, 2 Myl. & Craig, 129; *Attorney General v. Williamson*, 60 L. T. N. s. 930; *Attorney General v. Emerson*, 10 Q. B. D. 191; *Attorney General v. Constable*, 4 Ex. D. 172; *Attorney General v. Devonshire*, 14 Q. B. D. 195; *Bristol v. Morgan*, and *Newcastle v. Johnson*, cited in Hale, *De Portibus Maris*, ch. 6; *Hargrave's Law Tracts*, 81; 2 Story Eq. Jur. §§ 921-925; *Cooper*, Eq. Pl. 102; *People v. Vanderbilt*, 26 N. Y.

287; 28 N. Y. 396; 38 Barb. 282; *Davis v. Mayor*, 14 N. Y. 526; *Mohawk Bridge Co. v. Utica Railroad Co.*, 6 Paige, 559; *Hart v. Albany*, 3 Paige, 559; *Attorney General v. Cohoes Co.*, 6 id. 133; *People v. St. Louis*, 5 Gilman, 351; *Hunt v. Chicago Ry. Co.*, 20 Ill. App. 282; *Attorney General v. Jamaica Pond Aqueduct Co.*, 133 Mass. 361.

<sup>2</sup> *Ibid.*; 4 Black. Com. 271, note.

<sup>3</sup> *Rex v. Grovesnor*, 2 Stark. 511; *Attorney General v. Richards*, 2 Anst. 603; *Newcastle v. Clark*, 2 Moore, 666; *Rex v. Clark*, 12 Mod. 615; *Rose v. Miles*, 4 M. & S. 101.

<sup>4</sup> *Post*, § 122.

<sup>5</sup> Com. Dig. tit. *Ad quod damnum*; *Rex v. Montague*, 4 B. & C. 598; *Rex v. Russell*, 6 B. & C. 566; *Commonwealth v. Alger*, 7 Cush. 53, 82; *Nichols v. Boston*, 98 Mass. 39, 41; *Bell v. Gough*, 23 N. J. L. 624, 661; *Hendricks v. Johnson*, 6 Porter, 572. The proceeding by inquisition under the

from indictment or injunction, as nuisances, buildings which impair the common right of navigation, yet Parliament has the power to determine whether this would be for the public advantage. It may legalize encroachments which are for the benefit of navigation,<sup>1</sup> and, it would seem, may also sanction such as are not in aid of the public right.<sup>2</sup>

§ 22. **Same — Prescription.**— The general principle is that no time runs against the king;<sup>3</sup> yet by custom or prescription a subject may acquire certain of the maritime interests of the Crown, including the right of several fishery in the creeks and arms of the sea, the property in the shore and in land left by the recession of the sea, and in wreck.<sup>4</sup> Lord Hale says that

writ of *ad quod damnum*, which was the common-law mode of taking private property for public use, is now quite generally superseded by the provisions in acts authorizing canals, dams, railroads, etc., for the condemnation of private property. If the act of incorporation is silent as to the mode of proceeding, or the nature of things requires it, the principles, applicable to proceedings under the writ of *ad quod damnum*, still govern. *Compton v. Susquehanna Railroad*, 8 Bland, 886.

<sup>1</sup> *Lowe v. Govett*, 8 B. & Ad. 863; *Rex v. Montague*, 4 B. & C. 598; *Vooght v. Winch*, 2 B. & Ald. 662; *Attorney General v. Burridge*, 10 Price, 850; *Attorney General v. Parmenter*, 10 Price, 878, 412; *Williams v. Wilcox*, 8 Ad. & El. 814; *Arundel v. McCulloch*, 10 Mass. 70; *Commonwealth v. Charlestown*, 1 Pick. 180, 185; *Weston v. Sampson*, 8 Cush. 347, 352; *Commonwealth v. Alger*, 7 Cush. 53, 83; *Nichols v. Boston*, 98 Mass. 39, 41; *People v. New York Ferry Co.*, 68 N. Y. 71; *Vanhorne v. Darrance*, 2 Dall. 304; *Flanagan v. Philadelphia*, 42 Penn. St. 219, 230; *Scudder v. Trenton Falls Co.*, Sax. (N. J.) 696; *Gough v. Bell*, 22 N. J. L. 441, 457.

<sup>2</sup> *Ibid.* In this country, the powers

of Congress and of the State legislatures are restrained by written constitutions, but acts of Parliament are valid, though they conflict with the unwritten constitution. 4 Co. Inst. 36; 1 Black. Com. 90, 160, 161, 244; Hale, *Of Parliaments*, 49; Locke on Government, p. 2, §§ 149, 227; Broom's Const. Law, 795; De Tocqueville, *Democracy in America*, ch. 6; *Hodgdon v. Little*, 14 C. B. N. s. 111; 16 id. 198; *Rolle v. White*, L. R. 3 Q. B. 286, 306; *Eduljee Byramjee, Ex parte*, 5 Moo. P. C. 294; 3 Moo. Ind. App. 468; *Eaton v. B. C. & M. R. Co.*, 51 N. H. 504, 516; *Thompson v. Androscooggin Co.*, 54 N. H. 545, 556; *Langdon v. New York*, 93 N. Y. 129, 155.

<sup>3</sup> 3 Black. Com. 257; Broom's Legal Maxims, 165. No lapse of time will legalize a public nuisance, and the right to maintain encroachments which limit the public right cannot be gained by prescription. *Post*, § 121; *Peckman v. Henderson*, 27 Barb. 207.

<sup>4</sup> Hale, *De Jure Maris*, chs. 5, 6; Hargrave's Law Tracts, 18, 25, 27, 29, 31, 32; *Kingston v. Horner*, 1 Cowper, 102; *In re Belfast Dock*, 1 Ir. Rep. Eq. 128; *Re Alston's Estate*, 5 W. R. 189; 28 L. T. N. s. 337; *Re Walton Cum Trimley Manor*, 28 id. 12; *Folsom v. Freeborn*, 18 R. L. 200, 206.

the evidence to prove that the shore is parcel of a manor are commonly these: "Constant and usual fetching gravel and seaweed and sea-sand between the high-water and low-water mark, and licensing others so to do; inclosing and imbanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand; presentment and punishment of purprestures there in the court of a manor; and such like. And as it may be parcell of a manor, so it may be parcell of a vill or parish; and the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like."<sup>1</sup> He does not indicate how many of these evidences should combine in order to establish such title to the shore. It has been held that a prescriptive right to wreck will not alone confer such title as against the Crown;<sup>2</sup> but there is authority for the claim that long-continued enjoyment of the shore by taking shell-fish and gravel, or by letting it to tenants to take seaweed, may suffice to prove that it is part of the adjacent manor.<sup>3</sup> Mr. Hall<sup>4</sup> discusses this doctrine of prescription at length, and concludes that the shore, being land,<sup>5</sup> must be governed by the rules of law which apply to inland estates; that a title to this, as well as other land, can only be established, by prescription against the Crown, by showing an adverse possession for sixty years, which is the period prescribed by the Statute of Limitations as to Crown lands; that such adverse possession must, as in the case of the dry land, be proved by showing occupation and actual possession, and that the taking of wreck and seaweed, and the exer-

<sup>1</sup> Hale, *De Jure Maris*, ch. 7; Hargrave's *Law Tracts*, 27. As to parishes, see *Perrott v. Bryant*, 2 Y. & Col. 61.

<sup>2</sup> *Dickens v. Shaw*, reported in Hall on the *Seashore* (2d ed.), App. 45. See *Chad v. Tilsed*, 5 Moore, 185, 197; 2 Brod. & Bing. 403; *Calmady v. Rowe*, 6 C. B. 861, 891; *ante*, § 6.

<sup>3</sup> See *Le Strange v. Rowe*, 4 F. & F. 1048; *Healy v. Thorne*, Ir. R. 4 C. L. 495; *Neill v. Devonshire*, 8 App. Cas. 153, 170; 2 L. R. Ir. 169; *Little v. Wingfield*, 8 Ir. C. L. 279.

<sup>4</sup> Hall on the *Seashore* (2d ed.),

16-40, 217. See *Lord Advocate v. Young*, 12 App. Cas. 544; Moore on the *Seashore*, 432, 433; Brown on *Lim.* 566; Phear's *Rights of Water*, 88. The user should not be merely occasional and discontinuous. *Hollins v. Verney*, 13 Q. B. D. 304. See *Reg. v. McCormick*, 18 Q. B. (Can.) 131; *Doe d. West v. Howard*, 5 Q. B. (Can.) 462.

<sup>5</sup> *Scratton v. Brown*, 4 B. & C. 485; *Chad v. Tilsed*, 2 Brod. & Bing. 403, 409; 5 Moore, 185; *Beaufort v. Swansea*, 3 Exch. 413.

cise of similar privileges, which do not necessarily imply a title to the soil, because they may be possessed without it, cannot be evidence to establish an absolute ownership in the shore by prescription. In this country, no right in natural oyster beds can be gained by prescription against the state;<sup>1</sup> and in Massachusetts it has recently been held that the continued taking, for more than twenty years, of seaweed and stones from an open beach, did not disseize its owner.<sup>2</sup>

§ 23. **Same — Same.**— Under a royal grant no alienation will be presumed beyond what is clearly and indisputably expressed.<sup>3</sup> But where the subject possesses land adjoining the sea, the title to which was acquired under an ancient grant from the Crown, which does not by its terms clearly exclude the shore, modern usage is admissible to interpret the grant, and to establish a title to the soil between high and low-water mark as part of the adjoining lands.<sup>4</sup> Thus, modern acts of ownership may be admitted to show that ancient grants of King John and Edward I. included the sea-coast down to low-water mark;<sup>5</sup> to show whether the words “river L.” in an

<sup>1</sup> *Clinton v. Bacon*, 56 Conn. 508; *White v. Petty*, 57 Conn. 576.

<sup>2</sup> *Litchfield v. Ferguson*, 141 Mass. 97. See *Townsend v. Reeves*, 44 N. J. L. 525; *Andrew v. Nantasket Beach R. Co.*, 152 Mass. 506; *New Shoreham v. Ball*, 14 R. L. 566; *Roberts v. Baungarten*, 110 N. Y. 380.

<sup>3</sup> *Royal Fishery of the Banne*, Sir John Davies, 149; *Somerset v. Fogwell*, 5 B. & C. 375; *Attorney General v. Farnen*, 2 Lev. 171; *post*, § 29.

<sup>4</sup> *Chad v. Tilsed*, 5 Moore, 185; 2 Brod. & Bing. 403; *Beaufort v. Swansea*, 3 Exch. 413; *Levett v. Wilson*, 3 Bing. 115; *Lopez v. Andrews*, 3 Man. & Ryl. 329; *Weld v. Hornby*, 7 East, 194, 199; *Attorney General v. Jones*, 2 H. & C. 347; *Calmady v. Rowe*, 6 C. B. 861; *Attorney General v. Chamberlaine*, 4 K. & J. 292; *Hastings v. Ivall*, L. R. 19 Eq. 558; *Attorney General v. Chambers*, 4 De Gex & J. 55; 4 De Gex, Macn. & G. 206;

*Waterpark v. Fennell*, 7 H. L. Cas. 650; *Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Rogers v. Allen*, 1 Camp. 309; *Lee v. Brown*, 2 Mod. 69; *Bristow v. Cormican*, 3 App. Cas. 641; Ir. R. 10 C. L. 425; *Lord Advocate v. Blantyre*, 4 App. Cas. 770; *Agnew v. Lord Advocate*, 11 Ct. of Ses. (3d Series), 309; *Newcastle Pilots v. Bradley*, 2 El. & B. 428, note; *Jenkins v. Harvey*, 1 C. M. & R. 877; *Brine v. Thompson*, 4 Q. B. 543, 552; *In re Belfast Dock Act*, Ir. R. 1 Eq. 128; *Healy v. Thorne*, Ir. R. 4 C. L. 495; *Donegall v. Templemore*, 9 Ir. C. L. R. 374; *Brew v. Haren*, Ir. R. 11 C. L. 198; Ir. R. 9 C. L. 29; 1 Ir. Eq. 442; *Boyle v. Mulholland*, 10 Ir. C. L. R. 150; *Mulholland v. Killen*, Ir. R. 9 Eq. 471; *Bloomfield v. Johnson*, Ir. R. 8 C. L. 68, 91; *Clark v. Bonnycastle*, 3 O. S. (Can.), 528.

<sup>5</sup> *Beaufort v. Swansea*, 3 Exch. 413; *Attorney General v. Jones*, 2 H. & C.

ancient patent comprised the bed of the river down to a point where it reached the sea, or only to a certain ford some distance up the river,<sup>1</sup> or to show that the seashore is parcel of a manor.<sup>2</sup> In *Chad v. Tilsed*,<sup>3</sup> it appeared that a grant of wreck was made by King Henry II., in connection with the grant of certain lands upon the coast, which was confirmed by Henry VIII. The proprietors had erected an embankment upon the shore forty years prior to the suit, and, though the bank had been broken by tempests, had since asserted, without opposition, an exclusive right to the soil thus enclosed. It was held that this exclusive occupation and usage constituted evidence from which a previous usage might be presumed, and that such usage, coupled with the general terms of the grant, served to elucidate it and to establish the asserted right to the shore. Dallas, C. J., said:<sup>4</sup> “I agree that cases of this sort may rest on one or both of the two following grounds: That is to say on grant, or on usage which presupposes a grant; I agree, also, that in the case of grant, no usage, however long, can countervail the clear words of the instrument, for what is done under usurpation cannot constitute a legal usage; but it is equally clear that when a grant of remote antiquity contains general words, the best exposition of such a grant is long usage under it. Unless, therefore, the usage of forty years ago can be proved to have originated in usurpation, it is evidence whence usage anterior to that time may be presumed; and such a length of modern usage, connected with the ancient usage, affords the strongest exposition of the meaning of the original grant.” In the equity case of *Hastings v. Ivall*,<sup>5</sup> the town of Hastings sought to restrain the defendant by injunction from depositing earth upon a portion of the shores within its limits. Letters patent from Queen Elizabeth to the corporation were produced, which granted certain lands in and about Hastings, and “all that her parcel of land and her

347; *Le Strange v. Rowe*, 4 F. & F. L. R. 675; *Daly v. Murray*, 17 L. R. 1048; *Hunt on Boundaries* (2d ed.), Ir. 185.

225.

<sup>3</sup> 5 Moore, 185; 2 Brod. & Bing.

<sup>1</sup> *Donegall v. Templemore*, 9 Ir. 403. See also *Attorney General v. Com. Law*, 874; *In re Belfast Dock*, 1 Ir. Eq. 128. Portsmouth (unreported), stated in Moore on the Foreshore, 555.

<sup>2</sup> *Calmady v. Rowe*, 6 C. B. 861; <sup>4</sup> 2 Brod. & Bing. p. 406.  
*Attorney General v. Reeve*, 1 Times <sup>5</sup> L. R. 19 Eq. 558.



hereditaments called the Stone Beache, with the appurtenances in Hastings aforesaid, in the said county of Sussex, and all messuages, houses, edifices, and buildings whatsoever, with the appurtenances, in and upon the aforesaid parcel of land called the Stone Beache." It appeared that the corporation had exercised acts of ownership over the beach; that these acts had on several occasions been recognized by the Crown, but that there had been certain acts on the part of the corporation tending to show admissions of the title of the Crown to certain parts of the beach. The power of the Crown to grant the shore in the reign of Elizabeth was not doubted, and as the term "Stone Beach" was now applied to the soil below, as well as above, high-water mark, the corporation was held to have a sufficient possessory title to the space between high and low-water mark to enable it to maintain the suit against a mere trespasser, even though the evidence might not be sufficient to displace the *prima facie* title of the Crown.<sup>1</sup> In this country, also, ancient patents, or grants from the government, in which the description of the land is vague, may be interpreted by the acts of the government, of the parties, and of those claiming under similar grants of the contiguous lands.<sup>2</sup> So, also, ancient deeds and plans may be introduced in evidence to show the position of a creek or arm of the sea which has been filled up since they were made.<sup>3</sup> In *Cross v. Morristown*,<sup>4</sup> Beasley, C. J., distinguished between property which vested in the Crown or State for itself, and property vested in it as a *parens patriæ*, intimating that a lost grant of the former will be more readily presumed than of the latter. It is also to be observed, conversely, that the government, when no provision is made for suits against it, cannot itself acquire a title by adverse possession.<sup>5</sup>

<sup>1</sup> See *Pettingell v. Boynton*, 139 Mass. 244.

<sup>2</sup> *Schenck v. Wood*, 13 Johns. 346; *Hewlett v. Cock*, 7 Wend. 371; *Owen v. Bartholomew*, 9 Pick. 520; *Stone v. Clark*, 1 Met. 378; *Boston v. Richardson*, 105 Mass. 351, 371; *Stoutenburgh v. Murray*, 7 Johns. 5; *Hardenberg v. Schoonmaker*, 7 Johns. 12; *Wilkins v. Lamb*, 7 Cowen, 431.

<sup>3</sup> *Drury v. Midland Railroad*, 127

Mass. 571; *Rust v. Boston Mill Corporation*, 6 Pick. 158; *Sparhawk v. Bullard*, 1 Met. 95; *Barker v. Bodwell*, 3 Dane Abr. 397; *Commonwealth v. Crowninshield*, 3 Dane Abr. 397.

<sup>4</sup> 18 N. J. Eq. 805, 811. See *Ocean Beach Association v. Yard* (N. J.), 20 Atl. 763; *post*, p. 72, note.

<sup>5</sup> *San Francisco S. Union v. Irwin*, 28 Fed. Rep. 708.

§ 24. Same — Fishery — Shell-fish — Profit a prendre.—

In strictness, the *jus publicum* is limited to the rights of navigation and fishery, and to the incidental rights above referred to.<sup>1</sup> In the case of *Bagott v. Orr*,<sup>2</sup> in which the *prima facie* right of every subject to take shell-fish found upon the sea beach between high and low-water mark was recognized, the court declined to express an opinion as to the subject's right to take *shells*, saying that, as no authority was cited in support of it, they should pause before establishing a general right of that kind.<sup>3</sup> In *Porter v. Shehan*,<sup>4</sup> in Massachusetts, it was held, with respect to unenclosed flats, which were private property, subject to the right of the public to take floating and shell-fish therefrom, that the public right of fishery does not include the right to take the soil, or fish shells, part of the soil, except such slight portions of the soil as would necessarily and ordinarily be attached to shell-fish when taken. So, the public have no general right to take mussel-bed manure from private flats,<sup>5</sup> or sand, gravel, or shingle from

<sup>1</sup> *Ante*, § 20.

<sup>2</sup> *Boa & P.* 472.

<sup>3</sup> *Id.* p. 479; *Blundell v. Catterall*, 5 B. & Ald. 268, 299. See Hall on the Seashore (2d ed.), 187.

<sup>4</sup> 7 Gray, 435.

<sup>5</sup> *Moore v. Griffin*, 22 Maine, 350, 355; *Moulton v. Libbey*, 37 Maine, 493; *Clement v. Burns*, 43 N. H. 609. See *Le Strange v. Rowe*, 4 F. & F. 1048; *Cowper v. Baker*, 17 Ves. 128; *Brew v. Haren*, Ir. R. 11 C. L. 198; *Calmady v. Rowe*, 6 C. B. 879; *Jerwood on the Seashore*, 87. See *Maloon v. White*, 57 N. H. 152. In the case of *Dickens v. Shaw* (Hall on the Seashore, 2d ed., App. 45, 60, 64, 65), the lords of the manor of Brighton sued the defendant for digging and taking away sand from the seashore of Brighton, and the plaintiffs, being put to proof of their title to the *locus in quo*, proved only, as a badge of ownership, the right to wreck. Mr. Justice Park instructed the jury,

*inter alia*, that by the law of England the king had the right of soil between high and low-water mark, but that the subject might be in possession of it by grant or prescription, which was evidence from which they might draw an inference, and that, if the lord of the manor was entitled to wreck, this, if uncontradicted, was evidence of a title to the soil. The jury returned a verdict for the defendant, with which the presiding justice certified that he was not satisfied. Upon the hearing to obtain a new trial, Mr. Justice Bailey said (p. 50) with reference to the fact that many persons had commonly taken sand from this beach: "I do not think that it proves the right is not in the Crown, for, in general, the Crown has the right,—not with a view to the private reservation to collect the stones for itself, or to collect the sand for itself, but for the general interest for the public; and if you can, without interfer-



the shore above high water, even when it is desired for ballast in aid of navigation.<sup>1</sup> If the sand of the shore is drifted by the wind upon a private close, it becomes a part of that close, and a custom to take such sand is bad.<sup>2</sup> No right to thus remove the soil of a landowner can be acquired by a custom, not annexed to the person or attached to a particular estate, on behalf of the inhabitants of a town or locality, however ancient or uniform such custom may have been;<sup>3</sup> nor can the

ing with and prejudicing the interest of the public, remove the sand and the stones, the Crown will not interfere. But if you do that which amounts to a nuisance, then you may be indicted for it." A new trial was refused. It is clear from the opinions, and from the fact that the presiding judge was not satisfied with the verdict, that, in the opinion of the judges, there is no affirmative general right to take sand or gravel from the shore, although the Crown may suffer, or even may be presumed to suffer it to be done when the public rights will not be impaired. See also Bro. Abr. tit. Customs, 46; and remarks of Holroyd, J., in *Blundell v. Catterall*, 5 B. & Ald. 268.

<sup>1</sup>In *Linn Regis v. Taylor*, 3 Lev. 160, it was held that a custom to take gravel for ballast in ships is a good custom. See also *Johnson v. Wyard*, 2 Lutw. 1344. But this is not supported by the later decisions cited in the following notes. The king cannot take gravel in the inheritance of a subject. *Case of Prerogative*, 12 Co. 12.

<sup>2</sup>*Blewett v. Tregonning*, 3 Ad. & El. 554.

<sup>3</sup>*Lloyd v. Jones*, 6 C. B. 81; *Murphy v. Ryan*, Ir. R. 2 C. L. 148; *Bland v. Lipscomb*, 24 L. J. Q. B. 155, note; *Pitts v. Kingsbridge Board*, 19 W. R. 844; *Constable v. Nicholson*, 14 C. B. n. s. 230; *Maldon v. Woolvet*, 12 Ad. & El. 13; *Race v. Ward*, 4 El. & Bl.

702; *Rivers v. Adams*, 3 Ex. D. 361; *Chilton v. London*, 7 Ch. D. 735; *Goodman v. Saltash*, 7 App. Cas. 633 (see *post*, § 331); *De la Warr v. Miles*, 17 Ch. D. 535; *Attorney General v. Mathias*, 4 K. & J. 579; *Allgood v. Gibson*, 34 L. J. n. s. 888; *Murgatroyd v. Robinson*, 7 El. & Bl. 391; *Padwick v. Knight*, 7 Exch. 854; *MacNamara v. Higgins*, Ir. R. 4 C. L. 326; *Dyce v. Hay*, 1 Macq. H. L. 305; *Oxenden v. Palmer*, 2 B. & Ad. 236; *Gateward's Case*, 6 Rep. 59 b; *Grimstead v. Marlowe*, 4 T. R. 718; *Willingale v. Maitland*, L. R. 3 Eq. 103; *Linn Regis v. Taylor*, 3 Lev. 160; *Hall on the Seashore* (2d ed.), 196 *et seq.*; *Lockwood v. Wood*, 6 Q. B. 50; *Weekly v. Wildman*, 1 Ld. Raym. 465; *Selby v. Robinson*, 2 T. R. 758; *Rogers v. Brenton*, 10 Q. B. 26; *Mellor v. Spateman*, 1 Saund. 341; *Wilson v. Willes*, 7 East, 121; *Clayton v. Corby*, 5 Q. B. 415; 5 Vin. Abr. 29; *Waters v. Lilley*, 4 Pick. 145; *Melvin v. Whiting*, 7 Pick. 79; 13 Pick. 184; *Coolidge v. Learned*, 8 Pick. 503; *Sale v. Pratt*, 17 Pick. 191, 197; *Green v. Chelsea*, 24 Pick. 71, 80; *Porter v. Sullivan*, 7 Gray, 441; *Boston v. Richardson*, 98 Mass. 351, 357; *Morse v. Marshall*, 97 Mass. 519; *Perley v. Langley*, 7 N. H. 233; *Knowles v. Dow*, 22 N. H. 387; *Nudd v. Hobbs*, 17 N. H. 524; *Merwin v. Wheeler*, 41 Conn. 14; *Hill v. Lord*, 48 Maine, 83, 98.

public gain such a right by general custom or prescription,<sup>1</sup> inasmuch as a claim destructive of the subject-matter of a grant cannot be set up by usage. The Crown, being charged by a prerogative with a duty to protect the realm from the inroads of the sea, may restrain a subject from removing sand or stones from the seashore, if the effect will be to destroy a natural barrier against the sea.<sup>2</sup> So, in this country, the legislature of a State may, by statute and without compensation, prohibit the removal of stones, gravel, or sand from a beach when such removal would endanger a harbor and its navigation.<sup>3</sup> The rights of the public in tide waters and their shores, for navigation and fishery, not being affected by a transfer of the Crown's interest to individuals, it would appear that, as the public have no right to take sand from a private beach, they cannot claim that right where the shore remains in the Crown.<sup>4</sup> When the shore is private property, a removal of

<sup>1</sup> Ibid.; *Hilton v. Granville*, 5 Q. B. 701; *Fitch v. Rawling*, 2 H. Bl. 393; *Pearsall v. Post*, 20 Wend. 119; s. c. 22 Wend. 425; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Munson v. Hungerford*, 6 Barb. 265, 271; *Curtis v. Keesler*, 14 Barb. 511, 521; *Cobb v. Davenport*, 33 N. J. L. 223; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Merwin v. Wheeler*, 41 Conn. 14; *Manion v. Creigh*, 37 Conn. 462; *State v. Wilson*, 42 Maine, 9, 28; *Bethum v. Turner*, 1 Greenl. 111; *Littlefield v. Maxwell*, 81 Maine, 134, 141.

<sup>2</sup> *Attorney General v. Tomline*, 12 Ch. D. 214; *Nicholson v. Williams*, L. R. 6 Q. B. 632; *State v. Norris*, 70 Md. 91; *post*, §§ 91, 161. By the common law, a man may go upon his neighbor's land for the defense of the realm against its enemies, and for that purpose may there make bulwarks and trenches. *Case of Prerogative*, 12 Co. 12.

<sup>3</sup> *Commonwealth v. Tewksbury*, 11 Met. 55; *Boston v. Richardson*, 105 Mass. 351, 362; *Boston v. Lecraw*, 17 How. (U. S.) 426, 433. Large stones are not "gravel" or "sand," though

imbedded in and mixed with the gravel of a beach. *Brown v. Brown*, 8 Met. 573.

<sup>4</sup> *Blundell v. Catterall*, 5 B. & Ald. 268, *per* Best, J.; *Dickens v. Shaw*, in Hall on the Seashore (2d ed.), App.; *Howe v. Stowell*, 1 Alcock & Nap. 356; *Bagott v. Orr*, 2 Bos. & Pul. 472; *Moore v. Griffin*, 22 Maine, 350, 355; *Dickens v. Shaw*, above cited. Mr. Hall (on the Seashore, 2d ed., 92, 186) argues in favor of the right of the public to take sand, etc., from the shore, although he admits that there is no direct authority upon the question in England. p. 210. He refers to the statute 7 James, ch. 18, making it lawful for the inhabitants of the maritime counties of Devon and Cornwall to take sea-sand at all places under the full sea-mark "as they have heretofore used to do" (until interrupted by the owners of the lands adjacent to the sea-coast, who demanded "composition with them at such rates as they themselves set down"), and thinks that this act, though locally limited in its application, is declaratory of the common

sand or gravel therefrom by the owner is a natural and lawful use of such property, and he appears to be subject to no liability, if the Crown or the State does not interfere, for injury to the adjoining lands resulting from a consequent overflow of the sea.<sup>1</sup>

§ 25. **Same — Seaweed.**— The right to gather seaweed and other marine growths is analogous to the right to take sand and gravel. The sea and the soil under it being the property of the Crown, the lord of a manor cannot acquire an exclusive right to take seaweed growing below low-water mark, except

law. pp. 96, 209. Lord Hale, in stating how the subject may become possessed of the shore, cites this statute, saying: "The shore 'may belong to' a subject. The statute 7 James, ch. 18, supposeth it, for it provides those of Devon and Cornwall may fetch sea-sand for the bettering of their lands, and shall not be hindered by those who have their lands adjoining the sea-coast, *which appears by the statute they could not formerly.*" De Jure Maris, ch. 6, l. Mr. Hall considers (p. 95, note) this interpretation contrary to the words of the statute. In this country Mr. Dane (Dane's Abr. art. 3, § 2) says that the Massachusetts ordinance of 1641, which extended the title of the littoral proprietor to low-water mark not exceeding one hundred rods (*post*, §§ 27, 169), but reserved "free fishing and fowling" to the public, had been constantly practiced upon "as to fishing and fowling, taking sand, sea-manure, and ballast as the right of soil in flats ground." In *Moore v. Griffin*, 22 Maine, 350, 355, which related to flats between high and low-water mark, Shepley, J., said, with reference to Mr. Dane's statement: "No such right of taking sand, manure, or ballast is reserved in the grant made to the owner of the adjoining land. And Mr. Dane does not refer to any authority or decision in support of

that practice. No such practice can be recognized as depriving the legal owner of his rights according to his title, unless supported by proof that would establish a common right. The language of the ordinance cannot be extended beyond the obvious meaning of the words fishing and fowling. . . . Neither the ordinance nor the common law would authorize the taking of 'mussel-bed manure' from the land of another person." See, also, *Clement v. Burns*, 43 N. H. 609; *Emans v. Turnbull*, 2 Johns. 313, 322; *King v. Young*, 76 Maine, 76. The recent case of *Merwin v. Wheeler*, 41 Conn. 14, related to the taking of sand by prescription from a beach *above* high-water mark, and the decision there was that an individual, as one of the public, could not acquire such a right by prescription, it not being incident to an estate in other lands.

<sup>1</sup> *Attorney General v. Tomline*, 12 Ch. D. 215; *Hudson v. Tabor*, 2 Q. B. D. 290. As to the remedy in equity to protect private property from being endangered by the removal of shingle, etc., forming a defense against the sea, see *Clowes v. Beck*, 13 Beav. 347; *Chalk v. Wyatt*, 3 Meriv. 688; *Cowper v. Baker*, 17 Ves. 128; *Maloon v. White*, 57 N. H. 152; *Mears v. Dole*, 135 Mass. 508.

by grant from the Crown, or such long and undisturbed enjoyment as will establish a title by prescription.<sup>1</sup> When these products become detached from the sea-bottom by natural causes, and float from place to place with the tides and currents, a different rule is applied in practice. While sea sand does not lose its character of realty by natural changes,<sup>2</sup> seaweed is, by some authorities, classed with personal property.<sup>3</sup> It does not appear that the Crown ever made any exclusive claim to seaweed,<sup>4</sup> and the public may have a permissive right

<sup>1</sup> Benest v. Pipon, 1 Knapp P. C. 68.

<sup>2</sup> Blewett v. Tregonning, 3 Ad. & El. 554.

<sup>3</sup> Church v. Meeker, 34 Conn. 421; Mather v. Chapman, 40 Conn. 382. Seaweed, cast upon the shore by the sea, and left ungathered by him who has the exclusive ownership of such shore, has been held in Ireland not to be the subject of larceny. Queen v. Clinton, Ir. R. 4 C. L. 6. See, also, Reg. v. Justices, Ir. R. 5 C. L. 548. In the recent Irish case of Brew v. Haren, Ir. R. 11 C. L. 198; s. c. Ir. R. 9 C. L. 29, it was held (two judges dissenting) that trover lay by one who owned the shore down to low-water mark, for the wrongful taking of seaweed cast upon the shore between high and low-water mark, though such seaweed had been left ungathered by the plaintiff; it being considered that trover might be maintained by the conversion of an article the taking of which would not constitute larceny. Upon the other hand, Chancellor Kent treated seaweed, when washed ashore, as realty. In the leading case of Emans v. Turnbull, 2 Johns. 313, 322, he said: "The seaweed thus thrown up by the sea" (i. e. upon a portion of the seashore which was private property) "may be considered as one of those marine increases arising by slow degrees; and according to the rule of the common law, it belongs to the owner of the soil. The rule is that, if the

marine increase be by small and almost imperceptible degrees, it goes to the owner of the land; but if it be sudden and considerable, it belongs to the sovereign (2 Black. Com. 261; Harg. Law Tracts, 28). The seaweed must be supposed to have accumulated gradually. The slow increase, and its usefulness as a manure, and as a protection to the bank, will, upon every just and equitable principle, vest the property of the weed in the owner of the land. It forms a reasonable compensation to him for the gradual encroachments of the sea, to which other parts of his estate may be exposed; this is one sound reason for vesting these marine increments in the proprietor of the shore. The *jus alluvionis* ought in this respect to receive a liberal encouragement in favor of private right."

<sup>4</sup> Brew v. Haren, Ir. R. 11 C. L. 205, per Fitzgerald, J., who further says: "There seems also to be an absence of any claim to the property in such weed before appropriation on behalf of the grantee of the Crown until very recent times. The grantee of the Crown usually asserted his rights, whatever they were, by excluding the public from going on or over his lands to the seashore; or by excluding them from the seashore when he was in a position to assert his exclusive title to the soil of the seashore." See, also, Wyse v. Leahy,

to take it, when not cast upon those parts of the shore which have passed into private hands. Floating seaweed may thus, in point of fact, be regarded as having no owner. In the few instances in which the title to it has been called in question, the contest has been between those who claimed by prior occupancy and the proprietor upon whose land it was carried by the sea.<sup>1</sup> If seaweed is deposited by storms or tides upon the upland above high-water mark, or upon flats below high-water mark, belonging to an individual, the owner of the land is constructively first occupant, although he may leave it ungathered.<sup>2</sup> A stranger cannot lawfully enter upon land for the purpose of taking seaweed,<sup>3</sup> and a statute which gives

Ir. R. 9 C. L. 384; *Hamilton v. Attorney for Ireland*, L. R. 5 Ir. 555; 9 id. 271; 7 id. 223; *Daly v. Murray*, 17 id. 185, 196.

<sup>1</sup> *Church v. Meeker*, 34 Conn. 421; *Mather v. Chapman*, 40 Conn. 382; *Chapman v. Kimball*, 9 Conn. 38; *Hill v. Lord*, 48 Maine, 83.

<sup>2</sup> *Emans v. Turnbull*, 2 Johns. 313, 321; *Parsons v. Miller*, 15 Wend. 561; *Phillips v. Rhodes*, 7 Met. 322; *Barker v. Bates*, 13 Pick. 255; *Anthony v. Gifford*, 2 Allen, 549; *Proprietors of Cohasset Flats v. Tower*, 24 Law Rep. 734; *Chapman v. Kimball*, 9 Conn. 38; *Church v. Meeker*, 34 Conn. 421; *Mather v. Chapman*, 40 Conn. 382; *Moore v. Griffin*, 22 Maine, 350; *Clement v. Burns*, 43 N. H. 609; *Kenyon v. Nichols*, 1 R. L. 106, 411; *Bailey v. Sisson*, id. 233, 240; *Hall v. Lawrence*, 2 R. L. 218; *Baird v. Fortune*, 7 Jur. N. S. 926; *Howe v. Stowell*, 1 Alcock & Nap. 348; *Healy v. Thorne*, Ir. R. 4 C. L. 495, 499; *Queen v. Clinton*, Ir. R. 4 C. L. 6; *Lowe v. Govett*, 3 B. & Ad. 863; *Brew v. Haren*, Ir. R. 11 C. L. 198; s. c. Ir. R. 9 C. L. 29; *Queen v. Lord*, 1 Pr. Edw. Island, 245. See *East Hampton v. Kirk*, 68 N. Y. 459; s. c. 6 Hun, 257; 84 N. Y. 215. In *Kenyon v. Nichols*, 1 R. L. 106, 411, an action on the case was sustained for disturbance of the plaintiff's com-

monable right by taking seaweed from the beach. See, also, *Knowles v. Nichols*, 2 Curtis, 571; *Knowles v. Nichols*, 2 R. L. 198; *Knowles v. Knowles*, 12 R. L. 400, 406, 411. And see, generally, *Hall v. Lawrence*, 2 R. L. 218; *Bailey v. Sisson*, 1 R. L. 233.

<sup>3</sup> The case of *Howe v. Stowell*, 1 Alcock & Nap. 348, was trespass for breaking and entering the plaintiffs' close, and the defendant's plea of justification that the close in question was the seashore, and that the plaintiff entered under the general right of the king's subject to enter and carry away seaweed left by the tide, was held to be bad. Jebb, J., here said: "This being the claim of a right in derogation of, and as a qualification of the king's general right, it ought not to be allowed without some decision, or some authority, or some reason drawn from some decision or authority in favor of it. That the king has the soil of the shore from high to low-water mark, as well as beyond that mark, is clear from the authority of Hale, as also from the charter of the Admiral of England. Callis, 39; Davies, 153; Bagott v. Orr, 2 Bos. & P. 472. In the subsequent Irish case of *Healy v. Thorne*, Ir. R. 4 C. L. 495, 499, the court said: "With respect to the contention by

it to a person other than the land-owner is unconstitutional.<sup>1</sup> "By a liberal construction of the *jus alluvionis*," says Bigelow, C. J.,<sup>2</sup> "it is held that seaweed, kelp, and other marine plants, when detached from the bottom of the sea and thrown on the shore or beach, become vested in the owner of the soil. But these marine products do not become the property of the riparian proprietor until they are cast on the land or shore, so that they rest there and may be justly said to be attached to the soil. So long as they are afloat, and driven or moved from place to place by the rising tide, it is wholly uncertain where they may find a resting-place; and no one can claim ownership in them as appertaining to the particular part of the shore or beach which belongs to him. And this is true, whether they are wholly afloat, so that they do not come in contact with the bottom, or only partially so, or to such an extent that they occasionally, by the motion of the waves or the rise of tide, touch or rest on the beach." If seaweed,

defendant that the verdict was against the weight of evidence, it is to be considered that in this action of trespass, the plaintiff was in possession; the defendant is a mere trespasser. The public, in such cases, have no right to go on the seashore, between high and low-water mark, to take seaweed. *Howe v. Stowell*, *Alcock & Nap.* 348. Their rights are those of navigation and fishing. These are the privileges which the public enjoy as of right." See also *Queen v. Clinton*, *Ir. R.* 4 C. L. 6; *Brew v. Haren*, *Ir. R.* 11 C. L. 198; *s. c.* *Ir. R.* 9 C. L. 29; *Mulholland v. Killen*, *Ir. R.* 9 Eq. 471, 482. In the recent case of *Mather v. Chapman*, 40 Conn. 382, 399, the court, without noticing these cases, used much broader language, saying: "The right of taking seaweed would seem to stand upon the same ground as the right of taking fish. We see no reason for making a distinction between the vegetable and animal products of the ocean."

<sup>1</sup> *Cohasset Proprietors v. Tower*, 24

*Law Rep.* 734. The phrase "privilege of the shores," employed in a statute, includes the right to take gravel and seaweed. *Cushing v. Worrick*, 9 Gray, 382; *Ripley v. Knight*, 123 Mass. 515.

<sup>2</sup> *Anthony v. Gifford*, 2 Allen, 549. In this case the plaintiff brought an action of trover for the conversion of seaweed which he had collected and taken from a beach adjoining land from which the defendants claimed the right in gross to take seaweed. The question was as to the meaning of the word "adrift" in the General Statutes of Massachusetts, ch. 83, § 20, providing that "any person may take and carry away kelp or other seaweed between high and low-water mark, whilst the same is actually adrift in tide waters." A ruling that, if during flood tide the seaweed was in such a position that each wave moved it, it was adrift, although the bottom of the mass might touch the beach, was held to be correct.



though touching the soil under the water, is really adrift,<sup>1</sup> or if it is deposited upon a part of the seashore which is not private property,<sup>2</sup> it is not added to the adjoining land, and is not the property of the owner of such land. In such case, it belongs to him who first appropriates it.<sup>3</sup> The privilege of taking seaweed from another's land or beach is a profit *à prendre*, and may be conveyed without passing the soil.<sup>4</sup> A sale of all the sea-manure that may land on a certain beach during one year conveys no interest in the beach.<sup>5</sup> In *Knowles v. Dow*,<sup>6</sup> it was decided that a custom for the inhabitants of a town to haul seaweed upon the plaintiff's close, and there deposit it, and afterwards to take it away at pleasure, was not unreasonable or void.

§ 26. **Same — Bathing.**—In the case of *Blundell v. Catterall*,<sup>7</sup> the court of King's Bench decided that the public have no common-law right to bathe in the sea. The plaintiff in that case was the owner of the shore, and had an exclusive right to fish there with stake nets; and the defendant, who was a servant at a hotel near by, was sued for driving bathing-machines across the shore and into the sea for the purpose of bathing. The reasoning of the court was not confined to the grounds, that bathing at the place in question, with carriages or on foot, was an interference with the plaintiff's private right of fishery with stake nets, or that the use of bathing-machines might be distinct from the right to bathe without them, but proceeded upon the broad ground that there was no public right to frequent the shore for the purpose of bath-

<sup>1</sup> *Anthony v. Gifford*, 2 Allen, 549.

<sup>5</sup> *Parsons v. Smith*, 5 Allen, 578.

<sup>2</sup> *Mather v. Chapman*, 40 Conn. 882; *Peck v. Lockwood*, 5 Day, 22; *Nudd v. Hobbs*, 17 N. H. 527; *Arnold v. Mundy*, 1 Halst. 1, 12. In Connecticut and New Jersey, riparian proprietors have no legal title to unimproved flats below high-water mark. *Post*, ch. 5.

<sup>6</sup> 22 N. H. 387.

<sup>7</sup> 5 B. & Ald. 268. See *Mace v. Philcox*, 15 C. B. N. s. 600; 10 Jur. N. s. 680; 33 L. J. (C. P.) 124, deciding that, under a special statute for the regulation of the mode of sea-bathing and licensing bathing-machines, those who obtain such a license are not justified in placing the machines on such parts of the shore as are private property.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Hill v. Lord*, 48 Maine, 83, 100; *Nudd v. Hobbs*, 17 N. H. 524; *East Hampton v. Kirk*, 68 N. Y. 459; 84 N. Y. 215.

ing, either on foot or with carriages.<sup>1</sup> It has also been held in North Carolina that the privilege of approaching the sea for the purpose of bathing is not a right of necessity, and that there is no general right of access to the sea for this purpose.<sup>2</sup> The right of the public to pass over the shore between high and low-water mark is not limited, it seems, to the period when the tide is in, but exists also when the shore is dry<sup>3</sup> for purposes of navigation and fishery,<sup>4</sup> and if the decision in *Blundell v. Catterall* relates only to such parts of the shore as are private property, the only practical restraint upon the privilege of sea-bathing appears to be that which is imposed by decency and respect for public morals.<sup>5</sup>

**§ 27. Seashore — How defined.**— The presumption that the shore belongs to the Crown, as far as the high-water mark, gives rise to the presumption that the title to lands adjacent to tide water extends only to this line, and places the burden

<sup>1</sup>See *McManus v. Carmichael*, 8 Iowa, 1, 55; *Laird v. Briggs*, 19 Ch. D. 22.

<sup>2</sup>*Hatfield v. Baum*, 13 Ired. 394. Kent says: "The case of *Bagott v. Orr* may be considered as shaken by that of *Blundell v. Catterall*, 5 B. & Ald. 268; and the doctrine of *Peck v. Lockwood* seems to be very questionable." 3 Kent Com. 417, note (c). *Peck v. Lockwood*, 5 Day, 22, follows *Bagott v. Orr*, 2 B. & T. 472, deciding that the public may enter upon the shore for the purpose of taking shell-fish. *Bagott v. Orr* is several times referred to in *Blundell v. Catterall*, with no intimation of an intention to overrule it; and as the right to take shell-fish is included in the public right of fishing, the latter decision does not affect it. See *Moulton v. Libbey*, 37 Maine, 472, 491.

<sup>3</sup>*State v. Wilson*, 42 Maine, 9; *Colchester v. Brooke*, 7 Q. B. 889; *Marshall v. Ulleswater Co.*, L. R. 7 Q. B. 166; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; *Rex v. Russell*,

6 B. & C. 566; *Original Hartlepool Co. v. Gibb*, 1 Ch. D. 713; *Attorney General v. Conservators of the Thames*, 1 Hem. & M. 32; *South-Eastern Railway Co. v. Darling*, 5 C. B. N. S. 821.

<sup>4</sup>*Ibid.*; *Queen v. Lord*, 1 Pr. Edw. Island, 245; *Sisson v. Cummings*, 35 Hun, 22; *Galveston City Surf Bathing Co. v. Heidenheimer*, 63 Texas, 559. In *Packard v. Ryder*, 144 Mass. 440, it was held in Massachusetts, where littoral proprietors own the adjacent flats to low-water mark, not exceeding one hundred rods, that a person may, from a boat, enter and walk upon another's uninclosed flats, between high and low-water mark, and within one hundred rods of the upland, in order to fish in the sea, and may so fish there.

<sup>5</sup>*Rex v. Crunden*, 2 Camp. 89. The owner is not apparently liable for personal injuries suffered by a traveller falling into an excavation on the seashore. *Murphy v. Brooklyn*, 98 N. Y. 642.



of proof upon those who claim beyond it.<sup>1</sup> The public rights of navigation and fishery extend to the same limit, whether the shore itself is public or private property.<sup>2</sup> The low-water mark is an equally important boundary, since, under the decision in *Regina v. Keyn*,<sup>3</sup> and in the absence of statute, it is the limit of the nation's territory on the external coast, and also limits the common-law jurisdiction of counties on the sea-coast.<sup>4</sup> Lord Hale mentions three kinds of tides as seeming to give rise to three kinds of shore:<sup>5</sup> first, the high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoctials; second, the spring tides, which happen twice every month, at the full and change of the moon; and third, the ordinary or neap tides, which happen between the full and change of the moon, twice in twenty-four hours. He concludes that, by the common law, the shore, both of the sea

<sup>1</sup> *Royal Fishery of the Banne*, Sir John Davies, 149; *Somerset v. Fogwell*, 5 B. & C. 875; *Lowe v. Govert*, 3 B. & Ad. 863; *Smith v. Stair*, 6 Bell, App. Cas. 487; *Sidney v. Lord Commissioners*, 12 Moo. P. C. 473; *Howard v. Ingersoll*, 13 How. (U. S.) 381, 421; *United States v. Pacheco*, 2 Wall. 587; *Pollard v. Hagan*, 3 How. 212; *Mobile v. Hallett*, 16 Peters, 266; *Barney v. Keokuk*, 94 U. S. 324, 336; *Bowman v. Wathen*, 2 McLean, 376; *United States v. New Bedford Bridge*, 1 Wood. & M. 401, 415; *Jones v. Martin*, 35 Fed. Rep. 348; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Wiswall v. Hall*, 3 Paige, 313; *Storer v. Freeman*, 6 Mass. 435, 439; *Commonwealth v. Charlestown*, 1 Pick. 180, 182; *Porter v. Sullivan*, 7 Gray, 443; *Wonson v. Wonson*, 14 Allen, 82; *Hathaway v. Wilson*, 123 Mass. 361; *Bell v. Gough*, 23 N. J. L. 624; 22 *id.* 441 and 21 *id.* 156; *East Haven v. Hemingway*, 7 Conn. 186; *Mather v. Chapman*, 40 Conn. 382; *Hagan v. Campbell*, 8 Porter, 9, 25; *Long Beach Land Co. v. Richardson*, 70 Cal. 206; *Teschemacher v. Thompson*, 18 Cal. 11; *Rondell v. Fay*, 32 Cal. 354, 363;

*People v. Morrill*, 26 Cal. 336, 353; *Ward v. Mulford*, 32 Cal. 365, 372; *More v. Massini*, 37 Cal. 432; *Brumagin v. Bradshaw*, 39 Cal. 24; *Ball v. Slack*, 2 Whart. 508, 539; *Boulo v. Mobile Railroad Co.*, 55 Ala. 480; *Martin v. O'Brien*, 34 Miss. 21.

<sup>2</sup> *Ibid.* The word "foreshore," used in the later English decisions, appears, by 29 & 30 Vict. ch. 62, § 7, to denote "the shore and bed of the sea, and of every channel, creek, bay, estuary, and of every navigable river of the United Kingdom, as far up the same as the tide flows (and which are hereinafter for brevity called the foreshore)." See, also, *Trustees v. Bootle*, 2 Q. B. 4; *Penryhn v. Holm*, 46 L. J. Ex. 506; 37 L. T. 133; 25 W. R. 498. A Crown grant of an island in tide waters only conveys the land to high-water mark, and gives the grantee no exclusive right of fishery beyond that line. *Cheney v. Guptill*, 2 Hannay (N. B.), 379.

<sup>3</sup> 2 Ex. D. 63, *ante*, §§ 11-14.

<sup>4</sup> *Ante*, § 14. See p. 33, n. 1.

<sup>5</sup> *De Jure Maris*, ch. 6, I; ch. 4, II; *Hargrave's Law Tracts*, 12, 26.

and of the arms of the sea, does not include the soil which is overflowed by the high spring tides or by the spring tides, and that the rights of the sovereign and the public extend only to the point reached by the ordinary tides. In the case of *Attorney General v. Chambers*,<sup>1</sup> this view was adopted, and it

<sup>1</sup> 4 De Gex, M. & G. 206; 4 De Gex & J. 55. Alderson, B., here said: "Mr. Justice Holroyd, no mean authority, in his very elaborate judgment in the case of *Blundell v. Catterall*, 5 B. & Ald. 268, 290, mentions this as one of the instances in which the Common Law differs from the Civil Law, and says that it is clear that according to our law it is not the limit of the highest tides of the year, but the limit reached by the highest ordinary tides of the sea, which is the limit of the shore belonging *prima facie* to the Crown. What then are these 'highest ordinary tides?' Now we know that in fact the tides of each day, nay, even each of the tides of each day, differ in some degree as to the limit which they reach. There are the spring tides at the equinox, the highest of all. These clearly are excluded in terms by Lord Hale, both in p. 12 and p. 26 of his treatise *De Jure Maris*, for though in one sense these are ordinary, *i. e.*, according to the usual order of nature, and not caused by accidents of the wind and the like, yet they do not ordinarily happen, but only at two periods of the year. These then are not the tides contemplated by the common law, for they are not 'ordinary tides,' not being 'of common occurrence.' This may perhaps apply to the spring tides of each month, exclusive of the equinoctial tides; and, indeed, if the case were without distinct authority on this point, that is the conclusion at which we might have arrived. But then we have Lord Hale's authority, p. 26, *De*

*Jure Maris*, who says, 'Ordinary tides or neap tides which happen between the full and the change of the moon' are the limit of 'that which is properly called *littus maris*,' and he excludes the spring tides of the month, assigning as the reason that the lands covered with these fluxes are for the most part of the year dry and manorial, *i. e.*, not reached by the tides. And to the same effect is the case of *Lowe v. Govett*, 8 B. & Ad. 863, which excludes these monthly spring tides also. But we think that Lord Hale's reason may guide us to the proper limit. What are then the lands which for the most part of the year are reached and covered by the tides? The same reason that excludes the highest tides of the month (which happens at the springs) excludes the lowest high tides (which happen at the neaps), for the highest or spring tides and the lowest high tides (those at the neaps) happen as often as each other. The medium tides, therefore, of each quarter of the tidal period afford a criterion which we think may be best adopted. It is true of the limit of the shore reached by these tides, that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short, and on one day it is reached. This point of the shore, therefore, is about four days in every week, *i. e.*, for the most part of the year, reached and covered by the tides. And as some not indeed perfectly accurate construction, but approximate, must be given to the

was held that the average of the medium tides, in each quarter of a lunar revolution during the year, gives the limit, in the absence of all usage, to the rights of the Crown on the seashore. In other words, the boundary is the medium line between the ordinary line of high water in ordinary spring tides, at the full and change of the moon, and the ordinary line of high water at neap tides, at about midway in time between the full and change of the moon.<sup>1</sup> The expression, "ordinary high and low-water mark," which is generally used in defining the shore, signifies ordinary low-water mark as well as high.<sup>2</sup> Under the Massachusetts Colony ordinance of 1647, which extended the title of littoral proprietors to low-water mark, not exceeding one hundred rods, the low-water mark is the line of extreme low water, if within one hundred rods;<sup>3</sup> but in Maine, under this ordinance, the low-water mark is determined by the ebb of ordinary tides, as at common law.<sup>4</sup> These rules apply to tidal rivers and to the arms

words 'highest ordinary tides,' used by Mr. J. Holroyd, we think, after fully considering it, that this best fulfils the rules, and the reasons for it, given in our books."

<sup>1</sup> *Commonwealth v. Roxbury*, 9 Gray, 451, 483. Under the civil law, the shore extends as far as the highest waves reach in winter. *Inst. lib. 2, tit. 1, § 3*; *Dig. lib. 50, tit. 16, § 112*; *Civil Code of Louisiana, art. 4*; *Smith v. Stair*, 6 Bell, App. Cas. 487; *Horne v. Mackenzie*, 6 Cl. & Fin. 628; *New Jersey Zinc Co. v. Morris Canal Co.*, 44 N. J. Eq. 398; *Galveston v. Menard*, 23 Texas, 349, 398.

<sup>2</sup> *Hale, De Jure Maris*, ch. 4, II; ch. 6, I; *Dickens v. Shaw*, reported in *Hall on the Seashore* (2d ed.), Appendix, 50, 64; *Blundell v. Catterall*, 5 B. & Ald. 290; *Lowe v. Govett*, 3 B. & Ad. 863; *Harvey v. Lyme Regis*, L. R. 4 Ex. 260; *Attorney General v. Chambers*, 4 De Gex, Macn. & Gord. 206; *Doe v. Hill*, 2 Allen (N. B.), 587; *East Haven v. Hemingway*, 7 Conn. 186; *Church v. Meeker*, 34

Conn. 421, 424; *Teschmacher v. Thompson*, 18 Cal. 11; *People v. Morrill*, 26 Cal. 336, 353; *Ward v. Mulford*, 32 Cal. 365, 372; *Providence Steam Engine Co. v. Providence Steamship Co.*, 12 R. I. 348, 357; *Gough v. Bell*, 22 N. J. L. 441; 23 id. 624, 685; *Seaman v. Smith*, 24 Ill. 521, 524; *Howard v. Ingersoll*, 13 How. (U. S.) 381, 417; *Walker v. Marks*, 2 Sawyer, 152, 157.

<sup>3</sup> *Storer v. Freeman*, 6 Mass. 435, 438; *Sparhawk v. Bullard*, 1 Met. 95, 108; *Commonwealth v. Charleston*, 1 Pick. 180, 183; *Attorney General v. Boston & Maine Railroad Co.*, 3 Cush. 1; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Commonwealth v. Boston & Maine Railroad Co.*, 3 Cush. 1; *Wonson v. Wonson*, 14 Allen, 71, 82; 9 Gray, 515, 521, note; *Attorney General v. Woods*, 108 Mass. 436, 440; *Commonwealth v. Roxbury*, 9 Gray, 451, 491, 515, 521.

<sup>4</sup> *Gerrish v. Union Wharf Co.*, 26 Maine, 384.

and inlets of the sea, as well as the sea itself, but they have no application to fresh waters.<sup>1</sup> The terms, "ordinary low water" or "low water," says Wayne, J.,<sup>2</sup> "are only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish the water line at spring or neap tides. Such a difference is uniform twice within every month of the year; and, because it is so, it is termed ordinary. In that part of a river in which there is no ebb and flow, the changes in the current are irregular and occasional, without fixed quantity or time of recurrence, except as they are periodical with the wet and dry seasons of the year. And low water is the furthest receding point of ebb tide."

§ 28. Same — Terms synonymous with "shore." — The words "flats"<sup>3</sup> and "strand"<sup>4</sup> denote the land between the lines of high and low water, like the shore. The term "coast," or "sea-coast," appears to have no fixed meaning apart from the context, and to be equally applicable to the space between high and low-water mark, or to the territory bordering on the sea, or to that part of the sea which adjoins the land.<sup>5</sup> The

<sup>1</sup> Hale, *De Jure Maris*, ch. 4, II; *Royal Fishery of the Banne*, Sir John Davies, 149; *United States v. Pacheco*, 2 Wall. 587; *Wheeler v. Spinola*, 54 N. Y. 877; *Commonwealth v. Roxbury*, 9 Gray, 451, 491; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Kean v. Stetson*, 5 Pick. 492, 495; *Montgomery v. Reed*, 69 Maine, 510; *State v. Sargent*, 45 Conn. 358; *Galveston v. Menard*, 23 Texas, 349.

<sup>2</sup> *Howard v. Ingersoll*, 18 How. 381, 417. And see *id.* p. 428; *Dutton v. Strong*, 1 Black, 23, 32; *Handley v. Anthony*, 5 Wheat. 374; *Child v. Starr*, 4 Hill, 369, 367; *Canal Commissioners v. People*, 5 Wend. 423, 446; *Halsey v. McCormick*, 13 N. Y. 296, 298; *Wheeler v. Spinola*, 54 N. Y. 377, 385; *Waterman v. Johnson*, 13 Pick. 261; *Bradley v. Rice*, 13 Maine, 198; *Stover v. Jack*, 60 Penn. St. 339; *Lacy v. Green*, 84 Penn. St. 514.

<sup>3</sup> *Storer v. Freeman*, 6 Mass. 435, 439; *Saltonstall v. Long Wharf*, 7 Cush. 195, 201; *Doane v. Willcutt*, 5 Gray, 328, 335; *Church v. Meeker*, 84 Conn. 421, 424, 429; *Stannard v. Hubbard*, 34 Conn. 370; *Montgomery v. Reed*, 69 Maine, 510.

<sup>4</sup> *Doane v. Willcutt*, 5 Gray, 328, 335.

<sup>5</sup> *Cf.* *The Anna*, 5 Rob. Adm. 385. Callis says that the "sea-coast" certainly contains the shore and banks, and that, while a shore is sometimes dry land, and sometimes water, and a creek is always sea and never land, a coast is always dry land. *Callis on Sewers*, 54-57. Its meaning must, however, be gathered from the context. The indefiniteness of this term, and also of "shore," as sometimes used, appears in the Convention of 1818, between Great Britain and the United States, which provided that the inhabitants of both

word "beach" is synonymous with "shore." In Maine, a statute which prohibited cattle running on a certain "beach," and charged a committee to be appointed by a town with the execution of the law, was held to apply only to the space between high and low-water mark.<sup>1</sup> And in a later case in the same State, in which the same view was taken, it was said that this word, which was there used in a contract, must have some limited meaning, and could not apply to the large sand wastes above high-water mark, like those on Cape Cod.<sup>2</sup> In Massachusetts<sup>3</sup> and New York<sup>4</sup> the definition of the shore is considered to be an accurate definition of a beach also; but, in a quite recent case in Connecticut, the word "beach" was said to have no such inflexible meaning that it must denote land between high and low-water mark.<sup>5</sup> The word "waste" is also a sufficient description of the shore, and passes it in a private grant, if the estate to which the waste belongs extends to low-water mark.<sup>6</sup> The shore may also pass under the terms "sedge-flat,"<sup>7</sup> "sea-grounds,"<sup>8</sup> "ripa" or "bank,"<sup>9</sup> "anchor-

countries should have the liberty to fish on a part "of the southern coast of Newfoundland," "on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks from Mount Joly on the southern coast of Labrador to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast;" and also "to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, hereinbefore described, and of the coast of Labrador." "Coast," as used in certain Crown grants of townships, was limited to land fronting on the open sea, in *Queen v. Cox*, 1 Pr. Edw. Island, 170. A vessel engaged in the carrying trade on a navigable river is "engaged in the coastwise trade within U. S. St. of 1886, ch. 421, § 2. *Ravesies v. United States*, 87 Fed. Rep. 447; 35 id. 917.

<sup>1</sup> *Cutts v. Hussey*, 15 Maine, 227.

<sup>2</sup> *Littlefield v. Littlefield*, 28 Maine, 180; *Hodge v. Boothby*, 48 Maine, 68.

<sup>3</sup> *Doane v. Willcutt*, 5 Gray, 328, 335; *Niles v. Patch*, 13 Gray, 254, 257. See *Brown v. Lakeman*, 17 Pick. 444, 446; s. c. 15 Pick. 151.

<sup>4</sup> *East Hampton v. Kirk*, 68 N. Y. 459; s. c. 6 Hun, 257. See *Hastings v. Ival*, L. R. 19 Eq. 558, 580.

<sup>5</sup> *Melvin v. Wheeler*, 40 Conn. 14; *Mather v. Chapman*, 40 Conn. 382.

<sup>6</sup> *Attorney General v. Hanmer*, 4 Jur. N. s. 751; 27 L. J. Ch. 837; *Attorney General v. Jones*, 38 L. J. Ex. 249; 2 H. & C. 347.

<sup>7</sup> *Church v. Meeker*, 84 Conn. 421, 424; *Peck v. Lockwood*, 5 Day, 24. As to the effect of such words as "stagnum," "gurgis," "mariscus," "palus," "marettum," "salvia," etc., employed in ancient grants, see Co. Litt. 4 b, 5 a.

<sup>8</sup> *Scratton v. Brown*, 4 B. & C. 485. The word "grounds" does not generally include land under water. *State v. Jersey City*, 1 Dutch. 525, 530; *Commonwealth v. Roxbury*, 9 Gray, 491.

<sup>9</sup> "Ripa" or "bank" properly re-

age-ground,"<sup>1</sup> and "sand,"<sup>2</sup> when a different construction is not required by the context. The phrase "tide lands,"<sup>3</sup> employed in the statutes of California and Oregon, applies to the shore between ordinary high and low-water mark, and to the land daily covered by the tide, so as to be unfit for cultivation, and not to the soil which is permanently submerged, or to isolated sand-banks, alternately covered and exposed by the tides, and distant and entirely disconnected from the mainland.<sup>4</sup> "Salt-meadows,"<sup>5</sup> employed in a deed, denotes only the land above high-water mark which is overflowed by the spring or extraordinary tides.

§ 29. Same — "Shore" in conveyancing.— The shore partakes of the nature both of the sea which covers it and of the land which it defends.<sup>6</sup> When this term is used in deeds and legal instruments, it comprehends the soil itself, and is inapplicable to a grant of a mere privilege or easement.<sup>7</sup> The

fers to hard, dry land, and to the margin of fresh waters rather than salt. But "the bank of a bay" may include a sand-bank or mud-bank, though alternately covered and uncovered by the flux and reflux of the sea, and so be equivalent to "shore." *In re Belfast Dock*, Ir. R. 1 Eq. 128, 132.

<sup>1</sup> *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 266; L. R. 2 C. P. 688; L. R. 3 C. P. 578; *Le Strange v. Rowe*, 4 F. & F. 1048; *Calmady v. Rowe*, 6 C. B. 891.

<sup>2</sup> In the case of a warranty deed which purported to convey all the fishing rights, rights to the "sand," and all useful things that may drift upon the beach, and contained a description of the land which constituted the beach, with words of inheritance, it was held that the word "sand" was equivalent to "land," and that the fee passed by the deed. *Spinney v. Marr*, 41 Maine, 352.

<sup>3</sup> *San Francisco v. Le Roy*, 138 U. S. 656; *People v. Davidson*, 80 Cal. 379;

*Randall v. Fay*, 82 Cal. 354; *Walker v. Marks*, 2 Sawyer, 152; 17 Wall. 648; *Supervisors v. United States*, 18 Wall. 71; *People v. Morrill*, 26 Cal. 836; *Patterson v. Tatum*, 8 Sawyer, 164.

<sup>4</sup> *Elliott v. Stewart*, 15 Oregon, 259; *Andrus v. Knott*, 12 id. 501.

<sup>5</sup> *Church v. Meeker*, 34 Conn. 421, 429. A salt meadow cannot pass as an appurtenance. *Armstrong v. Du Bois*, 90 N. Y. 95, 102. Grant of "a certain piece of salt thatch" with other evidence, see *Roe v. Strong*, 119 N. Y. 316.

<sup>6</sup> "The shore is not counted for lands or grounds gained from the sea, or left by it, because at every full sea it is covered with the waters thereof." *Callis on Sewers*, 54. "Shores and such grounds, which *alternis vicibus* are wet and dry, are not accounted relinquished grounds." *Id.* 274.

<sup>7</sup> *Scratton v. Brown*, 4 B. & C. 485, 496; *Beaufort v. Swansea*, 3 Exch. 418.

shore may pass under the word "terra."<sup>1</sup> So a devise of "a beach for drift-wood and timber" is a gift of the land itself, and not of a mere easement in the land.<sup>2</sup> But it is not to be construed according to its technical meaning if such construction would violate the intention of the parties. Where land adjacent to the sea was conveyed by a deed which reserved the privilege "of piling up seaweed on the shore," it was held that the right reserved was to pile the seaweed upon the upland, and not below high-water mark, where it would be swept away by the tide.<sup>3</sup> So, where a certificate filed by a railroad company described one terminus of a tunnel as being "on the western shore of the Hudson River, and within or near Jersey City or Hoboken," the word "shore" was held to be used in the sense in which Jersey City or Hoboken is said to be situated on the shore of the river.<sup>4</sup>

<sup>1</sup> *Beaufort v. Swansea*, 8 Exch. 418, 425.

<sup>2</sup> *Brown v. Lakeman*, 17 Pick. 444; 18 Pick. 151; *Lakeman v. Butler*, 17 Pick. 436; *Phillips v. Rhodes*, 7 Met. 822, 825.

<sup>3</sup> *Mather v. Chapman*, 40 Conn. 382.

<sup>4</sup> *State v. Hudson Tunnel Railroad*

Co., 88 N. J. L. 548. See *Hathaway v. Wilson*, 123 Mass. 359, 361, 362; *Ripley v. Knight*, 123 Mass. 515; *Saltonstall v. Long Wharf*, 7 Cush. 195, 201; *Doane v. Willcutt*, 5 Gray, 328, 335; *Niles v. Patch*, 13 Gray, 254; *Hodge v. Boothby*, 48 Maine, 68.



## CHAPTER II.

### OF PROPERTY IN TIDE WATERS IN THIS COUNTRY.

#### SECTION.

30. The right to this property prior to the Revolution.
31. The powers possessed by the colonies.
32. The title acquired by the States at the Revolution, and the nature of this interest.
33. The commercial powers and admiralty jurisdiction ceded to the general government.
34. The power of Congress over navigable waters.
35. The rights of the State in relation to the power of Congress.
36. State grants in navigable waters, how construed.
37. Rights acquired by prescription against the State.
38. The State's control of fisheries within its limits.
39. The rights of the new States in their navigable waters.
40. The power of the general government over navigable waters not included in any State.

§ 30. **Tide waters in the United States — Property.**— In territories acquired by discovery, the rights of the new settlers are determined by the laws of the mother-country, which become immediately applicable;<sup>1</sup> but in lands acquired by conquest, the conqueror may prescribe what law he pleases.<sup>2</sup> The early English settlements in this country, upon the Atlantic coast, were of the former class,<sup>3</sup> the lands which were occupied

<sup>1</sup> 1 Black. Com. 107; *Bogardus v. Trinity Church*, 4 Paige, 178; 15 Wend. 111.

<sup>2</sup> *Ibid.*; *Calvin's Case*, 7 Co. 17; *Campbell v. Hall*, 1 Cowper, 204, 208; 1 Black. Com. 107; 1 Kent Com. 473, note; *United States v. Percheman*, 7 Peters, 51, 87; *Langdeau v. Hanes*, 21 Wall. 521, 527; *McMullen v. Hodge*, 5 Texas, 34.

<sup>3</sup> Blackstone's statement (1 Black. Com. 107, 108), that the American plantations were principally obtained by conquest and driving out the natives, or by treaties, and that the common law of England, as such, has

no allowance or authority there, and Lord Holt's remark in *Smith v. Brown*, Salk. 666, that "the law of England does not extend to Virginia; her law is what the king pleases," have been always treated as erroneous in this country. *Arnold v. Mundy*, 1 Halst. 1, 82, 83; *Bell v. Gough*, 28 N. J. L. 624, 707; *Johnson v. McIntosh*, 8 Wheat. 543; *Martin v. Waddell*, 16 Peters, 367; *Cherokee Nation v. Georgia*, 5 Peters, 1; *Worcester v. Georgia*, 6 Peters, 515; *Holden v. Joy*, 17 Wall. 211, 243, 244; *United States v. Cook*, 19 Wall. 591; *Jackson v. Porter*, 1 Paine, C. C. 457; *Mitchell*



by the colonies being claimed by the Crown of England by right of discovery. A grant from the king could alone confer title to the soil, and was the only source of authority for exercising powers of government over the lands granted.<sup>1</sup> The absolute right of property and dominion was thus held to belong to the European nation by which any particular portion of the country was first discovered, as if it had been found without inhabitants.<sup>2</sup> The Indians were regarded as mere temporary occupants, having no title to the soil which they could convey, except to the nation which claimed the territory, or with its express consent.<sup>3</sup> Hence, a grant by the Indian tribes neither augmented the title acquired by discovery, nor did it alone possess such validity as would enable the grantee to resist a title to the same lands under a royal grant.<sup>4</sup> Where Indian grants were recognized and confirmed by the colonial governments acting under the political powers conferred by the European nations, they were construed accord-

*v. United States*, 9 Peters, 745; *Clark v. Smith*, 13 id. 195; 8 Opin. Atty. Gen. 262, 264; *United States v. Forty-three Gallons of Whisky*, 98 U. S. 188; *Beecher v. Weathersby*, 95 U. S. 517, 525; *De Armes v. New Orleans*, 5 La. 132; *Penn v. Baltimore*, 1 Ves. 445; *Commonwealth v. Roxbury*, 9 Gray, 451, 478; *Jackson v. Ingraham*, 4 Johns. 163; *Jackson v. Waters*, 12 Johns. 365; *Jackson v. Hudson*, 3 Johns. 875; 1 Kent Com. 258; 3 id. 377 *et seq.*; *Jackson v. Wood*, 7 Johns. 295; *Gilbert v. Wood*, 7 Johns. 290; *Goodell v. Jackson*, 30 Johns. 693; *Penobscot Tribe v. Veazie*, 58 Maine, 402; *Veeder v. Guppy*, 3 Wis. 502. In England it is held that when English subjects establish themselves in uninhabited or barbarous lands, they continue subject to the sovereignty of England and to such of its laws as are applicable to their new condition; but that acts of Parliament, passed after the settlement of the new colonies, do not bind them unless they are expressly named. Anon. 2 P.

*Wms.* 75; *Blankard v. Galdy*, 2 Salk. 411; *Campbell v. Hall*, 1 Cowper, 204, 208; *Attorney General v. Stewart*, 2 Mer. 143, 159; *Advocate General v. Dossee*, 9 Jur. N. S. 877; *Dutton v. Howell*, Show. Parl. Cas. 31, 32; *Picton's Case*, 30 Howell's State Trials, 903; *Pitt v. Dacre*, 3 Ch. D. 295; *Jex v. McKinney*, 14 App. Cas. 77; *Martin v. Waddell*, 16 Peters, 367; *Pollard v. Hagan*, 3 How. 212, 229; 1 Black. Com. 107, 108; *Johnson v. McIntosh*, 8 Wheat. 543, 595.

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*

<sup>3</sup> See authorities above, note 3; *Holden v. Joy*, 17 Wall. 211, 243, 244; *Leavenworth Railroad Co. v. United States*, 92 U. S. 733; *Minter v. Shirley*, 45 Miss. 376; *Wood v. M. K. & T. R. Co.*, 11 Kansas, 323; 1 Kent Com. 258; 3 id. 377 *et seq.*; *Commonwealth v. Roxbury*, 9 Gray, 451, 478; *Lynn v. Nahant*, 118 Mass. 433; *Bell v. Gough*, 23 N. J. L. 624, 707.

<sup>4</sup> *Ibid.*

ing to the laws of such nations. In 1685, the colonial assembly of Connecticut confirmed to proprietors, who had purchased from the Indians, lands which included an arm of the sea, with all islands, ponds, ways, "waters, watercourses, havens, ports, rivers, fishings," etc. This confirmation, though in itself a grant of title, did not convey the soil between high and low-water mark, the words above quoted being held insufficient, by the common law, to convey such soil.<sup>1</sup> So, the title of the colonies to the shores and tide waters within their limits did not pass, under the colony patents, to the different towns which had purchased them from the Indians.<sup>2</sup> No obstacle was thus presented to the application of the common law in controversies respecting waters either tidal or inland. Nor did the fact that many parts of this country were claimed, and actually settled, by those who were strangers to the common law, prevent that system from becoming generally prevalent. In New York, which was settled by the Dutch, with whom the civil law prevailed, the province was claimed by right of discovery, when it passed into the possession of the English, and, being re-established as a British colony, the common law of England was applied in controversies respecting its waters,<sup>3</sup> with the exception, perhaps, of the Hudson and Mohawk rivers.<sup>4</sup> The common law, so far as it is not repugnant to the institutions and laws of the particular State, has become, either by right of discovery or by statute, the fundamental law throughout this country, except in Louisiana.<sup>5</sup>

<sup>1</sup> *East Haven v. Hemingway*, 7 Conn. 186, 200; *Middletown v. Sage*, 8 Conn. 221; *Jackson v. Porter*, 1 Paine C. C. 457; *Commonwealth v. Roxbury*, 9 Gray, 451, 478, 493. In the above case of *East Haven v. Hemingway*, Hosmer, C. J., while holding that the confirmation was a grant, added: "At the same time it must be admitted that the principal, if not the sole, object of the grant was to confirm to the proprietors the title to their lands purchased of the natives, which they had not legal capacity to sell, and of which the proprietors had been in quiet possession for many years."

<sup>2</sup> *Church v. Meeker*, 34 Conn. 421, 428; *Seeley v. Brush*, 35 Conn. 423.

<sup>3</sup> *Canal Commissioners v. People*, 5 Johns. 423, 445; *Cortelyou v. Van Brundt*, 2 Johns. 257; 1 Story on the Constitution, 136; *Smith's New Jersey Law*, 36, 37; *Mayor v. Hart*, 95 N. Y. 443.

<sup>4</sup> *Smith v. Rochester*, 92 N. Y. 463; *post*, § 57. The city of New York, though occupied by the Dutch, was always English territory in the view of the law. *Mortimer v. New York El. R. Co.*, 6 N. Y. S. 898; *Hine v. Same*, 7 id. 464.

<sup>5</sup> *Clark v. Clark*, 17 Nev. 124; *Norris v. Harris*, 15 Cal. 226; *Waters v.*

from the colonies.—Under this country, whether charter, or otherwise, the power to control and regulate navigation was practically co-extensive with the territory in which the Crown claimed to exercise its own benefit, any exclusion of the Crown's possessions, or in the case of a grant to individuals, for what is expressly granted, or implied, in the case of a grant of the domains, where the object was merely to vest the Crown's property, it also to invest them with the power to establish complete though not absolute rule has been held applicable to the case of King James I., in *North v. North*, upon the basis of the grant, expressly named,<sup>4</sup> as the lands described, but also the fisheries, mines, etc., and all jurisdictions, royalties, privileges, both within the tract of the islands and seas adjoining the ports, rivers, waters, or fisheries, in case of a private grant, to be employed, and especially to be made for adequate and valuable consideration, in respect to rights not charged upon the public trust. *Langdon v. New York*, 93 N. Y. 129; *Dermott v. State*, 101 N. Y. 101. *Post*, § 64; *Indiana v. Milk*, 11 Ind. 197. *See* *Barker v. Bates*, 13 Pick. 255. *Wood's Case*, 1 Co. 46 b; 16 Vin. tit. Prerogative, K. § 27; *Chitty on the Prerogative*, 392; 2 Black. 18; *Yelv.* 143; *Shep. Touch.* 97: Dig. tit. Grant, E. 5; *East v. Hemingway*, 7 Conn. 186, *Middletown v. Sage*, 8 Conn. 28. Cf. *Robins v. Ackerly*, 91 N. Y.

the word "royalties," in connection with the manifest purpose of the grant, were held to convey to the colonial governments the right and jurisdiction of the Crown in the shores of navigable waters, and in the soil under such waters, and to invest them with such powers of legislation and administration as were necessary to advance the prosperity of the colonists. Such was the construction adopted by the Supreme Court of the United States,<sup>1</sup> and by the courts of Massachusetts,<sup>2</sup> New Jersey,<sup>3</sup> and Connecticut.<sup>4</sup> It is doubtless consonant to the law of England. Thus, in *Doe v. East India Co.*,<sup>5</sup> before the Privy Council, it appears to have been conceded that the defendants, as representing the Indian government, had a freehold in the bed and shores of the navigable rivers of India. Upon this

98; *Hand v. Newton*, 92 N. Y. 88; *Breen v. Locke*, 46 Hun, 291; *Dugger v. McKesson*, 100 N. C. 1; *ante*. § 30; *post*, § 304a. The royal grant of the province of Maine, in 1639, to Sir Ferdinando Gorges, expressly included the right to wreck. See 3 Dane's Abr. 137.

<sup>1</sup> *Martin v. Waddell*, 16 Peters, 367; 3 Harr. (N. J.) 495; *Johnson v. McIntosh*, 8 Wheat. 595; *Fairfax v. Hunter*, 7 Cranch, 618; *Den v. Jersey City*, 15 How. 426; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, 457; *Bennett v. Boggs*, Bald. C. C. 60.

<sup>2</sup> *Barker v. Bates*, 13 Pick. 255; *Commonwealth v. Alger*, 7 Cush. 53; *Commonwealth v. Roxbury*, 9 Gray, 451; *Boston v. Richardson*, 105 Mass. 351; *Storer v. Freeman*, 6 Mass. 435; *Parker v. Smith*, 17 Mass. 413; *Lapish v. Bangor Bank*, 8 Maine, 85; *Clancey v. Houdlette*, 39 Maine, 451. The Massachusetts emigrants "did not, indeed, surrender up their charter, or cease to recognize its obligatory force. But they extended their acts far beyond its expression of powers; and, while they boldly claimed protection from it against the royal demands and prerogatives,

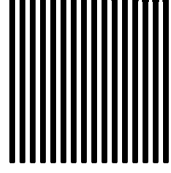
they nevertheless did not feel that it furnished any limit upon the freest exercise of legislative, executive, or judicial functions. They did not view it as creating an English corporation, under the narrow construction of the common law, but as affording the means of founding a broad political government, subject to the Crown of England, but yet enjoying many exclusive privileges." 1 Story on the Constitution (4th ed.), § 67.

<sup>3</sup> *Arnold v. Mundy*, 1 Halst. 1; *Bell v. Gough*, 21 N. J. L. 156; 22 id. 441; 23 id. 624, 665; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532.

<sup>4</sup> *Church v. Meeker*, 34 Conn. 421, 428; *State v. Sargent*, 45 Conn. 858, 872. See *East Haven v. Hemingway*, 7 Conn. 188; *Middletown v. Gage*, 8 Conn. 221; *Browne v. Kennedy*, 5 H. & J. 1; *Carson v. Blazer*, 2 Binney, 475.

<sup>5</sup> 10 Moo. P. C. 140. The government of the province of Quebec cannot, by letters-patent, grant submerged land in the channel of a navigable river. *Normand v. St. Lawrence Steam Nav. Co.*, 4 Quebec L. R. 1.





Massachusetts passed the ordinance of 1790, which reserved the mud flats of the colony, down to the low water mark, as being one hundred rods from the shore, as the property of the littoral proprietor.<sup>1</sup> In New York, a grant of the oyster fisheries in an island was made by the colonial government, and in Rhode Island, the colonial assembly, was

§ 3. — At the time of the Revolution, when the States were sovereign, the respective States claimed rights in the tide waters within their jurisdiction, and the rights therein as had been established under the governments established under the charters in navigable waters were

*See* 347; *Lakeman v. Burnham*, 7 Gray, 437, 440; *Commonwealth v. Exbury*, 9 Gray, 451 and note; *Nichols v. Boston*, 98 Mass. 39, 42; *Boston v. Richardson*, 105 Mass. 351; *Allen*, 146; *Chapman v. Kimball*, Conn. 40; *Simons v. French*, 25 Conn. 346; *Church v. Meeker*, 34 Conn. 421; *State v. Sargent*, 45 Conn. 3, 372; *Hollister v. Union Co.*, 9 Conn. 443; *Pitkin v. Olmstead*, 1 Conn. 219; *Moulton v. Libbey*, 37 Me. 472; *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Clement v. Griggs*, 43 N. H. 609; *Browne v. Kenney*, 5 H. & J. 195; *Owings v. Norwood*, 2 H. & J. 96; *Hall v. Gittings*, id. 112; *Cockey v. Smith*, 3 H. & J. 20; *Hutchings v. Talbott*, id. 378; *Penningham v. Browning*, 1 Bland. 9; *Matthews v. Ward*, 10 Gill & J. 3; *State v. Medbury*, 3 R. I. 138; *Case v. American Steamboat Co.*, 9 R. I. 419, 427; *Providence Steam Engine Co. v. Providence Steamship Co.*, 12 R. I. 348; *Mowey v. Providence*, 16 R. I. 422; *Ball v. Slack*, 2 Chart. 508, 539; *Stover v. Jack*, 60 Conn. St. 339; *Tinicum Fishing Co.*

not affected or impaired by this change of title, and the powers acquired by the States were those which, in England, and in this country previous to the Revolution, could have been exercised by the king alone, or by him in conjunction with Parliament.<sup>1</sup> It is apparent that the principles of the English law upon the subject have been much modified in this country.<sup>2</sup> While in England there are rights of private property and of jurisdiction in the Crown, the public rights of navigation and fishery, which the Crown cannot impair, and the power of Parliament to regulate these public interests, there are here no rights but those of the public on the one hand and of individuals on the other.<sup>3</sup> For this purpose, the State represents the people, and the ownership is that of the people in their united sovereignty.<sup>4</sup> Thus, in *Pollard v. Hagan*,<sup>5</sup> the

*v. Carter*, 61 Penn. St. 21; *Langdon v. New York*, 93 N. Y. 129; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *Rogers v. Jones*, 1 Wend. 261; *People v. New York Ferry Co.*, 68 N. Y. 71; 7 Hun, 105; *Towle v. Remsen*, 70 N. Y. 303, 308; *Gould v. Hudson River Railroad Co.*, 6 N. Y. 522; *Smith v. Levinus*, 8 N. Y. 472; *Mahler v. Norwich Transportation Co.*, 35 N. Y. 352; *People v. Tibbetts*, 19 N. Y. 523; *People v. Vanderbilt*, 26 N. Y. 287; *Hudson River Railroad Co. v. Loeb*, 7 Rob. 418.

<sup>1</sup> *Ibid.* The definitive treaty of peace, concluded at Paris, September 3, 1783, recognized the respective States, and contained the following: "His Britannic majesty acknowledges the United States, namely, New Hampshire, Massachusetts, Rhode Island, &c., to be free, sovereign and independent States; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claim to the government, property and territorial right of the same in every part thereof."

<sup>2</sup> *Martin v. Waddell*, 16 Peters, 369; *Barney v. Keokuk*, 94 U. S. 324;

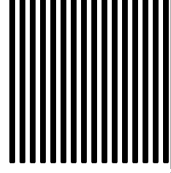
*Clement v. Burns*, 43 N. H. 609; *Providence Steamship Co. v. Providence Steam Engine Co.*, 12 R. I. 356; *Church v. Meeker*, 34 Conn. 428; *Arnold v. Mundy*, 1 Halst. 1; *Boston v. Richardson*, 105 Mass. 362; *Moulton v. Libbey*, 37 Maine, 472; *Ward v. Willis*, 6 Jones L. 183, 185; *Martin v. O'Brien*, 84 Miss. 21; *Eldridge v. Cowell*, 4 Cal. 80.

<sup>3</sup> *Ibid.*; *Clement v. Burns*, 43 H. H. 609, 617, 619.

<sup>4</sup> *McCready v. Virginia*, 94 U. S. 391, 394. The case of *Martin v. Waddell*, 16 Peters, 369, was an action of ejectment for the recovery of certain land covered with water below low-water mark in Raritan Bay in the State of New Jersey. The plaintiffs claimed a private and exclusive title to the land (1) under the letters-patent of King Charles II. in 1664 to the Duke of York, which conveyed to the latter a part of New England, &c., and "the lands from the west side of Connecticut to the east side of Delaware Bay," and various islands along the coast, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes,

<sup>5</sup> 3 How. 212, 229.





It was said: The State's "rights" were not governed by the common law in the colonies before the establishment of their own institutions." In *Bell v. The State*, 10 J., said: "The prerogative of the king the shores of the State was private property than as property of the public, was not applicable, indeed, the exercise of it, was to prevent him from seizing pleasure structures on the shore at low tide, whether there was

waters as entrusted to the King only for the common benefit of his subjects, and held that "the land under the navigable waters passed to the State as one of the royalties incident to the power of government; and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them, were held by the Crown." Of the two judges who dissented, Thompson, J., delivered an opinion in which he maintained that, under the letters patent, the Duke of York, and afterwards the proprietors of New Jersey, acquired the right and title of the Crown in the soil as well as the powers of government, and that the proprietors "surrendered nothing but the mere powers of government granted by the charter, retaining unaffected in any manner whatever the right of private property." See *New Orleans v. United States*, 10 Peters. 362; *Den v. Jersey City*, 15 How. 426; *Smith v. Maryland*, 18 How. 71, 74; *Barney v. Keokuk*, 94 U. S. 324; *States v. Milwaukee*, 10 Wall. 497, 504; *Dutton v. Strong*, 1 Black, 23, 31; *McCready v. Virginia*, 94 U. S. 391. 23 N. J. L. 624, 661.

or was not an obstruction of the navigation, could not but have been considered as an intolerable grievance, and, had it been commonly insisted on, would not have failed prominently to appear among the oppressive acts which occasioned and justified the Revolution. . . . There is no evidence that the *jus privatum*, the right of private property in the shore to low-water mark, was ever asserted in the colony as a right of the Crown, or that it has until recently been claimed by the State; but there is, on the contrary, in my opinion, the strongest evidence that this right has been abandoned to the proprietors of the adjoining land from the first settlement of the province, and exercised by them to the present day, so as to have become a common right, and thus the common law. What was the origin of the usage, it may be difficult to say. If it be conceded that it arose from a mistaken apprehension of the doctrines of the English common law, or from what must now be admitted to have been a mistaken construction of the original grants to the first proprietors, I do not see that this concession will materially influence the result. The mistake was universal, and was acted on throughout the States." In *Providence Steam Engine Co. v. Providence Steamship Co.*,<sup>1</sup> in Rhode Island, Potter, J., said: "To apply the common-law doctrine strictly would require us to hold that all the marshes in the State belong to the State; yet from the very first settlement, although flowed by the tide, they have always been recognized as private property, platted and sold as such, taxed as such, and the State has made provision by statute for exempting them from the fence laws, for the very reason that they are overflowed by the tides. . . . The true doctrine seems to be, as the result of the decisions, that the State has the governmental control of the shores and tide waters for the benefit of the public, in order to protect the public rights of passage or other rights on the shore, and to protect the navigation. . . . During our Revolutionary War, and the distressful times which followed it, if the State had owned the fee of this valuable property, it could not have escaped a sale. Town treasurers were committed to jail for the non-payment of nearly every State tax that was ordered, and yet

<sup>1</sup> 12 R. I. 848, 856.



of this as a property which to sell to lessen taxation. To do so of the shore, in such a sense as to deprive nearly half of the proportion of its value derived

**Admiralty jurisdiction.**—The jurisdiction with respect to the navigable waters is restricted by certain powers conferred upon Congress by the Constitution. Property itself was not granted to the United States, but powers thus ceded to the United States of jurisdiction by its courts, Congress, in admiralty and maritime law, upon the high seas or upon navigable waters, and accessible to vessels of commerce, and power to regulate commerce among the several States.<sup>2</sup> The powers are distinct, having no common source, and being conferred in

accordance with the Constitution. *The Oler*, 2 Fed. Rep. 543; *The Oler*, 2 Fed. Rep. 543; *The Avon*, 1 Brown 170. This jurisdiction includes the right to claim for lockage in a public river. *Monongahela Navigation Co. v. The M. T. Connell*, 1 Fed. Rep. 218. It is immaterial whether the commerce in which the vessels are engaged is interstate, foreign or wholly internal to the United States. *United States v. Burlington Ferry Co.*, 21 Fed. Rep. 381. It extends over steam ferry-boats, running either between localities in different States (*Chesman v. Two Ferry Boats*, 2 Bond, 363; *The Gate City*, 5 Fed. Rep. 200), or between points in the same State and county on the opposite sides of a navigable river like the Ohio. *Murray v. Ferry Boat*, 2 Fed. Rep. 86.

<sup>2</sup> U. S. Const. art. 1, § 8; *Hallet v. Brown*, 14 Johns. 278; *Percival v. Mackey*, 18 Johns. 257.

the constitution by separate grants.<sup>1</sup> Neither of them is absolutely exclusive of State authority. In causes of admiralty and maritime jurisdiction, the right of a common-law remedy is expressly saved to suitors where the common law is competent to give it;<sup>2</sup> and, if Congress has not excluded State legislation, the State courts retain concurrent jurisdiction in maritime cases, where, previous to the constitution, they had jurisdiction of the subject-matter.<sup>3</sup> So the commerce clause of the constitution does not make nugatory legislation by a State which affects commerce and does not interfere with the existing regulations of Congress upon the same subject.<sup>4</sup> In the absence of treaty stipulations or express legislation by Congress, neither of the clauses restricts the power of a State to control the fisheries within its boundaries when its regulations do not discriminate in favor of its own citizens and against those of other States.<sup>5</sup> The admiralty jurisdiction does not extend to injuries sustained on land above high-water mark,<sup>6</sup> as where a wharf, an elevator, a marine railway, or a bridge,<sup>7</sup> is injured by a collision with, or a fire originating upon, a vessel,<sup>8</sup> although it includes injuries to vessels caused by colliding with bridges or other obstructions in navigable waters,<sup>9</sup>

<sup>1</sup> *The Commerce*, 1 Black, 574, 579; *The Belfast*, 7 Wall. 624.

<sup>2</sup> U. S. Rev. Stats. § 563; *Edwards v. Elliott*, 21 Wall. 582; *United States v. Bevans*, 3 Wheat. 336; *Pelham v. The B. F. Woolsey*, 8 Fed. Rep. 457; *Terrell v. Same*, 4 id. 552.

<sup>3</sup> *Reynolds v. The Favorite*, 10 Minn. 242; *Morin v. The F. Sigel*, id. 250; *Bohannon v. Hammond*, 42 Cal. 227.

<sup>4</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *Pound v. Turck*, 95 U. S. 459, 468; *Gilman v. Philadelphia*, 8 Wall. 718; *Corfield v. Coryell*, 4 Wash. 371, 378; *Wilson v. Blackbird Creek Co.*, 2 Peters, 245; *Crandall v. Nevada*, 6 Wall. 85; *Cox v. State*, 8 Blackf. 197; *People v. St. Louis*, 10 Ill. 350; *Ingraham v. Chicago Railroad Co.*, 34 Iowa, 249; 1 Kent Com. 439.

<sup>5</sup> *Commonwealth v. Manchester*, 152 Mass. 280; 139 U. S. 240.

<sup>6</sup> *Buckley's Case*, 2 Leon. 182. The

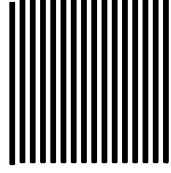
*C. Accame*, 20 Fed. Rep. 642. In such case the State statute may give a remedy by personal action and attachment. *Johnson v. Chicago Elevator Co.*, 119 U. S. 388.

<sup>7</sup> *Ibid.*; *Boston v. Crowley*, 38 Fed. Rep. 202; *The Queen City*, 17 Ill. App. 208.

<sup>8</sup> *The Plymouth*, 3 Wall. 20; *The Rock Island Bridge*, 6 Wall. 218; *United States v. Winchester*, 99 U. S. 372; *The Maud Webster*, 8 Ben. 547; *The Ottawa*, 5 Am. L. T. Rep. 147; *The Mary Stewart*, 5 Hughes, 312.

<sup>9</sup> *Northwestern Union Packet Co. v. Atlee*, 2 Dillon, 479; 21 Wall. 389; *The Mohler*, 21 Wall. 280; *The Lady Pike*, 21 Wall. 1; *King v. American Transportation Co.*, 1 Flippin, 1; *Assante v. Charleston Bridge Co.*, 40 Fed. Rep. 765; *Milwaukee v. The Curtis*, 37 id. 705; *The Professor Morse*, 23 id. 808; *Johnson v. Ele-*





power to regulate commerce above high-water mark, State, if such acts interfere

ss.—The right of Congress power to regulate navigation of the United States, and to the purposes of intercourse different States.<sup>3</sup> The navigation are those which, whether any condition, by themselves, a continued highway overried on with other States or modes in which such commerce the power of Congress upon

; 1 Kent Com. 439; Pollard v. gan, 3 How. 212, 229; The Bright r, 1 Woolw. 266; Rogers v. Cincinnati, 5 McLean, 337; The Brig son, 1 Brock. 423; The Chusan, 2 ry, 456; Navigation Co. v. Dwyer, Texas, 376. The power given to gress to regulate commerce does t, it seems, include the regulation navigation with the Indians. Moor eazie, 32 Maine, 343.

The Daniel Ball, 10 Wall. 557; o Montello, 20 Wall. 430; Gilman Philadelphia, 3 Wall. 713, 724; uth Carolina v. Georgia, 93 U. S. 4; bile Co. v. Kimball, 102 U. S. 691; d v. Steamship Co., id. 541; Miller New York, 109 U. S. 385; Wilson Blackbird Creek Marsh Co., 2 ers, 245; New York v. Miln, 11 ers, 102, 149; Pennsylvania v. eeling Bridge Co., 13 How. 518; id. 421; Gilman v. Philadelphia, Wall. 713; Silliman v. Hudson er Bridge Co., 2 Wall. 403; 1 Black, ; 4 Blatch. 74, 395; Hinson v. t, 8 Wall. 148; United States v. uth, 1 Dillon, 469; United States Coombs, 12 Peters, 72; Pound v.

this subject does not stop at the boundaries of the States, and, when exercised, is exclusive of State authority.<sup>1</sup> If it authorizes the obstruction of public navigable waters, its action is conclusive as to the extent to which the public interests will be promoted by the interference with, or termination of, the navigation.<sup>2</sup> It possesses all powers necessary to the protection and improvement of the channels of intercourse;<sup>3</sup> the right to declare what shall or shall not be deemed an illegal obstruction of navigation, either before or after its erection or condemnation as a nuisance,<sup>4</sup> and the power to close one of several channels in a navigable river, in order to make the others more useful for navigation.<sup>5</sup> The methods approved by Congress for the improvement of a harbor prevail, in case of conflict with State legislation upon the same subject,<sup>6</sup> and that body may lawfully empower a private corporation to occupy the internal waters of a State, and appropriate the soil beneath by the construction of a bridge over them, for purposes of interstate commerce, without the consent of the State and against its protest.<sup>7</sup> The commercial power of Congress over the Savannah River is not restricted by the compact between

Turck, 95 U. S. 459; *Cannon v. New Orleans*, 20 Wall. 577; *Henderson v. New York*, 92 U. S. 259; *Crandall v. Nevada*, 6 Wall. 85; *United States v. Holliday*, 3 Wall. 407; *Morse v. Home Ins. Co.*, 30 Wis. 496.

<sup>1</sup> *Sinnott v. Davenport*, 22 How. 227; *Sherlock v. Alling*, 93 U. S. 99; *Halderman v. Beckwith*, 4 McLean, 286.

<sup>2</sup> *Miller v. Mayor*, 13 Blatch. 469; *People v. Kelly*, 76 N. Y. 475.

<sup>3</sup> *South Carolina v. Georgia*, 93 U. S. 4; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1; *Works v. Junction Railroad Co.*, 5 McLean, 425; *United States v. Railroad Bridge Co.*, 6 McLean, 517.

<sup>4</sup> *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; *South Carolina v. Georgia*, 93 U. S. 4; *Gibbons v. Ogden*, 9 Wheat. 196; *Gilman*

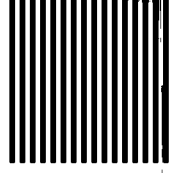
*v. Philadelphia*, 3 Wall. 713; *The Passenger Cases*, 7 How. 288, 394; *People v. Brooks*, 4 Denio, 469. When Congress legislates, it suspends, but does not necessarily repeal, the State law. *Sturgis v. Spofford*, 45 N. Y. 446; 52 Barb. 436; *Henderson v. Spofford*, 59 N. Y. 131; *Ex parte McNeil*, 13 Wall. 236; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 244; *Sherlock v. Alling*, 93 U. S. 99; *Wilamette Iron Bridge Co. v. Hatch*, 125 U. S. 1.

<sup>5</sup> *Ibid.*; *South Carolina v. Georgia*, 94 U. S. 4.

<sup>6</sup> *Wisconsin v. Duluth*, 96 U. S. 379; 2 Dillon, 406; *United States v. Duluth*, 1 Dillon, 469; *South Carolina v. Georgia*, 93 U. S. 4; *post*, ch. 4.

<sup>7</sup> *Decker v. Baltimore R. Co.*, 80 Fed. Rep. 723; *Penn. Ry. Co. v. Baltimore Ry. Co.*, 37 id. 129; *post*, § 129.





Georgia prior to the adoption of the act, which provided that the river should be the boundary between the two States, and a specified channel of the river was to be the boundary between the citizens of both States, and the other State.<sup>1</sup> So the act of Congress authorized a railroad bridge across the river in the power of Congress to do so, although it makes no provision for compensation to New Jersey for the taking of land in the State, not for the use of the bridge, although a statute of that State without its consent, of bridges across the river between it and other States.<sup>2</sup>

of the States.—Under the act a State has the right, if its consent be given, to the action of Congress upon bridges and dams across the river;<sup>3</sup> to license wharves, piers and boats;<sup>4</sup> to establish harbor

*Hudson River Bridge Co.*, 2 Wall. 33; 1 Black, 582; 4 Blatch. 74, 395; *Many Bridge Case*, 2 Wall. 403; *The Passaic Bridges*, 3 Wall. 782; *Griffin v. Gibb*, 1 McAll. 212; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Askingum County Commissioners v. Board of Public Works*, 39 Ohio 628; *Commonwealth v. Breed*, 4 Pick. 460; *Silliman v. Troy Bridge Co.*, 11 Blatch. 274; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 237; *United States v. New Bedford Bridge*, Wood. & M. 401; *People v. Rensselaer Railroad Co.*, 15 Wend. 113; *Savannah v. Georgia*, 4 Ga. 26; *Green v. B. R. Nav. Co. v. Chesapeake R. Co.* (Ky.), 10 S. W. 6; *Bailey v. Philadelphia Railroad Co.*, 4 Harr. (Del.) 9; *Flanagan v. Philadelphia*, 42 Penn. St. 219.

*Post*, ch. 4; *Savannah v. State*, 4 Ga. 26; *Delaware Canal Co. v. Law-*

lines to which wharves may be extended;<sup>1</sup> to prescribe the places and manner in which vessels may lie in a harbor, what lights they are to carry at night,<sup>2</sup> or what course they shall pursue in navigating a river;<sup>3</sup> to pass reasonable quarantine and inspection<sup>4</sup> laws, and pilotage,<sup>5</sup> or port regulations;<sup>6</sup> to

rence, 2 Hun, 163; *United States v. Bain*, 3 Hughes, 593.

<sup>1</sup> *Post*, ch. 4.

<sup>2</sup> *Cooley v. Board of Wardens*, 12 How. 299; *The New York v. Rea*, 18 How. 223; *The James Gray v. The John Fraser*, 21 How. 184; *Sinnot v. Davenport*, 22 How. 227; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ex parte McNeil*, 13 Wall. 236; *Peete v. Morgan*, 19 Wall. 589; *Railroad Co. v. Husen*, 95 U. S. 465; *Foster v. Master*, 94 U. S. 246; *Mobile Co. v. Kimball*, 102 U. S. 691; *Osborne v. Mobile*, 16 Wall. 479; *Railroad Co. v. Fuller*, 17 Wall. 560; *Leloup v. Mobile*, 127 U. S. 640; *The America*, 1 Lowell, 177; *Banta v. McNeil*, 5 Ben. 74; *Sproul v. Hemingway*, 14 Pick. 1; *Neilson v. Garza*, 2 Woods, 287; *Higgins v. Lime*, 130 Mass. 1; *The California*, 1 Sawyer, 463; *The Panama*, Deady, 27; *Master v. Prats*, 10 Rob. (La.) 459; *Portwardens v. Ship M. J. Ward*, 14 La. Ann. 289; *Portwardens v. Ship C. Morgan*, id. 595; *People v. Sperry*, 50 Barb. 170; *Stilwell v. Raynor*, 1 Daly, 47; *Hunt v. Card*, 14 Pick. 135. An act authorizing harbor masters to regulate and station vessels, and imposing a penalty for violation of their orders, is a valid police regulation. *Vanderbilt v. Adams*, 7 Cowen, 349; *Commissioners v. Clark*, 33 N. Y. 251; *Patterson v. Kentucky*, 97 U. S. 501; *Simpson's Appeal*, 77 Penn. St. 270. See *Gardner v. Whitford*, 4 C. B. N. S. 665. So of city by-laws for same purpose. *Ex parte Mowry*, 3 Allen (N. B.), 276. So is an act of the State legislature regulating the speed of steamboats while passing the wharves

of a city. *People v. Jenkins*, 1 Hill (N. Y.), 469. And a State statute defining what lights shall be carried on its internal waters may continue in force, notwithstanding subsequent legislation by Congress on the same subject. *Fitch v. Livingston*, 4 Sand. (N. Y.) 492. The pilot laws of a State may fix the compensation of pilots beyond the State boundaries. *The Nevada*, 7 Ben. 386; *Horton v. Smith*, 6 Ben. 264; *The Traveller*, id. 280; *The Whistler*, 8 Sawyer, 232; *Wilson v. Mills*, 10 Abb. Pr. N. S. 143; 4 Daly, 549. The exercise by the States of the power to regulate pilotage does not withdraw it from the admiralty jurisdiction of the district courts. *Cooley v. Board of Wardens*, 12 How. 299; *Ex parte McNeil*, 13 Wall. 236; *The Lottawanna*, 21 Wall. 558, 581.

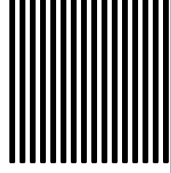
<sup>3</sup> *Aldrich v. The W. H. Beaman*, 45 Fed. Rep. 125, holding valid the New York law providing that vessels shall navigate the middle of the East River.

<sup>4</sup> *Hospes v. O'Brien*, 24 Fed. Rep. 145 (for scaling logs).

<sup>5</sup> *Ibid.*; *Sprague v. Thompson*, 118 U. S. 90; *Morgan's S. Co. v. La. Board of Health*, id. 455; 36 La. Ann. 666; *State v. Penny*, 19 S. C. 218. As to the extraterritorial effect of the pilot laws of coterminous States, see *The Clymene*, 12 Fed. Rep. 346; *The Arizona*, 14 id. 174; *The William Law*, id. 792; *The Charles O. Sparks*, 16 id. 480; *The Alcade*, 30 id. 133; *Neil v. Wilson*, 14 Oregon, 410; *The Abercorn*, 26 Fed. Rep. 877; 28 id. 384; *The South Cambria*, 27 id. 525.

<sup>6</sup> *Ibid.*; *The James Gray v. The*





age,<sup>1</sup> and similar matters to improve the navigability of the river. The collection of tolls in consideration of the power of Congress over the matter is not merely a matter of uniform system of two States, bordering the sea, may license pilots, but cannot exclude pilots from those parts of such waters within its own territorial limits. It may appropriate money on the further side of a boundary, the appropriation being for a public use of the other State.<sup>6</sup> The improvable waters within their reach are not permitted to impair their free navigation; but the inaction of Congress; but the inaction of Congress to an assent to the exercise of such authority continues.<sup>7</sup> The authority, cannot lay tonnage at a specified rate per ton from ves-

<sup>1</sup> *The Clymene*, 9 Fed. Rep. 164.  
<sup>2</sup> *Fisher v. Steele*, 39 La. Ann. 447.  
<sup>3</sup> §§ 247, 248, note, *post*.  
<sup>4</sup> *Mobile v. Kimball*, 102 U. S. 691.  
<sup>5</sup> *Inman Steamship Co. v. Tinker*, 102 U. S. 238; *Transportation Co. v. Wheeling*, 99 U. S. 273; *Steamship Co. v. Portwardens*, 6 Wall. 31; *Cranford v. Nevada*, 6 Wall. 35; *State v. Tonnage Tax Cases*, 12 Wall. 204; *Wet v. Morgan*, 19 Wall. 581; *Cann v. New Orleans*, 20 Wall. 577; *Cincinnati Packet Co. v. Catlettsburg*, 102 U. S. 559; *Hackley v. Geraghty*, 102 N. J. L. 332; *John Kyle Steamboat v. New Orleans*, 23 Int. Rev. Rec. 102; *Harbor Commissioners v. Pash*, 19 S. C. 315; *Commonwealth v. Erie Railway*, 1 Pearson (Pa.), 345; *New Orleans v. Eclipse Tow-boat Co.*, 39 La. Ann. 647.





sels engaged in the oyster trade;<sup>1</sup> taxes upon the transportation<sup>2</sup> or inspection<sup>3</sup> of passengers; or imposts or duties, without the consent of Congress, which may itself impose these burdens,<sup>4</sup> upon exports and imports;<sup>5</sup> nor can it restrict navigation between the States under a provision of its Constitution requiring foreign corporations to have a known place of business and an authorized agent to receive service of process, which provision, as applied to a foreign packet company, is void.<sup>6</sup> Wharfage charges, imposed on vessels as an equivalent for the benefits and facilities furnished to them in mooring and landing cargoes, are not within these prohibitions, even though the vessels are enrolled and licensed under the acts of Congress, and the rates are proportioned to their tonnage;<sup>7</sup> but one State cannot, under the pretense of exacting wharfage

<sup>1</sup> *Booth v. Lloyd*, 33 Fed. Rep. 593; *Ex parte Insley*, id. 680; *Dize v. Lloyd*, 36 id. 651. A municipal ordinance authorizing a license tax held void as being a regulation of commerce. *Moran v. United States*, 112 U. S. 69.

<sup>2</sup> *Smith v. Turner*, 7 How. 283; 4 Denio, 475, n.; *New York v. Miln*, 11 Pet. 102; *Groves v. Slaughter*, 15 Pet. 449; *Railroad Co. v. Maryland*, 21 Wall. 456; *Chy Lung v. Freeman*, 92 U. S. 275; *People v. Pacific Mail S. S. Co.*, 8 Sawyer, 640; *Henderson v. New York*, 92 U. S. 259; *Norris v. Boston*, 7 How. 283; 4 Met. 282.

<sup>3</sup> *People v. Compagnie Generale Transatlantique*, 107 U. S. 59; 20 Blatch. 296; *People v. Pacific Mail S. Co.*, 8 Sawyer, 640; *Edye v. Robertson*, 21 Blatch. 460; *Sweeny v. Otis*, 37 La. Ann. 520.

<sup>4</sup> U. S. Const. art. I, § 10. Congress may regulate commerce with foreign nations by levying duties upon vessels bringing immigrants. *The Head-Money Cases*, 112 U. S. 580; 18 Fed. Rep. 135.

<sup>5</sup> *Brown v. Maryland*, 12 Wheat. 419; *The License Cases*, 5 How. 504; *Nathan v. Louisiana*, 8 How. 78; *Mager v. Grima*, id. 490; *Aguirre v. Max-*

*well*, 3 Blatch. 140; *Clarke v. Clarke*, 3 Woods, 408.

<sup>6</sup> *New Orleans Packet Co. v. James*, 32 Fed. Rep. 21.

<sup>7</sup> *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern Union Packet Co. v. St. Louis*, 4 Dillon, 10, 18, n.; *The Ann Ryan*, 7 Ben. 20; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa, 196; *Worsley v. Second Municipality*, 9 Rob. (La.) 324; *Schwartz v. Flatboats*, 14 La. Ann. 243; *Ellerman v. McMains*, 30 La. Ann. 190; *First Municipality v. Pease*, 2 La. Ann. 538; *Cannon v. New Orleans*, 20 Wall. 577; 27 La. Ann. 16; *Leathers v. Aiken*, 9 Fed. Rep. 679; *Sterrett v. Houston*, 14 Texas, 153. See *Northwestern Co. v. St. Paul*, 3 Dill. 454; *post*, § 142. Unreasonable and exorbitant wharfage is not the laying of a duty on tonnage. *Ouchita Packet Co. v. Aiken*, 121 U. S. 444; 4 Woods, 208; 11 Fed. Rep. 662; *S. C.* 16 id. 890 and note. Vessels engaged in domestic commerce are under the control of the State only when within the marine league; and, on passing that line, come under the exclusive control of Congress. *Pacific Coast Steamship Co. v. Railroad Commis-*

dues, build up its domestic commerce by means of oppressive burdens upon the industry and business of other States.<sup>1</sup> A State may also authorize enrolled and licensed steamboats, plying between different ports upon a river, to be taxed as personal property by the city which is their home port, and in which the company owning them has its principal office,<sup>2</sup> and may tax the gross receipts of such boats.<sup>3</sup> So, it may provide a remedy *in personam* for injuries caused by the negligence of a common carrier upon the bays and rivers within its territorial jurisdiction, and the law giving such remedy is not invalid as a hindrance to the free exercise of the license to vessels navigating such waters under the acts of Congress.<sup>4</sup> It may regulate the manner of rafting and driving logs down its rivers,<sup>5</sup> and may incorporate companies, with power to convert unnavigable into navigable streams, and to levy tolls on vessels or logs passing over them, or to improve the navigation of streams partially navigable;<sup>6</sup> but it cannot authorize the imposition of tolls for the passage of logs to other States, upon waters the navigation of which it has not improved.<sup>7</sup> It cannot grant exclusive rights of navigation upon waters which are channels of intercourse between different States;<sup>8</sup> but it

sioners, 18 Fed. Rep. 10; *Lord v. Steamship Co.*, 102 U. S. 541.

<sup>1</sup> *Ibid.*; *Guy v. Baltimore*, 100 U. S. 434; *The John M. Welch*, 18 Blatch. 54; *Webb v. Dunn*, 18 Fla. 721. An attempted imposition of wharfage by the State before it has constructed or acquired the wharf is a duty on tonnage in violation of the Federal Constitution. *People v. Pacific Rolling Mills Co.*, 60 Cal. 323.

<sup>2</sup> *Transportation Co. v. Wheeling*, 99 U. S. 273; *The North Cape*, 6 Biss. 505; *People v. Commissioners*, 48 Barb. 157.

<sup>3</sup> *Philadelphia Steamship Co. v. Commonwealth*, 104 Penn. St. 109.

<sup>4</sup> *Steamboat Co. v. Chase*, 16 Wall. 522; 9 R. L. 419; *Sherlock v. Alling*, 93 U. S. 99; 44 Ind. 184.

<sup>5</sup> *Scott v. Wilson*, 3 N. H. 321; *Craig v. Kline*, 65 Penn. St. 399; *Harrigan v. Connecticut River Lumber Co.*, 129 Mass. 580; *Treat v. Lord*, 42

*Maine*, 552; *Mandlebaum v. Russell*, 4 Nev. 551; *Mason v. Boom Co.*, 3 Wall. Jr. 252. In Utah, see Laws of 1890, ch. 28, p. 21.

<sup>6</sup> *Carondelet Canal Co. v. Parker*, 29 La. Ann. 430; *Duluth Lumber Co. v. St. Louis Boom Co.*, 5 McCrary, 332; *Commissioners v. Green Nav. Co.*, 79 Ky. 73; *post*, ch. 4.

<sup>7</sup> *Ibid.*; *Carson R. L. Co. v. Patterson*, 33 Cal. 334. See *Conley v. Chedic*, 7 Nev. 336.

<sup>8</sup> *Gibbons v. Ogden*, 9 Wheat. 1, reversing s. c. 17 Johns. 488; and overruling *Livingston v. Van Ingen*, 9 Johns. 507; *North River Steamboat Co. v. Livingston*, 3 Cowen, 713; *Hopk. Ch.* 149; *Ogden v. Gibbons*, 4 Johns. Ch. 150, 174; *United States v. Morrison*, 4 New York Leg. Obs. 333; *United States v. Jackson*, *id.* 450. Either government has power to grant a right of ferry on waters separating Mexico or Canada and the

may grant such rights upon lakes which are wholly within its limits, and not accessible from other States, and upon those parts of rivers from which, by reason of rocks or other obstructions, interstate communication is excluded.<sup>1</sup> The power to establish and regulate ferries is subject to the control of the States, and not of the general government;<sup>2</sup> and, in the case of boundary rivers, like the Mississippi, a ferry franchise conferred by a single State is valid without the concurrent sanction either of Congress or of the State upon the opposite side of the river, or the right of landing beyond the limits of the State by which the grant is made.<sup>3</sup>

§ 36. **Same — State grants.**— The State may grant to individuals or corporations the soil of public navigable waters<sup>4</sup>

United States. *Tugwell v. Eagle Pass Ferry Co.*, 74 Texas, 480; *Kirby v. Lewis*, 6 Q. B. (Can.) 207; *Reg. v. Davenport*, 16 Q. B. (Can.) 411.

<sup>1</sup>*Veazie v. Moor*, 14 How. 568; *Withers v. Buckley*, 20 How. 84; *Moore v. American Transportation Co.*, 24 How. 1, 36; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Moor v. Veazie*, 32 Maine, 343; 81 Maine, 360; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *The Bright Star*, Woolw. 266.

<sup>2</sup>*Conway v. Taylor*, 1 Black, 603; *Gibbons v. Ogden*, 9 Wheat. 1, 214; *Fanning v. Gregoire*, 16 How. 534; *Hall v. De Cuir*, 95 U. S. 485, 488; *Elizabethport Ferry Co. v. United States*, 5 Blatch. 198; *United States v. The James Morrison*, 1 Newb. 241, 257; *United States v. The William Pope*, id. 256; *People v. Babcock*, 11 Wend. 506; *People v. T. R. Co.*, 19 Wend. 113; *Freeholders v. New Jersey*, 4 Zab. 718; *Columbia Bridge Co. v. Geisse*, 38 N. J. L. 39, 580; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; 107 U. S. 365; *St. Louis v. Waterloo Ferry Co.*, 14 Mo. App. 216; *Chilvers v. People*, 11 Mich. 43; *Jones v. Fanning*, *Morris (Iowa)*, 348; *Burlington Ferry Co. v. Davis*, 48 Iowa,

133; Alb. L. J., June 16, 1883; *Waterbury v. Laredo*, 68 Texas, 565.

<sup>3</sup>*Ibid.*; *Marshall v. Grimes*, 41 Miss. 27; *St. Louis v. Waterloo-Carondelet Turnpike Co.*, 14 Mo. App. 216; *Madison v. Abbott*, 118 Ind. 337. Transportation for hire by a steam ferry across the Delaware river by a corporation of New Jersey is interstate commerce, and not subject to exactions in Pennsylvania. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. As to the right of ferriage over a river forming a national boundary, and its suspension during war between the nations on opposite sides of the stream, see *Ogden v. Lund*, 11 Texas, 688; *Prather v. New Orleans*, 24 La. Ann. 42. The commissioners of either of two countries bounding on a river may license a ferry across it. *Jones v. Johnson*, 2 Ala. 746. A covenant not to run steamboats in two States and in any of the navigable waters of a territory is void, being against public policy. *Oregon Steam Nav. Co. v. Hale*, 1 Wash. Ter. N. S. 283.

<sup>4</sup>*Commonwealth v. Alger*, 7 Cush. 53; *Arnold v. Mundy*, 1 Halst. 1; *Bell v. Gough*, 23 N. J. L. 624; *Attorney General v. Delaware Railroad Co.*, 27

or exclusive rights of fishery in them.<sup>1</sup> If the terms of the grant are doubtful, that construction will be adopted which least restricts the rights of the State and of the public, inasmuch as public grants, whether made by the Crown, or by Congress, or by a State, are construed strictly, and pass only what appears by express words or necessary implication.<sup>2</sup> When the legislature provides for the sale or occupation of lands owned by the State and adjacent to tide water, an express declaration is necessary to warrant the inference that it was intended to permit the shore below high-water mark to be converted into private property.<sup>3</sup> A statute which merely extends the bounds of a town over tide waters, so as to include certain islands therein, confers jurisdiction only, and conveys no right of property in the soil under the water.<sup>4</sup> A confirmation by a

N. J. Eq. 1, 631; Hudson Tunnel Co. v. Attorney General, id. 176, 573; Galveston v. Menard, 23 Texas, 349; *ante*, § 31; People v. Thompson, 30 Hun, 457.

<sup>1</sup> *Ibid.*; *post*, ch. 4.

<sup>2</sup> *Ante*, § 31; Royal Fishery of the Banne, Davies, 149; Somerset v. Fogwell, 5 B. & C. 875; The Rebekah, 1 Rob. Adm. 227, 230; Feather v. The Queen, 6 B. & S. 257; Attorney General v. Farmer, Sir T. Raym. 241; 2 Lev. 171; Bro. Abr. Patent, pl. 62; Charles River Bridge v. Warren Bridge, 11 Peters, 420, 544, 557; Leavenworth Railroad Co. v. United States, 92 U. S. 733; Minturn v. Larue, 23 How. 435; 1 McAll. 370; Rice v. Railroad Co., 1 Black, 358; Cleveland v. Norton, 6 Cush. 380; Boston v. Richardson, 13 Allen, 146; 105 Mass. 351; Commissioners v. Holyoke Water Power Co., 104 Mass. 446, 449; People v. New York Ferry Co., 68 N. Y. 71; People v. Canal Appraisers, 83 N. Y. 461; Clark v. Reeves, 3 Caines, 293; Lansing v. Smith, 4 Wend. 9; 8 Cowen, 46; Morris Canal Co. v. Central Railroad Co., 16 N. J. L. 419; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210; Thompson

v. River Co., 58 N. H. 108; West Branch Canal Co. v. Elmira Railroad Co., 55 Penn. St. 180; McManus v. Carmichael, 3 Iowa, 1; La Plaisance Bay Co. v. Monroe, Walk. Ch. 155; Haight v. Keokuk, 4 Iowa, 200; North-Western Fertilizing Co. v. Hyde Park, 70 Ill. 634; Mills v. St. Clair County, 2 Gilman, 198; 8 How. 569; Vansickle v. Haines, 7 Nev. 249. See Hyman v. Reed, 13 Cal. 444. So a grant from the sovereign of the right to take toll is construed against the grantee. Stourbridge Canal v. Wheeley, 2 B. & A. 793; Britain v. Cromford Canal, 3 B. & Ald. 140; Leeds Canal v. Huster, 1 B. & C., 424; Woolrych on Waters, 306, 312.

<sup>3</sup> *Ibid.*; Kimball v. Macpherson, 46 Cal. 103.

<sup>4</sup> Palmer v. Hicks, 6 Johns. 133; People v. Schermerhorn, 19 Barb. 540; Brookhaven v. Smith, 118 N. Y. 634; Roe v. Strong, 119 id. 316; Breen v. Locke, 46 Hun, 291; Ruge v. Apalachicola Oyster Co., 25 Fla. 656; San Diego v. Granniss, 77 Cal. 511; Bechtel v. Edgewater, 45 Hun, 240; Bassett v. Franklin, 15 R. I. 572; Middletown v. Newport Hospital, 16 R. I. 319. The first of these cases was an

colonial assembly to proprietors, who had purchased from the Indians, of lands which included an arm of the sea, with all ports, rivers, etc., was held not to be a grant of the soil between high and low-water mark.<sup>1</sup> So, a general authority conferred by the legislature to lay out highways will not authorize the laying out of a highway over navigable waters.<sup>2</sup> A conveyance by the State of all its right, title, and interest in and to the bed of a navigable river, does not pass any exclusive right of wharfage,<sup>3</sup> or authorize a destruction or exclusive use of the navigation;<sup>4</sup> and if the legislature confers upon a railroad company power to construct its road "along" tide water, this does not authorize the construction of the road below high-water mark.<sup>5</sup> So, a charter to a mill corporation,

action of debt for a penalty prescribed by the town of Flushing against any person raking clams within its boundaries, and the regulation prescribing the penalty was held to be illegal and void. The court said that the statute by which the bounds of the town were extended over the bay and into the Sound, so as to include the islands southward to the main channel, was merely for the purpose of jurisdiction and no evidence of a grant of property in the soil covered by the water, and that the town must show such right of property in order to entitle it to regulate the use of such lands. It was also said: "All the ground, under the navigable waters of the Hudson River, is within the boundaries of some town, for the purposes of civil and criminal jurisdiction; but it does not follow that the lands under the water belong to the town situated on the river." See *Robins v. Ackerly*, 91 N. Y. 98. In *Commonwealth v. Roxbury*, 9 Gray, 451, 594, Shaw, C. J., said: "Counties are composed of towns. And for many purposes, the body of the county extends not only over the shores of the sea, but to some distance below the ebb of the tide, for

many purposes of civil and criminal proceedings, and for certain purposes of jurisdiction; and, for the like purposes, towns may be considered as having a co-extensive jurisdiction; but this has no bearing upon the question of property. An act of incorporation, therefore, without words of grant of the soil, would vest no part of the property of the government in such town. Nor was the purpose of the organization of such a nature as would require of the government any portion of the public right vested in them for public use and benefit; therefore, no portion of the *jus publicum* will be presumed to have been granted without express words." See *Trustees v. Loundes*, 40 Fed. Rep. 625.

<sup>1</sup> *East Haven v. Hemingway*, 7 Conn. 186; *Middletown v. Sage*, 8 Conn. 221; *Commonwealth v. Roxbury*, 9 Gray, 493, 494.

<sup>2</sup> *Post*, ch. 4.

<sup>3</sup> *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90.

<sup>4</sup> *Treat v. Lord*, 42 Maine, 552; *People v. Williams*, 64 Cal. 498.

<sup>5</sup> *Stevens v. Erie Railway Co.*, 21 N. J. Eq. 259; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532.

authorizing it to exclude tide water from flats belonging to the State, and to use them as a basin for the purpose of mill power, does not release the title of the State to the flats.<sup>1</sup> State laws providing for the entry and sale of public lands, or for the sale of swamp and overflowed lands, do not extend to the soil beneath navigable waters, and no right to obstruct the navigation passes to the purchaser under such laws.<sup>2</sup> If lands are patented by a State "according to the official plat" in its land-office, and the plat designates them as tidal overflow, it cannot be objected that they were not conveyed as overflowed lands.<sup>3</sup> In *Attorney General v. Hanmer*,<sup>4</sup> letters patent of the Crown, as lord of the manor of Englefield, granting "all those coal mines found or to be found within the commons, waste grounds, or marshes within the said lordship of Englefield," with a proviso that the grant should be construed strictly against the Crown, and most strictly and beneficially for the grantees, was held to pass coal lying under the foreshore of the estuary of the River Dee, between high and low-water marks, and forming part of the manor of Englefield.

<sup>1</sup> *Commonwealth v. Roxbury*, 9 Gray, 451.

<sup>2</sup> *Chapman v. Hoskins*, 2 Md. Ch. 485; *People v. Morrill*, 26 Cal. 336; *Taylor v. Underhill*, 40 Cal. 471; *Upham v. Hosking*, 62 Cal. 250, 258; *Chandler v. Calumet & H. Co.*, 36 Fed. Rep. 665; *Tatum v. Sawyer*, 2 Hawks (N. C.), 226; *Smith v. Ingram*, 7 Ired. 175; *Freytag v. Powell*, 1 Whart. 536; *Barton v. Bouvier*, 1 Phila. 523; *Brandt v. McKeever*, 18 Penn. St. 70; *Barclay Railroad Co. v. Ingham*, 36 Penn. St. 194; *Storer v. Jack*, 60 Penn. St. 339; *Allegheny City v. Moorehead*, 80 Penn. St. 118; *Philadelphia v. Scott*, 81 Penn. St. 80; *Hinman v. Warren*, 6 Oregon, 408; *Norfolk City v. Cooke*, 27 Gratt. 430. If the stream of a public navigable river is artificially diverted from its channel, the land reclaimed cannot be appropriated by warrant and survey. *Poor v. McClure*, 77 Penn. St.

214; *Wainwright v. McCullough*, 63 Penn. St. 66; *Allegheny City v. Moorehead*, 80 Penn. St. 118. In *People v. Morrill*, 26 Cal. 336, land containing asphaltum between high and low-water mark on the Pacific Ocean, was treated as open to location of mining claims under the general law the same as other lands of the State. See, also, *More v. Massine*, 37 Cal. 432. The United States act of September 28, 1850, was a present grant to the several States of the swamp and overflowed lands within their limits remaining unsold, subject to a later determination of what lands were then of that description. *Tubbs v. Wilhoit*, 138 U. S. 134; *Gormley v. Uthe*, 116 Ill. 643; *Sterling v. Jackson*, 69 Mich. 488; *San Francisco v. Le Roy*, 138 U. S. 656.

<sup>3</sup> *Cragin v. Powell*, 128 U. S. 691.

<sup>4</sup> 27 L. J. Ch. 837.



§ 37. **Same — Prescription against the State.**— Individuals may also acquire by prescription, against the Crown or the State, the right to the soil of public waters;<sup>1</sup> and, by the weight of authority, they may gain, in the same way, exclusive rights of fishery in them.<sup>2</sup> When the shores or flats of tide waters have become private property, the title thereto may be lost by disseisin,<sup>3</sup> and a title to the upland, acquired by long-continued possession, carries the adjoining flats as appurtenant or parcel without proof of actual possession, unless there is evidence that the title to the upland has been separated from that to the flats.<sup>4</sup> A disseisin of flats is made by a continued, exclusive, and adverse occupation thereof for the statutory period, usually twenty years; as by enclosing them with a boom, which rests thereon, when the tide is out, under a claim of title to the flats,<sup>5</sup> by enclosing a small pond with a wall, and the use of the same for the purpose of a tide-mill and for storing logs;<sup>6</sup> by filling them up and using them for a highway,<sup>7</sup> or erecting a wharf thereon and using the adjoining flats for mooring vessels,<sup>8</sup> or maintaining fences of stakes

<sup>1</sup> Hale, *De Jure Maris*, ch. 5; Hargrave's *Law Tracts*, 18; *Nichols v. Boston*, 98 Mass. 39; *Boston v. Richardson*, 105 Mass. 41; *Kean v. Stetson*, 5 Pick. 492, 495; *Leffingwell v. Warren*, 2 Black, 599; *Tracy v. Norwich Railroad Co.*, 39 Conn. 382; *Seeley v. Brush*, 5 Conn. 419; *Church v. Meeker*, 34 Conn. 421; *Chapman v. Kimball*, 9 Conn. 41; *Middleton v. Sage*, 8 Conn. 228; *Palmer v. Hicks*, 6 Johns. 133; 2 Kent Com. 427. In Massachusetts, see Stat. 1867, ch. 275.

<sup>2</sup> *Post*, ch. 5.

<sup>3</sup> *Wheeler v. Stone*, 1 Cush. 813; *Boston v. Richardson*, 105 Mass. 351; *Clancey v. Houdlette*, 39 Maine, 451; *Treat v. Chipman*, 35 Maine, 34.

<sup>4</sup> *Valentine v. Piper*, 22 Pick. 85; *Porter v. Sullivan*, 7 Gray, 441, 445; *Commonwealth v. Alger*, 7 Cush. 58, 80; *Sparhawk v. Bullard*, 1 Met. 95; *Thornton v. Foss*, 26 Maine, 402; *Brackett v. Persons Unknown*, 53 Maine, 228, 238. As one tract of land

cannot pass as an appurtenance to another tract, the flats go with the upland as parcel rather than as appurtenant. *Ammidown v. Granite Bank*, 13 Allen, 285, 291; *Central Wharf v. India Wharf*, 123 Mass. 561, 566.

<sup>5</sup> *Stetson v. Veazie*, 11 Maine, 408.

<sup>6</sup> *Tufts v. Charlestown*, 117 Mass. 401. See *Barker v. Deignan*, 25 S. C. 252.

<sup>7</sup> *Tyler v. Hammond*, 11 Pick. 193. It was also held in *Tyler v. Hammond* that the lessee of an easement in a dock may disseise the lessor by taking exclusive possession and holding against the latter's will, and that an easement does not become merged or lost by a disseisin or wrongful claim of title against the owner of the servient tenement. *Stetson v. Veazie*, 11 Maine, 408; *Locks & Canals v. Nashua Railroad Co.*, 104 Mass. 1, 8.

<sup>8</sup> *Wheeler v. Stone*, 1 Cush. 813;



or twigs, erected for fish weirs.<sup>1</sup> The habitual and continued taking of wreck or seaweed from unenclosed flats, and licensing others to do so, or cutting grass thereon, under a claim of right, may or may not, it seems, establish a disseisin according to the circumstances of the case.<sup>2</sup> But sailing over unimproved flats when covered by the tide, or anchoring upon them, or using them for the purpose of approaching a wharf from the sea, or taking shell-fish therefrom,<sup>3</sup> being the exercise of a public right, is not such possession as constitutes a disseisin.<sup>4</sup> So a grant by the State of a several fishery in a public navigable river cannot be presumed from the uninterrupted use and enjoyment of such fishery by an individual in common with others for more than twenty years.<sup>5</sup> The mere user of the seashore by the turning on of cattle, although continued for a period of sixty years, is not such an act of ownership as to raise a presumption of title in the owner of the cattle, without proof of the exercise of the right in the face of opposition on the part of the person interested in resisting the right, or of knowledge and acquiescence on his part, inasmuch as the seashore is property of such a nature that it cannot easily be protected against intrusion, and would not usually be worth the trouble and expense of fencing.<sup>6</sup> In case of a mixed pos-

*Rust v. Boston Mill Corporation*, 6 Pick. 158; 9 Gray, 524; *Hamblet v. Francis*, 4 Mass. 75; *Treat v. Chipman*, 35 Maine, 34; *State v. Wilson*, 42 Maine, 9.

<sup>1</sup> *Treat v. Chipman*, 35 Maine, 34.

<sup>2</sup> *Hale, De Jure Maris*, ch. 6; *Hargrave's Law Tracts*, 27; *Hall on the Seashore* (2d ed.), 32; *East Hampton v. Kirk*, 84 N. Y. 215; 68 N. Y. 459; 6 Hun, 257; *Roe v. Strong*, 107 N. Y. 350; *Commonwealth v. Roxbury*, 9 Gray, 451, 499; *Thacher v. Cobb*, 5 Pick. 423; *Tappan v. Burnham*, 8 Allen, 65; *Thornton v. Foss*, 26 Maine, 402; *Clancey v. Houdlette*, 39 Maine, 457; *New Shoreham v. Ball*, 14 R. L. 566; *ante*, § 22.

<sup>3</sup> *People v. Lowndes*, 55 Hun, 469.

<sup>4</sup> *Drake v. Curtis*, 1 Cush. 395; *Curtis v. Francis*, 9 Cush. 466; *Brimmer*

*v. Long Wharf*, 5 Pick. 139; *Gray v. Bartlett*, 20 Pick. 192; *Weston v. Sampson*, 8 Cush. 347; *Porter v. Sullivan*, 7 Gray, 441; *Tracy v. Norwich Railroad Co.*, 39 Conn. 382; *Boulo v. New Orleans Railroad Co.*, 55 Ala. 480; *Deering v. Long Wharf*, 25 Maine, 65. See *Pell v. Towers*, Noy, 20.

<sup>5</sup> *Delaware Railroad Co. v. Stump*, 8 Gill & J. 479.

<sup>6</sup> *Attorney General v. Chambers*, 4 De Gex & J. 55; *Thomas v. Marshfield*, 10 Pick. 364; 13 Pick. 240; *Donnell v. Clark*, 19 Maine, 174, 183; *Murphy v. Welder*, 58 Texas, 235. Where the flats and upland belong to different persons, the owner of the upland, by passing over the shore with boats at high water, or landing boats there at low water, and passing

session, the seisin of flats follows the legal title;<sup>1</sup> and, if the claim is doubtful in extent, or not to the entire parcel, a title by disseisin is limited by the actual occupation, and is not to be extended by construction.<sup>2</sup> If the individual inhabitants of a town use land upon the seashore as a landing place without authority from the town, this does not support, but is adverse to, a claim of possession by the town in its corporate capacity,<sup>3</sup> although the use and enjoyment of the landing place by the inhabitants of other towns, as well as by those of the town in which it is situated, would be sufficient to establish a right by prescription in all the inhabitants of the State.<sup>4</sup> So the acts of such individual inhabitants, during a long period

to and fro over the beach, for twenty years, does not gain possession, there being nothing to define possession of any particular portion of the land, and the acts being consistent with public passage at high water, and with an easement at low water. *Doe v. Littlehale*, Stevens' N. B. Digest, p. 271, pl. 5. To maintain trespass, plaintiff's possession must be shown by acts done with the apparent object of taking possession as owner, and mere casual acts of a transient nature, few in number, and occurring at long intervals, are not sufficient. *E. g.*, the *locus* being a small uncultivated island, the acts of fastening the plaintiff's net to a tree on the island annually for about twenty years, collecting drift-wood upon it, and once putting a calf there to pasture, are insufficient. *Gidney v. Bates*, *id.* p. 386, pl. 21.

<sup>1</sup> *Codman v. Winslow*, 10 Mass. 151; *Hamblet v. Francis*, 4 Mass. 75; *Brimmer v. Long Wharf*, 5 Pick. 185; *Rust v. Boston Mill Corporation*, 6 Pick. 171; *Wheeler v. Stone*, 1 Cush. 317; *Gray*, 523; *Barnstable v. Thacher*, 3 Met. 239; *Tappan v. Burnham*, 8 Allen, 65, 70; *Coleman v. San Raphael Road Co.*, 49 Cal. 517; *Stearns v. Woodbury*, 10 Met. 27.

<sup>2</sup> *Boston v. Richardson*, 105 Mass. 372; *Kennebeck Purchase v. Springer*, 4 Mass. 416; *Boston Mill Corporation v. Bulfinch*, 6 Mass. 229; *Brown v. Nye*, 12 Mass. 285; *Brimmer v. Long Wharf*, 5 Pick. 181; *Porguand v. Smith*, 8 Pick. 272; *Wheeler v. Stone*, 1 Cush. 313, 317, 322; *Allen v. Holton*, 20 Pick. 458; *Watkins v. Holman*, 16 Peters, 25, 55; *Thornton v. Foss*, 26 Maine, 402.

<sup>3</sup> *Green v. Chelsea*, 24 Pick. 71, 79. In *Boston v. Richardson*, 105 Mass. 351, evidence was held admissible, in support of a claim of title by disseisin, in favor of a city, that it had maintained a fish-house and engine-house at the end of a highway toward the sea, and had repaired a capsill standing on a stone wall at the head of the dock; with respect, at least, to the land covered by the buildings.

<sup>4</sup> *Coolidge v. Learned*, 8 Pick. 504; *Commonwealth v. Newbury*, 2 Pick. 51. Reputation is evidence upon the question whether a landing place is public or private property, and there is no distinction between the evidence of reputation to establish and to disparage the public right. *Drinkwater v. Porter*, 7 C. & P. 181; *Rex v. Sutton*, 3 N. & P. 569.

of time, in taking seaweed from a beach for the purpose of manuring their lands, is not competent evidence of a lost grant to the town from the owners of the beach.<sup>1</sup> Perambulations are not evidence against the State that a town possesses the title to flats within its limits;<sup>2</sup> nor do votes of a town, which grant annually to individuals the right to take shell-fish from beaches within its limits for a specified price paid to the town, and which provide for the preservation of the beaches, tend to establish in the town an absolute title to the beaches,<sup>3</sup> except so far as possession has been actually taken and continued under them.<sup>4</sup>

§ 38. **Same — State legislation — Fisheries.**— In *Corfield v. Coryell*,<sup>5</sup> the question was whether a statute passed by the legislature of New Jersey, which prohibited any person not an actual resident of the State, raking or gathering clams, oysters, or shells in any of the rivers, bays, or waters in the State, was repugnant to the provision of the constitution of the United States that “the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.”<sup>6</sup> It was held that the control of fisheries was not ceded to the United States by the commerce clause of the constitution; that this is a right of property vested in certain individuals, or in the State, for the use of its citizens; and that the provision just quoted did not amount to a grant of the common property of the State to the citizens of all the other States. In the case of *Smith v. Maryland*,<sup>7</sup> in the Supreme

<sup>1</sup> *Sale v. Pratt*, 19 Pick. 191.

<sup>2</sup> *Commonwealth v. Roxbury*, 9 Gray, 457. But see *Hale, De Jure Maris*, ch. 4; *Hargrave's Law Tracts*, 27.

<sup>3</sup> *Lynn v. Nahant*, 113 Mass. 433; *West Roxbury v. Stoddard*, 7 Allen, 158.

<sup>4</sup> *New Shoreham v. Ball*, 14 R. L. 566. See *Newport Hospital v. Carter*, 15 id. 285.

<sup>5</sup> 4 Wash. C. C. 371; *Bennett v. Boggs*, 1 Bald. C. C. 72; *Thompson v. Whitman*, 18 Wall. 457.

<sup>6</sup> Art. 4, § 2.

<sup>7</sup> 18 How. 71; *Thompson v. Whitman*, 18 Wall. 457; *The Ann*, 5 Hughes, 292. Statutory forfeiture of a vessel which illegally takes oysters does not necessarily give to the State title to the oysters on board. *McCandlish v. Commonwealth*, 76 Va. 1002. See *Booth v. Lloyd*, 33 Fed. Rep. 593. See *Bradshaw v. Lankford* (Md.), 21 Atl. 66. A State statute which provides that “any person” belonging to a steamer, who takes fish in violation of its provisions, shall forfeit his vessel, cannot be enlarged by construction to mean that he shall for-

Court of the United States, the question was whether a vessel, which was owned by a citizen of Pennsylvania, and was enrolled and licensed for the coasting trade under an act of Congress, was lawfully condemned to be forfeited to the State of Maryland for the violation of an act of that State designed to protect the growth of oysters in its waters by prohibiting the use of particular instruments in dredging them. The court expressed no opinion upon the questions considered in *Corfield v. Coryell*, but held that it was within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States for a disobedience, by those on board, of the law in question. In the later case of *McCready v. Virginia*,<sup>1</sup> the same court held, with respect to a statute of Virginia, similar in its provisions to that considered in *Corfield v. Coryell*,<sup>2</sup> that the power over fisheries had not been granted to the United States, and that the right to gather oysters is a right of property, which, though common to all the citizens of the particular State, is not a general privilege or immunity of citizenship. The same has frequently been held in the State courts.<sup>3</sup> In *Dunham v. Lamphere*,<sup>4</sup> in Massachusetts, the defendant was a citizen of Rhode Island, and had a fishing license under the laws of the United States, and the action was brought to recover a penalty imposed for the violation of a statute of Massachusetts, which made it unlawful for any person to take fish

feit another person's vessel. The *J. W. French*, 13 Fed. Rep. 916. The imposition of State license fees, to be expended in guarding the oyster grounds, upon all vessels engaged in planting or taking oysters there, proportioned to their tonnage, is not an attempt to regulate commerce between the States, nor is it obnoxious to the State constitutional provision that all property shall be assessed under general laws and by uniform rules, according to its true value. *Johnson v. Loper*, 46 N. J. L. 321.

<sup>1</sup> 94 U. S. 391; *McCready v. Commonwealth*, 27 Gratt. 985, 982; *Boggs*

*v. Commonwealth*, 76 Va. 989; *Martin v. Waddell*, 16 Peters, 367.

<sup>2</sup> 4 Wash. C. C. 371, cited above.

<sup>3</sup> *Haney v. Compton*, 36 N. J. L. 507; *Day v. Compton*, 37 N. J. L. 514; *State v. Medbury*, 3 R. L. 138; *Chambers v. Church*, 14 R. L. 398; *New England Oyster Co. v. McGarvey*, 12 R. L. 385; *Crandall v. State*, 10 Conn. 340; *Dunham v. Lamphere*, 3 Gray, 268; *People v. Coleman*, 4 Cal. 46; *Slaughter v. Commonwealth*, 13 Gratt. 767; *Johnson v. Drummond*, 20 Gratt. 419; *Hendricks v. Commonwealth*, 75 Va. 934.

<sup>4</sup> 3 Gray, 268.

with seines within one mile from the shores of Nantucket and other small islands. It was held that this law, which applied to the coast fisheries in the outer sea as well as in the waters within the islands, was not repugnant to the Federal Constitution. This decision was prior to the Massachusetts statute, which extended the territorial jurisdiction of the State one marine league seaward from its seashore at low-water mark.<sup>1</sup> The statute declared to be constitutional was treated as making the sea within a mile from the islands a part of the territory of the State,<sup>2</sup> and this decision was approved in the recent case of *Commonwealth v. Manchester*.<sup>3</sup> It follows from these authorities that the coast fisheries, as well as those in inland tide waters, and the taking of both shell and floating fish, are under the control of the respective States, and that each State may lawfully exclude the citizens of other States from these privileges, as well as aliens having no special rights secured to them by treaty.<sup>4</sup>

<sup>1</sup> Mass. St. 1850, ch. 6; Gen. Sts. ch. 1, § 1; *ante*, § 16.

<sup>2</sup> Shaw, C. J., here said (3 Gray, 269, 270): "The fact of taking fish by a seine within a mile of the shore of Gravel Island, which constitutes part of the territory of the State, after the act went into operation, is plainly contrary to the letter of the statute, and leaves the only question to be, whether the statute itself has the force of law. Being within a mile of the shore puts it beyond doubt that it was within the territorial limits of the State, although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be that these limits extend a marine league, or three geographical miles, from the shore; and, in ascertaining the line of shore, this limit does not follow each narrow inlet or arm of the sea; but when the inlet is so narrow that persons and objects can be descried across it by the naked eye, the line of territorial jurisdiction stretches

across from one headland to the other of such inlet."

<sup>3</sup> 152 Mass. 230; 139 U. S. 240.

<sup>4</sup> "Citizens of other States having no property right which entitles them to fish against the will of the State, *a fortiori*, the alien, from whatever country he may come, has none whatever in the waters or the fisheries of the State. Like other privileges he enjoys as an alien by permission of the State, he can only enjoy so much as the State vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor." . . . "Conceding that the State may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege, it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation." In *re Ah Chong*, 2 Fed. Rep. 733, 736, *per Sawyer*, C. J.

§ 39. **Same — Rights of new States.**— The United States is the source of title to lands within its limits which are not within the boundaries of the States, and the new States, being admitted into the Union upon an equal footing with the original States, become entitled to all the rights and privileges possessed by the latter.<sup>1</sup> They have the same rights, sovereignty, and jurisdiction, as to the soil of navigable waters, as the older States;<sup>2</sup> and neither the right of the United States to the public lands, nor the power conferred upon Congress to make laws and regulations for the sale and disposition thereof, enables the general government to grant the shores and bed of such waters within the limits of a new State after its admission into the Union.<sup>3</sup> The new States may possess lands, either under grants from the United States or by virtue of their sovereignty; and their ownership of the seashore and of the soil of the bays and inlets of the sea within their limits is of the latter class.<sup>4</sup> The declaration in the act of Congress, admitting Oregon and other States into the Union, that its navigable waters shall be “common highways and forever free” does not empower the Federal courts to enjoin the construction of a bridge authorized by State legislation, notwithstanding the appropriation by Congress of money for the improvement of the river in question;<sup>5</sup> nor, if Congress has not

<sup>1</sup> Pollard v. Hagan, 3 How. 212; Case v. Toftus, 39 Fed. Rep. 730.

<sup>2</sup> Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Hallett v. Beebe, 13 How. 25; Withers v. Buckley, 20 How. 84; St. Clair Co. v. Lovington, 23 Wall. 46, 69; Mumford v. Wardwell, 6 Wall. 423, 436; Weber v. Harbor Commissioners, 18 Wall. 57; Friedman v. Goodwin, 1 McAll. 142; Teschemacher v. Thompson, 18 Cal. 11; Gunter v. Geary, 1 Cal. 462; Chapin v. Bourne, 8 Cal. 298; Eldridge v. Cowell, 4 Cal. 81; People v. Davidson, 30 Cal. 379; Farish v. Coon, 40 Cal. 33; Coburn v. Ames, 52 Cal. 385; Le Roy v. Dunkerly, 54 Cal. 452; Strader v. Graham, 10 How. 82; Boulo v. Mobile Railroad Co., 55 Ala. 480. See Pollard v. Kibbe, 14 Peters, 353;

9 Porter, 712; Mobile v. Eslava, 16 Peters, 234; 9 Porter, 577; Mobile v. Hallet, 16 Peters, 261; Mobile v. Emanuel, 1 How. 95; Pollard v. Files, 2 How. 592; 3 Ala. 47; Duval v. McLoskey, 1 Ala. 708, 747; Kemp v. Thorp, 3 Ala. 291; Hagan v. Campbell, 8 Porter, 9.

<sup>3</sup> Ibid.; Pollard v. Hagan, 3 How. 212, 230.

<sup>4</sup> Guy v. Hermance, 5 Cal. 73; People v. Morrill, 26 Cal. 336; Ward v. Mulford, 32 Cal. 365; Shively v. Welch, 20 Fed. Rep. 28.

<sup>5</sup> Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1; 7 Sawyer, 127. See Cardwell v. American River Bridge Co., 113 U. S. 205; 19 Fed. Rep. 562.



acted, does such declaration prevent the State from obstructing the navigation of a river.<sup>1</sup>

§ 40. **Same — Grants by the United States.**— In *Hinman v. Warren*,<sup>2</sup> in Oregon, it was held that the United States, while holding the title to the soil of tide waters, cannot make a valid conveyance of such soil. There are also *dicta* to this effect in the case of *Haight v. Keokuk*,<sup>3</sup> in Iowa, but *Hinman v. Warren* was the first adjudication upon the subject. According to this view, the United States holds purely as trustee for the future State, and is without statutory or constitutional authority to do any act making it impossible to admit the new State upon a footing equal, in all respects, with that of the other States. The decisions of the Supreme Court of the United States were thought to lead to the conclusion reached in *Hinman v. Warren*;<sup>4</sup> but it would seem that there is no very direct expression of such a view, in the opinions of that court.<sup>5</sup> The power of Congress to legislate in the interest of a territory is superior to that of the territorial legislature,<sup>6</sup>

<sup>1</sup> *Scheurer v. Columbia Street Bridge Co.*, 27 Fed. Rep. 172; *People v. Potrero R. Co.*, 67 Cal. 166.

<sup>2</sup> 6 Oregon, 408.

<sup>3</sup> 4 Iowa, 199, 213.

<sup>4</sup> *Hinman v. Warren*, 6 Oregon, 408, 411.

<sup>5</sup> In *Weber v. Harbor Commissioners*, 18 Wall. 57, 65, Mr. Justice Field said: "Although the title to the soil under the tide waters of the bay (of San Francisco) was acquired by the United States by cession from Mexico, equally with the title to the upland, they hold it only in trust for the future State. Upon the admission of California into the Union upon an equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State." But in *Barney v. Keokuk*, 94 U. S. 324, 338, the question was left open, Bradley, J., saying, in speaking of the surveys by the general government of lands adjoining the navi-

gable fresh rivers of the West (*post*, § 68): "It properly belonged to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water." In *Gavit v. Chambers*, 8 Ohio, 496, 498, the court, in adopting the common-law rule, by which the title of riparian proprietors upon all fresh-water streams extends *usque ad filum aquæ*, said: "There is nothing in the trust vested in Congress, and executed by them, and nothing in the manner of executing it, to warrant the establishment of a different principle here."

<sup>6</sup> See U. S. Rev. Stats. §§ 1850, 1891; *American Ins. Co. v. Canter*, 1 Peters, 511, 545; *Scott v. Jones*, 5 How. 343; *United States v. Gratiot*, 14 Peters, 526; *Reynolds v. United States*, 98 U. S. 145; *Ferris v. Higley*, 20 Wall. 375; *National Bank v. Yankton*, 101 U. S. 129, 133; *Clinton v. Englebrecht*,



apart from the authority to regulate commerce, granted by the Constitution of the United States; and it would seem that Congress may, at least, make such grants in aid of commerce and navigation, as are necessary for the erection of wharves, piers, dams, and bridges in navigable waters, if, indeed, there is any power in the courts to review its determination as to the means of promoting these public interests. In the earlier cases of *Mobile v. Eslava*,<sup>1</sup> and *Mobile v. Hallet*,<sup>2</sup> Mr. Justice Catron says, in a dissenting opinion, that it had not been doubted that the United States could convey the soil under the navigable waters of Alabama, prior to its admission into the Union. In the recent case of *Case v. Toftus*,<sup>3</sup> in the United States circuit court, the question raised in *Hinman v. Warren* was considered doubtful. Whether a patent of upland from the United States conveys the seashore below high-water mark is a Federal question under the removal acts.<sup>4</sup>

13 Wall. 434; *United States v. Vigil*, 13 Wall. 449, 451; *Johnson v. McIntosh*, 8 Wheat. 543; *Fletcher v. Peck*, 6 Cranch, 142; *Carpenter v. Rogers*, 1 Mon. Ter. 90; *Territory v. Lee*, 2 id. 124; *Carson River Co. v. Barrett*, 2 Nev. 249; *Swan v. Williams*, 2 Mich. 427; 3 Story Com. 193, 536; 1 Kent Com. 257, 384; *Franklin v. United States*, 1 Col. 35; *Reynolds v. People*, id. 179; *Wisconsin v. Doty*, 1 Pinney (Wis.), 396; *Van Sickle v. Haines*, 7 Nev. 249; *Union Mining Co. v. Ferris*, 2 Sawyer, 176; *In re Attorney General*, 2 New Mex. 49; *Phelps v. The City of Panama*, 1 Wash. Ter. N. S. 518.

<sup>1</sup> 16 Peters. 234; 9 Porter, 577.

<sup>2</sup> 16 Peters, 261. See also *Pollard*

*v. Hagan*, 3 How. 212; *Hagan v. Campbell*, 8 Porter, 1; *Abbot v. Kennedy*, 5 Ala. 393, 396; *Hendricks v. Johnson*, 6 Porter, 472; *Mobile v. Emanuel*, 1 How. 95, 98, 102; 17 Peters, 155; 9 Porter, 403; *Pollard v. Files*, 2 How. 591; s. c. 3 Ala. 47; *Pollard v. Kibbe*, 14 Peters, 353; 9 How. 471; s. c. 1 Ala. 403; *Doe v. Beebe*, 13 How. 25; *Hallett v. Beebe*, 13 How. 25; 8 Ala. 909; *Pollard v. Greit*, 8 Ala. 930; *Hallett v. Hunt*, 7 Ala. 882. See *Tripp v. Spring*, 5 Sawyer, 209.

<sup>3</sup> 39 Fed. Rep. 732. See 18 N. J. L. J. 6; 8 West. L. J. 346.

<sup>4</sup> *Kenyon v. Squire* (Wash.), 24 Pac. 28, 29.

## CHAPTER III.

### RIVERS, LAKES AND PONDS.

#### SECTION.

41. River and watercourse defined.
42. Navigable or tidal rivers.
43. What streams are navigable and public.
44. A river is navigable and public at common law as far as the water is ordinarily ponded back by the tide.
45. Banks and shores of rivers.
46. Property in fresh-water streams and rivers.
47. Navigable fresh-water rivers.— Bracton.
48. Ibid.— Case of the Royal Fishery of the Banne.
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- 51, 52. Ibid.— The present rule in England.
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- 56–58. Ibid.— The common-law rule adopted in New England and other Eastern States.
59. Ibid.— South Carolina.
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- 66, 67. Ibid.— The effect of decisions respecting the admiralty jurisdiction.
68. Ibid.— The ordinance of 1787.
69. Ibid.— The public land system. Illinois.
70. Ibid.— Ohio.
71. Ibid.— The Ohio River.
72. Ibid.— Iowa.
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74. Ibid.— Alabama.
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76. Late decisions in the Western States limit private ownership to the margin of the river.
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- 82–83. Ibid.— The rule in this country.
84. Ibid.— Massachusetts.
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§ 41. **River and watercourse defined.**—A river is a running stream of water pent in on either side by banks, shores, or walls; and it bears that name as well where the waters flow and reflow with the tide as where the current is always in one direction.<sup>1</sup> Every river consists of: (1) the bed; (2) the water; (3) the banks or shores;<sup>2</sup> and it also has a current.<sup>3</sup> It is a river or watercourse from the point where the water comes to the surface and begins to flow in a channel until it mingles with the sea, the arms of the sea, lakes, etc.<sup>4</sup> It may

<sup>1</sup> Callis on Sewers, 77; Woolrych on Waters, 31; Tenterden, C. J., in *Rex v. Oxfordshire*, 1 B. & Ad. 289, 301; *Rex v. Trafford*, 1 B. & Ad. 874, 887; 8 Bing. 204; *Queen v. Derbyshire*, 2 Q. B. 745, 756; *Rex v. Whitney*, 3 Ad. & El. 69; 1 H. & N. 147; 7 C. & P. 208; *Abraham v. Great Northern Railway Co.*, 16 Q. B. 586, 597; *Menzies v. Breadalbane*, 8 Wilson & Shaw, 234, 243; *Long v. Boone County*, 36 Iowa, 60; *Benson v. Connors*, 68 Iowa, 770; *McHardy v. Ellice*, 1 Can. App. 628; 39 Q. B. (Can.), 546; 37 id. 580; *post*, § 264; *Palmer v. Waddell*, 22 Kansas, 352; *Gibbs v. Williams*, 25 id. 214; *Chicago R. Co. v. Morrow*, 42 id. 339.

<sup>2</sup> *Ibid.*; *Ennor v. Barwell*, 2 Giff. 410; *Briscoe v. Drough*, 11 Ir. C. L. 250; *Daws v. McDonald*, 18 Vict. L. R. 698. "Shore" is strictly applicable only to the space between ordinary high and low-water mark in a tidal river, but it is sometimes used with reference to a fresh river, or lake, either as synonymous with bank, or as denoting that portion of the bank which touches the margin of the stream at low water. See *Handly v. Anthony*, 5 Wheat. 374, 385; *Dutton v. Strong*, 1 Black, 23, 32; *Stone v. Augusta*, 46 Maine, 127, 137; *McCulloch v. Wainwright*, 14 Penn. St. 171, *post*, § 45; *Lacy v. Green*, 84 Penn. St. 514. A fresh river

"has *ripam*, but not *littus*." *Per* Walworth, Ch., in *Child v. Starr*, 4 Hill, 369, 375. "The bank and the water are correlative. You cannot own one without touching the other." *Per* Cowen, J., in *Starr v. Child*, 20 Wend. 149, 152.

<sup>3</sup> *State v. Gilmanton*, 9 N. H. 461; 14 N. H. 467.

<sup>4</sup> *Horne v. Mackenzie*, 6 Cl. & Fin. 628; *Dudden v. Clutton Union*, 11 Ex. 627; *Rawstron v. Taylor*, id. 369; *Wood v. Waud*, 8 Ex. 748; *Regina v. Metropolitan Board of Works*, 3 B. & S. 710; *Taylor v. St. Helen's Co.*, 6 Ch. D. 264; *Gallup v. Tracy*, 25 Conn. 16; *Sullens v. Chicago Ry. Co.*, 74 Iowa, 659; *Moore v. Same*, 75 id. 263. As to river-water flowing into an arm of the sea, see *Horne v. Mackenzie*, 6 Cl. & Fin. 628; *post*, § 44, note; *Clyde Nav. Trustees v. Laird*, 8 App. Cas. 658. A river may be "a body of water" within the meaning of a statute. *Berlin Mills Co. v. Wentworth's Location*, 60 N. H. 156. A "tributary" may be a lake or artificial pool through which a stream passes, but not a reservoir to which the water is conveyed by underground pipes and thence back to the stream. *Harbottle v. Terry*, 10 Q. B. D. 131, 137; *Hall v. Reid*, id. 134, note. See *Merricks v. Cadwalader*, 46 L. T. N. s. 29. "Sewer" and "drain," as distinguished from water-

sometimes be dry, but in order to be within the above definition it must appear that the water usually flows in a particular direction, and has a regular channel, with bed, banks, or sides.<sup>1</sup> Whether it does so flow is a question of fact for the jury.<sup>2</sup> The bed, which is a definite and commonly a permanent channel, is the characteristic which distinguishes these waters from mere surface drainage, flowing without a defined course or certain limits, and from water percolating through the strata of the earth, both of which are not subject to riparian rights, but form a part of the realty and belong exclusively to the owner thereof.<sup>3</sup> The fact that these waters have a current gives rise to questions relating to the obstruction and acceleration of the water which do not arise in the case of still waters, like lakes and ponds. A stream necessarily involves the idea of a current;<sup>4</sup> and a statute which provides for bridges

course, are defined in *Acton Local Board v. Batten*, 28 Ch. D. 283; *Wheatcroft v. Matlock Local Board*, 52 L. T. N. S. 356; *Bateman v. Poplar Board of Works*, 37 Ch. D. 272; *Croft v. Rickmansworth H. Board*, 39 Ch. 272; *Storey v. Casey*, 3 N. Zeal. L. R. (S. Ct.), 283. See *Wetmore v. Fiske*, 15 R. L. 354; *Freeman v. Weeks*, 45 Mich. 568.

<sup>1</sup> *Post*, § 263; *Chasemore v. Richards*, 7 H. L. Cas. 349; 5 H. & N. 983; 2 H. & N. 168; *Rawstrom v. Taylor*, 11 Exch. 869; *Luther v. Winnesimmet Co.*, 9 Cush. 171; *Ashley v. Wolcott*, 11 Cush. 192, 195; *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Wheeler v. Worcester*, 10 Allen, 591; *Gannon v. Hargadon*, 10 Allen, 106; *Bates v. Smith*, 100 Mass. 181; *Emery v. Lowell*, 104 Mass. 13; *Morrill v. Hurley*, 120 Mass. 99; *State v. Gilmanton*, 14 N. H. 467; *Bangor v. Lansil*, 51 Maine, 521; *Greeley v. Maine Central Railroad Co.*, 53 Maine, 200; *Morrison v. Bucksport Railroad Co.*, 67 Maine, 353; *Buffum v. Harris*, 5 R. L. 243;

*Goodale v. Tuttle*, 29 N. Y. 459; *Earl v. De Hart*, 1 Beasley, 280; *Bowlsby v. Speer*, 31 N. J. L. 351; *Shields v. Arndt*, 3 Green Ch. 234; *Beard v. Murphy*, 37 Vt. 99; *Swett v. Cutts*, 50 N. H. 439; *Kauffman v. Griesemer*, 26 Penn. St. 407; *Gillham v. Madison Railroad Co.*, 49 Ill. 484; *Hoyt v. Hudson*, 27 Wis. 656; *Eulrich v. Richer*, 37 Wis. 226; 41 Wis. 318; *Barnes v. Sabron*, 10 Nev. 217; *Shively v. Hume*, 10 Oregon, 76; *Geddis v. Parish (Wash. Ter.)*, 21 Pac. 314; *Imler v. Springfield*, 55 Mo. 119; *Jones v. Hannovan*, id. 432; *New Albany Railroad Co. v. Peterson*, 14 Ind. 112; *Greencastle v. Hazelett*, 23 Ind. 186; *Schlichter v. Phillipy*, 67 Ind. 201; *Crewson v. Grand Trunk Railway Co.*, 27 Q. B. (Can.) 68.

<sup>2</sup> *Ibid.*; *Eulrich v. Richer*, 37 Wis. 226; 41 Wis. 318.

<sup>3</sup> *Taylor v. Fickas*, 64 Ind. 167, and above authorities; *post*, ch. 9.

<sup>4</sup> *Joliet Railroad Co. v. Healy*, 94 Ill. 416, 421; *Gouverneur v. National Ice Co.*, 11 N. Y. Sup. 87.

over streams separating towns confers no authority to construct bridges over lakes, bays, or marshes, in which the water has no regular and perceptible flow.<sup>1</sup>

§ 42. Navigable and tidal rivers — Property in.— Those rivers and parts of rivers in which the tide ebbs and flows are known as “navigable” rivers, and by the common law they are vested *prima facie* in the Crown.<sup>2</sup> Hence, as was said in an early case, “all navigable rivers in England appertain to the king.”<sup>3</sup> They are arms of the sea, and the king has them because they partake of its nature.<sup>4</sup> This ownership is for the public benefit,<sup>5</sup> and in this country each State, as sovereign, has succeeded to the rights which the king formerly possessed in such rivers and in the soil beneath.<sup>6</sup> The high and low-water marks which define the shores are determined by the same rules as in the case of the shores and arms of the sea, and the rights of the public extend to ordinary high-water mark.<sup>7</sup> Islands which are formed in these rivers belong to the king,<sup>8</sup> and in this country to the respective States as sov-

<sup>1</sup> *In re Freeholders*, 68 N. Y. 376, 459.

<sup>2</sup> *Ante*, § 4. The different meanings of the word “navigable,” as employed in legal phraseology, are thus defined by Gray, C. J., in *Commonwealth v. Vincent*, 108 Mass. 441, 447: “The term ‘navigable waters,’ as commonly used in the law, has three distinct meanings: 1st, as synonymous with ‘tide waters,’ being waters, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt; or, 2d, as limited to tide waters which are capable of being navigated for some useful purpose; or, 3d (which has not prevailed in this Commonwealth), as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation;” citing *Commonwealth v. Chapin*, 5 Pick. 199; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Murdock v. Stickney*, 8

Cush. 113, 115; *Attorney General v. Woods*, 108 Mass. 436; *Waters v. Lilley*, 4 Pick. 145, 147; *Genesee Chief v. Fitzhugh*, 12 How. 443; *The Daniel Ball*, 10 Wall. 557. See, also, *Colchester v. Brooke*, 7 Q. B. 339, 374; *The Montello*, 20 Wall. 430, 442; *Abraham v. Great Northern Railway Co.*, 16 Q. B. 586, 598. In this country, the word ‘navigable’ is not commonly employed in the technical sense. See *Hickok v. Hine*, 23 Ohio St. 523; *Little Rock Ry. Co. v. Brooks*, 39 Ark. 403; *post*, § 54; 12 L. J. 75.

<sup>3</sup> *Rex v. Trinity House*, 1 Sid. 86; s. c. 1 Keb. 331.

<sup>4</sup> *Royal Fishery of the Banne*, Sir John Davies, 149.

<sup>5</sup> *Ante*, § 17.

<sup>6</sup> *Ante*, § 32.

<sup>7</sup> *Ante*, § 27.

<sup>8</sup> Hale, *De Jure Maris*, ch. 6, ii; *Callis on Sewers*, 45.

ereign powers,<sup>1</sup> and the rights of navigation<sup>2</sup> and fishery<sup>3</sup> in them, which are *prima facie* common to all, cannot be impaired by a grant from the Crown at common law, but may be by a State within the limits of which the waters lie, if intercommunication between different States is not thereby affected.<sup>4</sup>

§ 43. **Same — What are.**—The presence of the tide is strong *prima facie* evidence that a river is public and useful for navigation. It is not, however, conclusive. In many small creeks and inlets of the sea private property may exist. The extent to which a river, whether its waters are salt or fresh, is used for navigation, affords the strongest evidence of its navigable capacity.<sup>5</sup> If the channel is broad and deep and adapted to the purposes of commerce, it is a natural conclusion that it is a public navigation;<sup>6</sup> but if it is a small creek, navigable only

<sup>1</sup> *Middletown v. Sage*, 8 Conn. 221; *Tracy v. Norwich Railroad Co.*, 39 Conn. 382; *Hopkins Academy v. Dickerson*, 9 Cush. 544, 550.

<sup>2</sup> *Ante*, § 20.

<sup>3</sup> *Ante*, § 21; *Rose v. Balyea*, 1 Hannay (N. B.), 109.

<sup>4</sup> *Ante*, § 35.

<sup>5</sup> See *Miles v. Rose*, 5 Taunt. 706; *Vooght v. Winch*, 2 B. & Ald. 662. In the early case of *Commonwealth v. Charlestown*, 1 Pick. 180, 186–188, Parker, C. J., said: “By the common law, the property of the sovereign is said to extend to all places where the sea ebbs and flows, whether such places are navigable or not; but it is probable the usages of our country have given a reasonable limitation to this doctrine, confining the public right to what may be of public use; so that in many little creeks into which the salt water flows, but which are incapable of being navigated at all, private property may be maintained. . . . There is but one principle for judicial courts to be governed by, and that is, to consider

as public property all those inlets of the sea which are capable of sustaining vessels of any description, with their loading, for purposes really useful to trade or agriculture.” It is now settled that the public right is limited to those streams and inlets which are capable of public use. *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Charlestown v. County Commissioners*, 3 Met. (Mass.) 202; *Attorney General v. Woods*, 108 Mass. 436; 9 Gray, 519, note; *The Montello*, 20 Wall. 430, 442, 443; *United States v. New Bedford Bridge*, 1 Wood. & M. 401, 487; *Parsons v. Clark*, 76 Maine, 476; *Weathersfield v. Humphrey*, 20 Conn. 218; *Groton v. Hurlburt*, 22 Conn. 178; *Burrows v. Gallup*, 32 Conn. 501; *Brown v. Preston*, 38 Conn. 219; *Glover v. Powell*, 10 N. J. Eq. 211; *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Sullivan v. Spotswood*, 82 Ala. 163.

<sup>6</sup> See *per* Bailey, J., in *Rex v. Montague*, 4 B. & C. 598; *Charleston & S. R. Co. v. Johnson*, 73 Ga. 306.

at exceptional and extraordinary tides,<sup>1</sup> or at certain states of the tide, and then only for a short time and by very small boats, its inadaptability for general use is strong, if not conclusive, evidence against the existence of the public right.<sup>2</sup> The term "navigable," says Denman, C. J.,<sup>3</sup> "is a relative and comprehensive term, containing within it all such rights upon the water way, as, with relation to the circumstances of each river, are necessary for the full and convenient passage of vessels and boats along the channel." In *Mayor of Lynn v. Turner*,<sup>4</sup> the corporation of Lynn Regis was sued for not repairing and cleansing a tidal creek, "as from time immemorial they had been used," whereby, as appeared by one count of the declaration, the plaintiff lost the use of his navigation. It was urged that if one count of the declaration was bad, the judgment against the corporation should be set aside, and that, as the place in question was a public navigable river within the tide, no action would lie without proof of special damage; but Lord Mansfield considered that it did not sufficiently appear that it was a navigable river, and that the presence of the tide did not prevent its being in the private estate of the corporation. In *Miles v. Rose*,<sup>5</sup> Gibbs, C. J., considered the flowing of the tide not absolutely inconsistent with a right of private property in a creek, although strong *prima facie* evidence against such right. In *Vooght v. Winch*,<sup>6</sup> Holroyd, J., said that if a stream had ever been capable of navigation, an act of Parliament was the only means by which the public right could be determined; but in the later case of *Rex v. Montague*,<sup>7</sup> he concurred in the opinion that the public

<sup>1</sup> *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Attorney General v. Woods*, 108 Mass. 436.

<sup>2</sup> *Colchester v. Brooke*, 7 Q. B. 339.

<sup>3</sup> *Colchester v. Brooke*, 7 Q. B. 339, 374. See *Ilchester v. Raishleigh*, 61 L. T. N. S. 104, 477; *Sullivan v. Spotswood*, 82 Ala. 163.

<sup>4</sup> 1 Cowper, 86; Lofft, 556. Lord Mansfield here said: "*Ex facto oritur jus*. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many

places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate." The corporation was held to be bound by prescription to repair.

<sup>5</sup> 5 Taunt. 706.

<sup>6</sup> 2 B. & Ald. 662.

<sup>7</sup> 4 B. & C. 598. This was an indictment for cutting a trench across a common and ancient highway. At the trial it appeared that the highway in question was an embankment across a creek, and that the defend-



right might be extinguished in other ways than by act of Parliament; as by writ of *ad quod damnum*, or by the commissioners of sewers in certain cases, or by natural causes, such as the filling of the channel or the recession of the sea. Again, in the case of *Mayor of Colchester v. Brooke*,<sup>1</sup> Lord Denman, C. J., while regarding the flow and reflow of the tide as the strongest evidence that a river was public and navigable, considered the fact that the soil in arms of the sea and public navigable rivers, independently of any ownership of the adjoining lands, is *prima facie* vested in the Crown, but subject to the public right, and that the grantee of the Crown takes subject to the same right, not inconsistent with the loss of such right if the channel became choked up by natural causes.<sup>2</sup>

ants cut down this embankment by order of the corporation of London, who contended that the creek was a public navigable stream, and that the road improperly obstructed it; that the road had been so high for twenty years that no boats could pass over it at any time; and that, for years before, the only evidence of an actual navigation was by very small boats for a brief period at the time of high water. Bailey, J., said: "It was for the defendant to make out that there once was a public navigation. Now it does not necessarily follow, because the tide flows and reflows in any particular place that there is therefore a public navigation, although of sufficient size;" and after reviewing the above cases of *Mayor of Lynn v. Turner*, and *Miles v. Rose*, he said further: "Even supposing this to have been at some time a public navigation, I think that from the manner in which it has been neglected by the public, and from the length of time during which it has been obstructed, it ought to be presumed that the rights of the public have been lawfully determined. Most probably the rights of the pub-

lic (if they ever had any) arose from the flux and reflux of the tides of the sea, so as to make the channel navigable. If then the sea retreated, or the channel silted up, so as to be no longer navigable, why should not the public rights cease? If they arose from natural causes, why should not natural causes put an end to them? But they might also be put an end to, by act of Parliament, or by writ of *ad quod damnum*, and, perhaps, by commissioners of sewers, if there were any appointed for the district and they found that it would be for the benefit of the whole level. For these reasons it appears to me that if this case were sent down for trial again, the jury would be bound to find either that there never was a public navigation through the *locus in quo*, or that it has been determined by some lawful means." The opinions of Holroyd, J., and Littledale, J., were to the same effect.

<sup>1</sup> 7 Q. B. 339, 373, 374. See also *Rex v. Douglas*, 2 Ld. Ken. 499; *Woolrych on Waters*, 237.

<sup>2</sup> See *State v. Carpenter*, 68 Wis. 165; 2 Am. Law Rev. 589.

§ 44. *Same — Same.*— The question at what point a river ceases to be tidal, or navigable, first arose in the courts in the case of *Rex v. Smith*.<sup>1</sup> In that case the city of London, acting under powers conferred by statute, was proceeding to construct a towing path upon the bed of the river Thames, and the defendants were indicted for destroying a pile driven in the course of the work between high and low-water mark near Richmond. In the statement of the case, the river was admitted to be “navigable;” but, as the right of the city was regarded as derived from the Crown’s title to tide waters, it was contended in argument that the Thames above London Bridge was not navigable in the technical sense, although there was a regular rise and fall of the river caused by the accumulation and pressure backwards of the fresh water. Lord Mansfield said that the distinction between rivers navigable and not navigable, and those where the sea does or does not ebb and flow, was very ancient, but that the distinction then insisted on, between the case of the tide occasioned by the flux of the sea-water and the pressure backward of the fresh water, seemed to be entirely new.<sup>2</sup> He said that the case did not state whether the water, where the tide rises at Richmond, is fresh or salt; but that it rather took it for granted that it is salt, describing the Thames generally as a navigable river. The point was simply raised in that case, and not decided.<sup>3</sup> But it is settled in this country that it is

<sup>1</sup> 2 Dougl. 441 (1780). In *Horne v. Mackenzie*, 6 Cl. & Fin. 628, 648, the question was whether the defendants had fished unlawfully by means of stake-nets, which was an illegal act by statute if done in a “river,” but permissible in the sea; and it was held that the jury were improperly instructed that “the thing to be looked at is the absence or prevalence of the fresh water, though strongly impregnated by salt;” and that the absence or prevalence of salt water was a consideration of minor importance in such a case. As to what is the “mouth of a river,” see *Townsend Savings Bank v. Epping*, 8

*Woods*, 390; *Johnson v. State*, 74 Ala. 537.

<sup>2</sup> The question was not altogether new, for Lord Hale says (*De Jure Maris*, ch. 4, with reference to the extent to which a river is properly called an arm of the sea) that fresh rivers, “though they are public rivers, yet are not arms of the sea. But it seems that, although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow as in Thames above the bridge.”

<sup>3</sup> This case seems to have been misunderstood. In *Angell on Water-courses*, § 544, it is said of it that the

the fluctuation of the water, as shown by its regular rise and fall, under the influence of the tide, and not the proportion of salt water to fresh, that determines the point in a river at which its navigable character ceases. It was so decided in the Supreme Court of the United States with reference to the Mississippi River at New Orleans;<sup>1</sup> in Maine, in respect to the Penobscot River at Bangor;<sup>2</sup> and in Massachusetts, as to a portion of the Mystic River where the rise and fall of the water was two feet and the stream only about the same number of feet deep at low tide.<sup>3</sup> In the recent English case of *Reece v. Miller*,<sup>4</sup> it appeared that the water of the river Wye was not salt at the spot in question, and that in ordinary tides it was unaffected by any tidal influence, but that, upon the occasion of very high tides, the rising of the salt water in the lower parts of the river dammed back the fresh water, and caused it to rise and fall with the tide. It was held that the right of the Crown and the public right of fishery did not apply to the part of the river affected by the tide only under such circumstances or when the action of the tide was reinforced by a strong wind.

§ 45. **Fresh rivers — The banks — Their limits.**— A fresh-water river, like a tidal river, is composed of the *alveus*, or bed, and the water; but it has banks instead of shores.<sup>5</sup> The banks are the elevations of land which confine the waters in their natural channel when they rise the highest and do not overflow the banks;<sup>6</sup> and in that condition of the water the

point in question was by Lord Mansfield "pronounced new and inadmissible;" while in *Attorney General v. Woods*, 108 Mass. 439, Chapman, C. J., spoke of the question as there "settled." The point was indeed urged by counsel, but Lord Mansfield expressed no opinion upon it, saying "that there were no facts set forth in the case which let in the consideration of that distinction."

<sup>1</sup> *Peroux v. Howard*, 7 Peters, 843.

<sup>2</sup> *Lapish v. Bangor Bank*, 8 Greenl. 85.

<sup>3</sup> *Attorney General v. Woods*, 108

Mass. 436. To the same effect are *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Stone v. Augusta*, 46 Maine, 127, 137; *People v. Tibbetts*, 19 N. Y. 523.

<sup>4</sup> 8 Q. B. D. 626.

<sup>5</sup> See *ante*, § 41, note.

<sup>6</sup> *Howard v. Ingersoll*, 13 How. (U. S.) 381, 391, 427; 17 Ala. 780; *Houghton v. The C. D. & M. R. Co.*, 47 Iowa, 870; *Haight v. Keokuk*, 4 Iowa, 199, 212; *Stone v. Augusta*, 46 Maine, 127, 137; *Alabama v. Georgia*, 23 How. 506.

banks, and the soil which is permanently submerged, form the bed of the river.<sup>1</sup> The banks are a part of the river-bed,<sup>2</sup> but the river does not include lands beyond the banks, which are covered in times of freshets or extraordinary floods, or swamps or low grounds which are liable to overflow, but are reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture.<sup>3</sup> Fresh rivers, although not subject to the daily fluctuations of the tide, may rise and fall periodically at certain seasons, and thus have defined high and low-water marks. The low-water mark is the point to which the river recedes at its lowest stage.<sup>4</sup> The high-water mark is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.<sup>5</sup>

§ 46. Same — Property in.— Fresh-water streams which are not a common passage are private property, and the title

<sup>1</sup> Ibid.; 13 How. (U. S.) 415. In distinguishing the banks from the permanent bed of the river, the line is determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Ibid., *per* Curtis, J., pp. 427, 428; McCulloch v. Wainwright, 14 Penn. St. 171.

<sup>2</sup> Ibid.; Haight v. Keokuk, 4 Iowa, 199.

<sup>3</sup> Ibid.; 13 How. (U. S.) 415.

<sup>4</sup> 13 How. 417, 415, 428.

<sup>5</sup> Howard v. Ingersoll, 13 How. 381; Houghton v. The C. D. & M. R. Co., 47 Iowa, 370; Musser v. Hershey, 42 Iowa, 356; McCulloch v. Wainwright, 14 Penn. St. 171; Stover v.

Jack, 60 Penn. St. 339; Wainwright v. McCullough, 63 Penn. St. 66; *post*, § 264. See The Batture, Am. State Papers, vol. 17, p. 90; Public Lands, vol. 2, p. 90, *et seq.*; Municipality No. 2 v. Orleans Cotton Press, 18 La. 125, 278; Lacy v. Green, 84 Penn. St. 514; Gavit v. Chambers, 3 Ohio, 495. In Plumb v. McGannon, 32 Q. B. (Can.) 8, 14, Wilson, J., said of the St. Lawrence river: "The evidence does not show what the limit of the highest *ordinary* state of the river is, or was, as that would seem to be the proper limit of high-water mark, and not the highest limit that the water reaches in the course of the year; for the great flow caused by the melting of the snow and ice, and by the spring rains, or by other unusual floods or causes, is to be excluded in determining the limit of high-water mark. The true limit would appear to be, by analogy to tidal waters, the

to the bed of the river *ad flum aquæ* is in the riparian proprietors in severalty and not in common,<sup>1</sup> whether their tenure is freehold, copyhold, or leasehold.<sup>2</sup> They own the islands which form in the stream,<sup>3</sup> possess the exclusive right of fishing,<sup>4</sup> and may grant and convey the bed of the stream separate from the dry land which bounds it.<sup>5</sup> If the banks on both sides of the river belong to the same person, he owns the entire river-bed according to the extent of his lands in length.<sup>6</sup> There is great conflict of authority with respect to the large rivers and parts of rivers which, being navigable in fact, resemble tidal rivers, and, being fresh, partake of the nature of the small unnavigable streams which feed them. Where a

average height of the river after the great flow of the spring has abated, and the river is in its ordinary state."

<sup>1</sup> *Rex v. Wharton*, Holt, 499; 12 Mod. 510; *Carter v. Murcot*, 4 Burr. 2162; *Devonshire v. Pattinson*, 20 Q. B. D. 263; *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133; *Robertson v. Steadman*, 3 Pugsley (N. B.), 621; *King v. King*, 7 Mass. 499; *Lunt v. Holland*, 14 Mass.; *Dearfield v. Arms*, 17 Pick. 41; *Knight v. Wilder*, 2 Cush. 200; *Seneca Nation v. Knight*, 23 N. Y. 498; *Woodman v. Spencer*, 54 N. H. 507; *Adams v. Barney*, 25 Vt. 225; *Jackson v. Louw*, 12 Johns. 252; *Ball v. Slack*, 2 Whart. 538; *Oovert v. O'Conner*, 8 Watts. 470; *Barclay Railroad Co. v. Ingham*, 86 Penn. St. 194; *Poor v. McClure*, 77 id. 214; *Bradford v. Cressey*, 45 Maine, 9; *Cates v. Waddington*, 2 McCord (S. C.), 580; *McCullough v. Wall*, 4 Rich. (S. C.) 68; *Noble v. Cunningham*, McMullan (S. C.), 289; *Hayes v. Bowman*, 1 Rand. (Va.) 417; *Home v. Richards*, 4 Call, 441; *Smith v. Ingram*, 7 Ired. (N. C.) 175; *Ingraham v. Treadgill*, 3 Dev. (N. C.) 59; *Camden v. Creel*, 4 W. Va. 365. See 25 Cent. L. J. 539.

<sup>2</sup> *Tilbury v. Silva*, 45 Ch. D. 98.

<sup>3</sup> *Brickett v. Morris*, L. R. 1 H. L. Sc.

47; *Wishart v. Wyllie*, 1 Macq. H. L. 389.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Hartshorn v. Wright*, Peters C. C. 64; *Denver v. Pearce*, 13 Colo. 383.

<sup>6</sup> *Wadsworth v. Smith*, 11 Maine, 278, 281. The ground on which this rule is founded is thus explained in the dissenting opinion of Redfield, J., in *Buck v. Squires*, 22 Vt. 484, 494: "The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is at the same time one which the American courts, especially, have regarded as attended with very serious consequences, when not rigidly adhered to; and its chief object is, to prevent the existence of innumerable strips and gores of land, along the margins of streams and highways, to which the title, for generations, shall remain in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up to vex and harass those who in good faith had supposed themselves secure from such embarrassment."

fresh navigable river is held to be private property, the Crown or State and the public have no rights in it which are not connected with the navigation.<sup>1</sup>

§ 47. Same — Same — Bracton's view.— Bracton, who wrote in the thirteenth century, and is the earliest English authority upon this question, says that of natural right flowing water, the air, the sea, and the shores of the sea are common property; that *all* rivers that flow perpetually are public, and that the right of fishing therein and the use of the river banks are public also.<sup>2</sup> This, though not the modern common-law rule, corresponds with the doctrine of the civil law, and the phraseology is substantially the same as that of the Institutes.<sup>3</sup> No distinction is here drawn between those rivers

<sup>1</sup>Orr Ewing v. Colquhoun, 2 App. Cas. 839, 871; Queen v. Robertson, 6 Can. Sup. Ct. 52; Groat v. Moak, 94 N. Y. 115; Binney's Case, 2 Bland, 99, 125; Adams v. Pease, 2 Conn. 488; Ross v. Faust, 54 Ind. 471; Braxton v. Bressler, 64 Ill. 488; Berry v. Snyder, 3 Bush, 266, 285. As to a right by prescription to quarry stone in the bed of a river, see Overman v. May, 35 Iowa, 89; Commissioners v. Beckwith, 10 Kansas, 608; *post*, § 93a.

<sup>2</sup>The passages in Bracton (lib. I, ch. 12, fols. 7, 8), as translated in Sir Travers Twiss's edition of Bracton (vol. i, 57), are as follows: "Of natural right all these things are common: flowing water, air and sea, and the shores of the sea, as being as it were approaches to the sea. . . . All rivers and ports are public, and accordingly the right of fishing in a port and in rivers is common to all persons. The use of the banks is also public by the right of nations, as of the river itself. It is free to every person to moor ships there to the banks, to fasten ropes to the trees growing upon them, to land cargoes and other things upon them, just as to navigate the river itself; but the

property of the banks is in those whose lands they adjoin; and for the same cause the trees growing upon them belong to the same persons; and this is to be understood of perennial rivers, because streams which are temporary may be property."

<sup>3</sup>See Inst. lib. 2, 1, §§ 1, 2, 5; Royal Fishery of the Banne, Sir J. Davies, 149, 150; Blundell v. Catterall, 5 B. & Ald. 268, 304; Bagott v. Orr, 2 Bos. & P. 472. Bracton does not here follow the civil law, for while he says that the use of the sea, etc., are common, he does not add the remainder of the sentence from the civil law, that the property in these things cannot be taken to belong to any one. See Hall on the Seashore (2d ed.), 104, 105. The Roman law declared navigable rivers to be so far public property that a free passage over them was open to everybody, but distinguished between rivers and the sea, the former being classed among *res publicæ*, and the latter among *res communes*. Just. Inst. lib. II, tit. 1, §§ 1, 2; Dig. 48, 12; 2 Domat, bk. I, tit. 8, §§ 1, 2; 1 Phillimore's Int. Law, §§ 155-6; Vattel, Droit des Gens, liv. II, ch. 9, §§ 126-130; ch. 10, §§ 132-



which are and those which are not navigable in fact. The passage seems to show either that the rules of the common and civil law were the same at this early period, or that Bracton, finding the subject undefined in the law of England, supplied the deficiency, as he was wont to do, by borrowing from the Roman code.<sup>1</sup>

**§ 48. Same — The Banne fishery.**—The question appears to have been first passed upon judicially in the case of the Royal

134; Puffendorf, *De Jur. Nat. et Gen. lib. III, ch. 3, §§ 3–6*; Polson, *Law of Nations*, § 5; 1 Halleck, *Int. Law*, ch. 6, p. 147.

<sup>1</sup> Hale, *De Jure Maris*, c. 6 (II). As to the authority of Bracton, see 2 Reeve's *History of the English Law* (3d ed.), 88, 282; Crabb's *History of the English Law*, 157, 158; 1 Black. Com. 72; 4 *id.* 425; Güterbock's *Bracton*, Preface; *King v. Yarborough*, 3 Dow & Clark, 178, 187. Mr. Reeve (p. 88 above) says: "The familiarity with which Bracton recurs to the Roman code has struck many readers more forcibly than any other part of his character; and some have thence pronounced a hasty judgment upon his fidelity as a writer on English law. But the passage to which such persons take exception, if put together, would perhaps not fill three whole pages of his book; and it may be doubted whether they are such as can always mislead the reader. Upon a second consideration of these places where the Roman law is stated with most confidence, it will be seen that it is rather alluded to for illustration and ornament, than adduced as an authority, though it is visible that Bracton, with all his endeavors to give form and beauty to our own law, by setting forth its native strength to advantage, did not refuse such helps as could be derived from other sources to improve and augment it." Mr. Crabb (p. 158) goes farther, and says

that it is evident, from an attentive perusal of Bracton's works, that they contain nothing but what has been admitted by legal authorities into English jurisprudence. In *Blundell v. Catterall*, 5 B. & Ald. 268, Best, J., who differed from the majority of the court as to the public right of bathing in the sea, said, with reference to the above passage from Bracton: "Bracton has not stated this as civil law; he has made it part of his book *De Legibus et Consuetudinibus Angliæ*. He was Chief Justice of England in the reign of Henry the Third. . . . Bracton speaks not of newly-made rivers, but of such as were always navigable, and the banks of which had been as open to the public as their waters. This I take to be the law with all inland navigations in the reign of Henry the Third. These, like the sea and its shores, were then the property of the public, and the right of the public in them was not acquired by any compromise with the interests of any individual. . . . In the first ages of all countries, not only the sea and its shores, but all perennial rivers, were left open to public use. In all countries, it has been matter of just complaint, that individuals have encroached on the rights of the people. In England, our ancestors put the public rights in rivers under the safeguard of Magna Charta. The principle of exclusive appropriation must



Fishery of the Banne,<sup>1</sup> decided in Ireland in the year 1611. It was there resolved: (1) that, although the rule of the civil law be as it is found in Bracton, "yet, by the common law of England, a man may have a proper and several interest as well in a water or river as in a fishery;" (2) that "there are two kinds of rivers: navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative; but in every other river, not navigable, and in the fishery of such river, the ter-tenants on each side have an interest of common right." It is further said in this case: "The river Lee is found by acquisition the king's high stream; and in the Stat. of 28 Hen. 8, ch. 22, enacted in this kingdom, the rivers Barrow, Noire, and Suire are called the king's rivers, and the weirs erected in them are called purprestures; and, although the king permit his people, for their ease and commodity, to have common passage over such navigable rivers, yet he hath a sole interest in the soil of such rivers, and also in the fishery." The conclusion was, that "the river Banne, so far as the sea flows and ebbs in it, is a royal river; and the fishery of salmon there is a royal fishery, which belongs to the king as a several fishery, and not to those who have the soil on each side of the water. But, on the other part, it was agreed that every inland river, not navigable, appertains to the owners of the soil where it hath its course, and if such river runneth between two manors, and is the mear and boundary between them, the one moiety of the river and fishery belongeth to one lord, and the other moiety to the other."

The real question presented for decision was whether a royal grant of certain lands, adjacent to the river Banne, conveyed a salmon fishery at a point in the river where it was "navigable." If the word "navigable," as here used, means tidal,<sup>2</sup> the question of title to a fresh-water river was not in

not be carried beyond things capable of improvement by the industry of man." "every navigable river, so high as the sea ebbs and flows in it," is a royal river; that "every other river not navigable," and "every inland river not navigable," are private, etc.

<sup>1</sup> Sir John Davies, 149.

<sup>2</sup> The word "navigable" in this case is, perhaps, of somewhat doubtful meaning, it being said that In *People v. Canal Appraisers*, 83 N. Y. 461, 470, Davies, J., interprets

issue; and the first part of the last resolution, in which the king is held to be the owner of tidal rivers, and the resolution that nothing passes by implication in a royal grant, embrace the only points that were directly decided. It should also be noticed that the Barrow, the Noire, and the Suire, which are both navigable and fresh,<sup>1</sup> are here called royal rivers, and that the king is said to have a sole interest in the soil of these rivers, and also in the fishery.

§ 49. Same — Hale's *De Jure Maris*.—The treatise *De Jure Maris*, published in 1787, and usually ascribed to Sir Matthew Hale, who died in 1676, begins with the statement<sup>2</sup> that "fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquæ*; and the owners of the other side the right of soil or ownership, and fishing unto the *filum aquæ* on their side." In the second chapter of the treatise, the resolution in the case of the Royal Fishery of the Banne, in which the Barrow and other fresh rivers are termed royal rivers, is criticised,<sup>3</sup> but no

the case of the Royal Fishery of the Banne, and, also, *Warren v. Matthews*, 6 Mod. 73, and *Carter v. Murcot*, 4 Burr. 2162, as distinguishing only between those rivers which are, and those which are not, navigable in fact. But this view is not supported by the English decisions in which these cases are referred to.

<sup>1</sup> See *Encyclopedia Britannica*, tit. Barrow; *Murphy v. Ryan*, Ir. R. 2 C. L. 143, 153; *De Jure Maris*, ch. 2; *post*, § 51; *People v. Canal Appraisers*, 33 N. Y. 461, 470; *Powell v. Hefernan*, 8 L. R. Ir. 130.

<sup>2</sup> Hale, *De Jure Maris*, ch. 1, 3; Hargrave's *Law Tracts*, 5.

<sup>3</sup> *De Jure Maris*, ch. 2. This passage is as follows: "As the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways

by water; and as the highways by land are called *altæ viæ regię*, so these publick rivers for publick passage are called *fluvii regales*, and *haut streames le roy*; not in reference to the propriety of the river, but to the publick use; all things of publick safety and convenience being in a special manner under the king's care, supervision, and protection. And, therefore, the report in Sir John Davies, of the piscary of Banne, mistakes the reason of those books, that call these *streames le roy*, as if they were so called in respect of propriety (as 19 Ass. 6 Dy. 11), for they are called so, because they are of publick use, and under the king's special care and protection, whether the soil be his or not." The case of the Banne is also criticised in other respects in *De Jure Maris*, ch. 5. With respect to the right of fishing, it is said that

authorities are cited in support of this passage, or of the subsequent statement that the rivers which Bracton declares to be public "must be taken to be rivers that are arms of the sea."<sup>1</sup> In the same chapter, which is entitled "Of the right of prerogative in private or fresh rivers," it is said that the king has jurisdiction to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges and boats, and to reform the obstructions or annoyances therein; that these public streams which are highways by water, are called royal, not in reference to the propriety of the river, but to the public use, and that they are under the king's special care and protection, whether the soil be his or not. In chapter four it is said that the king has the right of property in the sea, and in the shore and in the creeks and arms thereof, where the sea flows and reflows, and so far only as the sea so flows and reflows; and that, although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow. These passages support the doctrine that the public have no rights in any fresh-water river except that of navigation. The authorship of the work<sup>2</sup> would not, perhaps, be of importance, were it not for the fact that, being associated with the name of Lord Hale, the positions here taken have been frequently accepted as a sufficient authority, without inquiring whether the positions themselves had a sound basis.<sup>3</sup> The work is posthumous, and there appears to be no evidence that it was revised or intended for publication,<sup>4</sup> or at what period of the author's life it was writ-

salmons, "though they are great fish, are not royal fish, as the report of Sir John Davies in the case of the fishing of Banne would intimate." The other passage relates to the acquisition by a subject of rights in the sea by prescription or usage, in which it is said: "I have added the more, because there are certain glances and intimations in the case of the piscary of Banne, in Sir John Davies's reports, as if the fishing in

these kinds of royal rivers were not acquirable but by special charter, which is certainly untrue; for they are acquirable by prescription or usage, as well as royal fish may be."

<sup>1</sup> De Jure Maris, ch. 4; Hargrave's Law Tracts, 12.

<sup>2</sup> *Ante*, § 18.

<sup>3</sup> See Phear's Rights of Water, 47, 48.

<sup>4</sup> See Hall on the Seashore, Introduction.

ten, while Lord Hale's name has not made it, in all respects, incontrovertible.<sup>1</sup>

§ 50. **Same — The early English cases.**— The early authorities being thus discordant, no certain rule is supplied by the earlier English cases, which relate either to tidal rivers or to fresh rivers which do not appear to be navigable. In *Bulstrode v. Hall*,<sup>2</sup> and other cases, which, upon the facts, involved no rights in places above the tide, rivers are said to belong to the king as far as the sea ebbs and flows in them. So in *Carter v. Murcot*,<sup>3</sup> and *Rex v. Smith*,<sup>4</sup> Lord Mansfield's opinions

<sup>1</sup> In the light of modern decisions, the following rules laid down in this treatise are not law: First, That the realm of England extends beyond low-water mark, and includes the adjacent seas, whether they are within the body of a county or not. *De Jure Maris*, ch. 4; Hargrave's Law Tracts, 10. *Contra*, *Regina v. Keyn*, 2 Ex. D. 63, referred to *ante*, §§ 13, 14. Second, That "any man may justify the removal of a common nuisance, either at land or by water, because every man is concerned in it." *De Portibus Maris*, ch. 7; Hargrave's Law Tracts, 87. *Contra*, see *post*, § 128. Third, That alluvion "is *de jure communi*, by the law of England, the king's, viz.: if by any marks or measures it can be known what is so gained." *De Jure Maris*, ch. 6; Hargrave's Law Tracts, 28. *Contra*, *Foster v. Wright*, 4 C. P. D. 438; *In re Hull & Selby Railway*, 5 M. & W. 327; *Rex v. Yarborough*, 3 B. & C. 106; 2 Bligh, N. S. 147; *post*, § 155. Fourth, It is now established that the right of towage along the banks of rivers does not exist in the absence of usage, grant, etc., notwithstanding the intimation in this book that this is a common-law right. *De Portibus Maris*, ch. 7; Hargrave's Law Tracts, 86; *Ball v.*

*Herbert*, 3 T. R. 253; *Blanchard v. Porter*, 11 Ohio, 138; *post*, § 99. The view that has been expressed in this country that this treatise is of so high authority that there is no appeal from it (6 Cowen, 536, note; *Cobb v. Davenport*, 32 N. J. L. 369, 379) would appear, therefore, to be somewhat exaggerated.

<sup>2</sup> 1 Sid. 148. See, also, *Rex v. Trinity House*, *id.* 86; and cases *ante*, § 18, notes; *Malcomson v. O'Dea*, 10 H. L. Cas. 619; *Warren v. Mathews*, 1 Salk. 357; 6 Mod. 73; *Carter v. Murcot*, 4 Burr. 2162.

<sup>3</sup> 4 Burr. 2162. In this case the only question was whether the plaintiff had by prescription a right of several fishery at the place in question, which was admitted to be a navigable river and arm of the sea. Lord Mansfield said: "The rule of law is uniform. In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides; and it generally extends *ad filum medium aquæ*. But in navigable rivers, the proprietors of the land on either side have it not; the fishery is common; it is *prima facie* in the king, and is public. If any one claims it exclusively, he must show a right. If he can show

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<sup>4</sup> 2 Dougl. 441. See *ante*, § 44.

were to the effect that the distinction is between those rivers in which the sea flows, and those in which it does not; but the cases related solely to tide waters. Upon the other hand, in Lord Fitzwalter's case,<sup>1</sup> before Chief Justice Hale, and in *Rex v. Wharton*,<sup>2</sup> before Chief Justice Holt, a case which has been referred to<sup>3</sup> as bearing upon this question, the rivers in question are not only called private rivers,<sup>4</sup> but there is no intimation that they were, in fact, capable of navigation.

§ 51. Same — The present English rule.— The rule thus indicated may be adequate for a country like England, where the rivers are small and rarely navigable in their natural condition above the tide,<sup>5</sup> and where, also, the question has not often arisen.<sup>6</sup> In Ireland, where the rivers are larger, the

a right by prescription, he may then exercise an exclusive right, though the presumption is against him, unless he can prove such a prescriptive right."

<sup>1</sup> 1 Mod. 105. The question here was as to the defendant's right of exclusive fishery in the river of Wallfleet, and Hale, C. J., said: "In case of a private river, the lord's having the soil is good evidence to prove that he hath the right of fishing, and it puts the proof upon them that claim *liberam piscariam*. But in case of a river that flows and reflows, and is an arm of the sea, there, *prima facie*, it is common to all."

<sup>2</sup> 12 Mod. 510; s. c. Holt, 499. This case was an indictment for riot, "the cause of the riot being the right of a private river." According to the report in 12 Mod., Holt, C. J., said: "If a river run continuously between the land of two persons, each of them is, by common right, owner of that part of the river which is next his land, and may let it to another or to a stranger." See, also, *Gibbs v. Wooliscott*, 3 Salk. 291.

<sup>3</sup> *Hopkins Academy v. Dickinson*, 9 Cush. 544, 547.

<sup>4</sup> The word "private" in this con-

nection would seem to exclude rivers, whether fresh or salt, that are capable of navigation. Although in the second chapter of the treatise *De Jure Maris* the heading is, "Of the right of the prerogative in private or fresh rivers," and the expression, "a fresh or private river," is again used there; yet in that and the following chapter, the terms "public rivers" and "public streams" are applied to all rivers that are a common passage.

<sup>5</sup> Vernon-Harcourt (on Rivers and Canals, ch. 3, p. 34; ch. 11, p. 155) says that, with the exception of some of the largest rivers of the world, few rivers are by nature perfectly convenient for navigation beyond the tidal portion of their course; and that there are but two thousand five hundred miles of navigable rivers in England.

<sup>6</sup> In *Elder v. Burrus*, 6 Humph. (Tenn.) 358, 366, Turley, J., said: "All laws are, or ought to be, an adaptation of principles of action to the state or condition of a country, and to its moral and social position. . . . There are many rules of action recognized in England as suitable, which it would be folly in the extreme, in countries differently located, to reo-

question was directly presented, apparently for the first time in the United Kingdom, in *Murphy v. Ryan*,<sup>1</sup> decided by the Irish Court of Common Pleas in 1868. This was an action of trespass for breaking and entering the plaintiff's close covered with water, called the River Barrow, and fishing therein. The issue presented, upon a demurrer to the defendant's plea, was whether, the Barrow being admitted to be from time immemorial a public and navigable river above and beyond the ebb and flow of the sea, and the alleged trespass being above that point, the defendant as one of the public had there the privilege of fishing. The demurrer was allowed, it being considered that no river had "been ever held navigable, so as to vest in the Crown its bed and soil, and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation; and that, beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *prima facie* in the riparian owners, and the right of fishing private." And more recently the English law has become settled in accordance with this view by the cases of *Pearce v. Scotcher*,<sup>2</sup> and *Tilbury v. Silva*.<sup>3</sup>

§ 52. **Same — Same.**— According to the more recent decisions in England, the title of the riparian owners extends to the center of all non-tidal streams,<sup>4</sup> but the ground of prescrip-

ognize as law; and, in our opinion, this distinction between rivers 'navigable' and not 'navigable,' causing it to depend upon the ebbing and flowing of the tide, is one of them. The insular position of Great Britain, the short courses of her rivers, and the well-known fact that there are none of them navigable above tide-water but for very small craft, well warrants the distinction there drawn by the common law. But very different is the situation of the continental powers of Europe in this particular. Their streams are many of them large and long and navigable to a great extent above tide-water; and accordingly we find that the civil law, which regulates and governs

those countries, has adopted a very different rule."

<sup>1</sup> Ir. R. 2 C. L. 143.

<sup>2</sup> 9 Q. B. D. 162.

<sup>3</sup> 45 Ch. D. 98.

<sup>4</sup> *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Dwyer v. Rich*, Ir. R. 4 C. L. 424; *Miller v. Little*, 2 L. R. Ir. 304; *Hargreaves v. Diddams*, L. R. 10 Q. B. 582; *Marshall v. Ulleswater Nav. Co.*, 3 B. & S. 742; *Bristow v. Cormican*, 3 App. Cas. 641, 666; Ir. R. 10 C. L. 398, 412, 435; *Bloomfield v. Johnston*, Ir. R. 8 C. L. 68; *Mussett v. Burch*, 35 L. T. N. S. 486; *Hudson v. McRae*, 4 B. & S. 585; *Grant v. Oxford*, L. R. 4 Q. B. 9; *Micklethwait*



tion on which the right of navigation has been thought to rest is different from that supported by the early authorities, and is inapplicable in this country.<sup>1</sup> In 1838 the question was regarded as not fully settled by Lord Denman, C. J., who, in *Williams v. Wilcox*,<sup>2</sup> said: "It is clear that the channels of public navigable rivers were always highways: up to the point reached by the flow of the tide the soil was presumably in the Crown; and, above that point, whether the soil at common

*v. Newlay Bridge Co.*, 33 Ch. D. 133; *Devonshire v. Pattinson*, 20 Q. B. D. 263.

<sup>1</sup> *Post*, § 53.

<sup>2</sup> 8 Ad. & El. 314, 333. This important passage of the opinion in *Williams v. Wilcox* is not noticed by Mr. Houck in his work on Rivers, in which he combats the supposed rule of the common law, or in Mr. Angell's works on Tide Waters and Watercourses. Although noticed in Hall on the Seashore (2d ed.), 3, note (f), and in Phear's Rights of Water, its meaning seems to have been misunderstood by those writers, Lord Denman's doubt being there referred to as if it related to tidal rivers, and as settled by Lord St. Leonard's opinion in *Lord Advocate v. Hamilton*, 1 Macq. H. L. 46, in which the language of the court was limited to navigable rivers. A comparison of the two cases, and an examination of the passage in *De Jure Maris*, ch. 2, pl. 3, referred to in *Williams v. Wilcox*, shows that the two judges were thinking of different subjects. See *Murphy v. Ryan*, Ir. R. 2 C. L. 143, 153, 154; *Ipswich Dock v. Overseers*, 7 B. & S. 310, 335. In *Bristow v. Cormican*, 3 App. Cas. 641, 666; Ir. R. 10 C. L. 425, it was held that the Crown has no title *de jure* to the soil or fisheries of an inland lake; and Lord Blackburn, referring to the doubt expressed by Wightman, J., in *Marshall v. Ulleswater Navigation Co.*, 3 B. & S. 742, upon the question

whether the soil of lakes, like that of fresh-water rivers, *prima facie* belonged to the riparian owners *ad filum aquæ*, or to the Crown, said: "That learned judge did not think that the law as to land covered by still water was so clearly settled to be the same as the law as to land covered by running water, as to justify him in unnecessarily deciding that it was the same. . . . I own myself to be unable to see any reason why the law should not be the same, at least where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property." In the same case in the lower court, Pallas, C. B. (p. 402), considered that the question whether "navigable" was synonymous with "tidal," so as to limit the public right of fishing to tide waters, would be worthy of grave consideration, if it were unfettered by authority; and Dowse, B., referring to the American decisions, said (p. 412) that it would amount to an absurdity if a man, who owned a strip of land containing perhaps a quarter of an acre on the bank of the Mississippi, should be entitled to a several fishery extending three-quarters of a mile out to the middle of the river. In the Exchequer Chamber (*Ibid.* pp. 412, 434), Whiteside, C. J., declared the test afforded by the title to be "an arbitrary rule, repugnant to reason, convenience and the common sense of mankind."



law was in the Crown or the owners of the adjacent lands (a point perhaps not free from doubt), there was at least a jurisdiction in the Crown, according to Sir Matthew Hale, 'to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats.'<sup>1</sup> In either case, the right of the subject to pass up and down was complete."

§ 53. **Same — Grounds of the doctrine.**—In view of the hesitation manifested in this country, especially in the Western States, to apply the English rule to our navigable fresh-water rivers and lakes, it should be remarked that the doctrine of Lord Hale and the early English decisions appears to be defective in that, according to the theory which they support, the general right of navigation in fresh waters is inconsistent with the private ownership of the soil beneath.<sup>2</sup> Woolrych says:<sup>3</sup> "Waters flowing inland, where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers. This is the most unfailing test to apply in order to ascertain a common right; others have been attempted, and frequently without success." In England, prescription appears to be the ground upon which the right of navigation in these waters now depends,<sup>4</sup> and in early decisions in this country it was held that fresh rivers, though navigable in fact, are not open to the public unless they have been long used for navigation, or have been declared highways by the legislature.<sup>5</sup> This is contrary

<sup>1</sup> Citing Hale, *De Jure Maris*, ch. 2.

<sup>2</sup> See *post*, § 55.

<sup>3</sup> Woolrych on Waters, 81.

<sup>4</sup> *King v. Montague*, 4 B. & C. 96; *Bristow v. Cormican*, 3 App. Cas. 641; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Hargreaves v. Diddams*, L. R. 10 Q. B. 582; *Coulson & Forbes on Waters*, 92, 93, 441; *Addison on Torts* (5th Eng. ed.), 561.

<sup>5</sup> In *Berry v. Carle*, 3 Greenl. 269, 274, Weston, J., said, in speaking of

the public right of navigation in the Saco River above the tide: "In the case of *Dunbar v. Vinal*, in the Supreme Court of Massachusetts in 1801, it was decided 'that the navigable waters of the country were a common privilege for passing upon them, and that the plaintiff had no right to intercept it by a dam.' But in the case of *Spring v. Chase et al.*, it was, in 1799, decided by the same Court to be otherwise, where the party owns the adjoining land, and

to Lord Hale, who makes no distinction in this respect between tidal and fresh navigable rivers, and says that both are common highways and *prima facie publici juris*, whether they are fresh or salt, whether they flow and reflow or not.<sup>1</sup> If proof of long-continued exercise of the right to pass over the soil covered by the water were required in newly settled colonies and territories, in which the rivers are often the chief means of transportation and travel, and the riparian owners were permitted, in the absence of such evidence, to obstruct large rivers by dams, bridges, or booms, or to demand compensation from navigators, it would amount to a serious grievance.

no tide ebbs and flows. In that case the plaintiff, being the owner of the adjoining lands, erected a bridge over Saco River, above, but near, the great falls and above the tide waters. The defendants threw down the bridge as a nuisance, for which they were called upon to answer in trespass. The plaintiff had judgment because, in the opinion of the Court, those were not navigable waters where the bridge was built, although the river was there convenient for boats and rafts, and for many miles above. These cases are not reported at large, but are briefly stated in 2 Dane's Abridgment, 696." Evidence of long-continued public use was also held to be essential or material in *Scott v. Willson*, 3 N. H. 321, 325; *State v. Gilmanston*, 14 N. H. 467, 478; *Browne v. Scofield*, 8 Barb. 239; *Shaw v. Crawford*, 10 Johns. 236; *Palmer v. Mulligan*, 3 Caines, 307, 312. And see *McManus v. Carmichael*, 3 Iowa, 1, 31. In the case of *Brown v. Chadbourne*, 31 Maine, 9, 21, the court considered the view expressed in *Berry v. Carle* erroneous, Wells, J., saying: "If a stream could be subject to public servitude by long use, only, many large rivers in newly set-

tled States, and some in the interior of this State, would be altogether under the control and dominion of the owners of their beds, and the community would be deprived of the use of those rivers, which nature has plainly declared to be public highways. The true test, therefore, to be applied in such cases, is, whether a stream is inherently, and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs. When a stream possesses such a character, then the easement exists, leaving to the owners of the bed all other modes of use not inconsistent with it." See, also, *Carter v. Thurston*, 58 N. H. 104, 106; 54 N. H. 545, 549, overruling the *dicta* in *Scott v. Willson*, above cited; *Tyrrell v. Lockhart*, 3 Blackf. 136; *Brubaker v. Paul*, 7 Dana, 428; *State v. Thompson*, 2 Strob. (S. C.) 12; *Hubbard v. Bell*, 54 Ill. 110; *Ellis v. Cary*, 30 Ala. 725; *Rhodes v. Otis*, 33 Ala. 578; *Peters v. New Orleans Railroad Co.*, 56 Ala. 528.

<sup>1</sup> Hale, *De Jure Maris*, chs. 1, 2, 3; Hargrave's Law Tracts, 6, 8, 9; *Williams v. Wilcox*, 8 Ad. & El. 314, 333, referred to *ante*, § 52.

§ 54. **Same — Same.**— Nature is competent, it has been said, to make a navigable river without the aid of the legislature;<sup>1</sup> and it is now fully established in this country, overruling the earlier decisions, that the public have a right of passage over all fresh-water streams which are by nature susceptible of general use, and that those rivers are public and navigable in law which are navigable in fact.<sup>2</sup> This right of navigation is distinct from the public right of fishery, which may or may not exist in the same waters.<sup>3</sup>

§ 55. **Same — Same.**— In theory, it would seem that prescription, as suggested by Woolrych, is the only ground upon which the right of navigation can be reconciled with the private ownership of the soil. The public right is said to be an easement to which the title of the adjoining owners is subjected, as in the case of a highway on the land,<sup>4</sup> but the anal-

<sup>1</sup> *Martin v. Bliss*, 5 Blackf. 35.

<sup>2</sup> *Hale*, *De Jure Maris*, chs. 2, 3; *Williams v. Wilcox*, 8 Ad. & El. 314, 333; *Barney v. Keokuk*, 94 U. S. 324; *Pound v. Turck*, 95 U. S. 459; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430, 442; *Carter v. Thurston*, 58 N. H. 104, 106; *Thompson v. Androscoggin Co.*, 54 N. H. 545; 58 N. H. 108; *Brown v. Chadbourne*, 31 Maine, 9; *Moor v. Veazie*, 32 Maine, 343; *Spring v. Russell*, 7 Greenl. 273, 290; *Wadsworth v. Smith*, 11 Maine, 278; *Adams v. Pease*, 2 Conn. 481; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Chapin*, 5 Pick. 199, 202; *Avery v. Fox*, 1 Abb. U. S. 246; *Smith v. Rochester*, 92 N. Y. 463, 479; *Palmer v. Mulligan*, 3 Caines, 307; *People v. Platt*, 17 Johns. 195, 211; *Hooker v. Cummings*, 20 Johns. 90; *Canal Commissioners v. People*, 5 Wend. 423; *Morgan v. King*, 35 N. Y. 454; 30 Barb. 9; 18 Barb. 277; *Munson v. Hungerford*, 6 Barb. 265; *Rowe v. Titus*, 1 Allen (N. B.), 326; *Eason v. McMaster*, 1 Kerr (N. B.),

501; *Boissonnault v. Oliv*, *Stuart* (Low. Can.), 565; *Moore v. Sanborne*, 2 Mich. 519; *Lorman v. Benson*, 8 Mich. 18; *Rhodes v. Otis*, 33 Ala. 578, 596; *Cox v. State*, 8 Blackf. 193; *Weise v. Smith*, 8 Oreg. 445, 448; *Healy v. Joliet Railroad Co.*, 2 Ill. App. 435; *People v. St. Louis*, 5 Gilman, 351; *Godfrey v. Alton*, 12 Ill. 29; *Memphis v. Overton*, 3 Yerger, 389; *Elder v. Burrus*, 6 Humph. 358; *Stuart v. Clarke*, 2 Swan, 15; *Sigler v. State*, 7 Baxter, 493; *Yates v. Judd*, 18 Wis. 118; *Hickok v. Hine*, 23 Ohio St. 523; *Selman v. Wolfe*, 27 Texas, 68.

<sup>3</sup> See *Leconfield v. Lonsdale*, L. R. 6 C. P. 665; *People v. Platt*, 17 Johns. 195, 211.

<sup>4</sup> *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Chapin*, 5 Pick. 190; *Hooker v. Cummings*, 20 Johns. 90; *Varick v. Smith*, 9 Paige, 137, 143; *Morgan v. King*, 35 N. Y. 454; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 8 Hun, 292; *Young v. Harrison*, 6 Ga. 130, 141; *McCullough*

ogy is imperfect. In the case of *Ball v. Herbert*,<sup>1</sup> Buller, J., said: "Callis compares a navigable river to a highway, but no two cases can be more distinct. In the latter case, if the way be foundeours and out of repair, the public have a right to go on the adjoining land; but, if a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands." A road or highway by land is limited in locality,<sup>2</sup> being confined within specific lines and not extending over tracts of land generally; and the public right to use it arises by statute, or by dedication, prescription, contract, or by survey and plat. If by statute, compensation must be made; in other cases the consent of the owner is required.<sup>3</sup> But, as the right of navigation extends to all waters which have a natural capacity for such use, there is a general presumption of an easement,<sup>4</sup> and the owners of the adjoining lands can neither prevent its acquisition or exercise,<sup>5</sup> or obtain compensation for such subjection of private property to common use. The anomalous nature of this doctrine is further illustrated by a decision in

*v. Wall*, 4 Rich. (S. C.) 68; *Ensminger v. The People*, 47 Ill. 384; *Braxton v. Bressler*, 64 Ill. 488; *The Magnolia v. Marshall*, 39 Miss. 109; *Morgan v. Reading*, 3 S. & M. 366.

<sup>1</sup> *Ball v. Herbert*, 3 T. R. 253, 263; *Williams v. Wilcox*, 8 Ad. & El. 314; *Carrick v. Johnston*, 26 Q. B. (Can.) 65.

<sup>2</sup> See, *e. g.*, *Bryan v. East St. Louis*, 12 Brad. (Ill.) 390; *Maddock v. Wal-lasey Local Board*, 55 L. J. Q. B. 267; *Brake v. Crider*, 107 Penn. St. 200; *Gentleman v. Soule*, 33 Ill. 271; *Plimpton v. Converse*, 44 Vt. 158; *Hart v. Connor*, 25 Conn. 331; *Jones v. Percival*, 5 Pick. 485; *Holmes v. Seely*, 19 Wend. 507; *Brice v. Randall*, 7 Gill & J. 349.

<sup>3</sup> See, *e. g.*, as illustrating the text as to highways, *State v. Kansas City Railway Co.*, 45 Iowa, 139; *State v. Welpton*, 34 Iowa, 144; *State v. Tucker*, 36 Iowa, 485; *Detroit v. Detroit Railway Co.*, 23 Mich. 173; *Cemetery Association v. Meninger*, 14

Kansas, 312; *Oliphant v. Atchison Co.*, 18 Kansas, 386; *State v. O'Laughlin*, 19 Kansas, 504; *Belleville v. Stookey*, 33 Ill. 441; *Grube v. Nichols*, 36 Ill. 92; *Smith v. Flora*, 64 Ill. 93; *Plimpton v. Converse*, 44 Vt. 158; *Johnson v. Stayton*, 5 Harr. (Del.) 448; *Melvin v. Whiting*, 13 Pick. 184.

<sup>4</sup> There appears to be no analogy for a general presumption of an easement. Mr. Phear says there cannot be such a presumption. Phear's *Rights of Water*, 15, note.

<sup>5</sup> An easement cannot be supported on the ground of long user, unless it was capable of prevention, or actionable at some time by the owner of the servient tenement. *Sturges v. Bridgman*, 11 Ch. D. 852; *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Mitchell v. Mayor*, 49 Ga. 19; *Webb v. Bird*, 18 C. B. N. S. 841; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Murgatroyd v. Robinson*, 7 E. & B. 391.

Michigan, in which it was held that the right of navigation in a private fresh river, though nominally an easement, is not, like other easements, an incorporeal hereditament or real estate; and that an action for obstructing this right, though local at common law, was not so under a statute which made actions on the case, for injuries to real estate, local, and other actions transitory.<sup>1</sup>

§ 56. **Same — The rule in New England.**—In this country the doctrine of private ownership has been quite generally recognized as the rule of the common law; but it has been held to be inapplicable to the condition of many of those States in which the inland rivers are large.<sup>2</sup> It is in force in all of the New England States,<sup>3</sup> where the fresh rivers are comparatively unimportant, although in Rhode Island it does not appear to have been directly passed upon.<sup>4</sup> In an early

<sup>1</sup> *Barnard v. Hinckley*, 10 Mich. 458; *Williamson v. Haskell*, 50 Mich. 364. A navigable river is not a "highway" within a statute against gaming, but may be a public place. *Dickey v. State*, 68 Ala. 508. See *State v. Dover R. Co.*, 43 N. J. L. 528.

<sup>2</sup> *Post*, §§ 64, 75.

<sup>3</sup> In Connecticut, *Adams v. Pease*, 2 Conn. 481; *Bissell v. Southworth*, 1 Root, 269; *Warner v. Southworth*, 6 Conn. 471, 474; *Chapman v. Kimball*, 9 Conn. 38, 41; *Enfield Bridge Co. v. Hartford Railroad Co.*, 17 Conn. 40, 63; *Mill River Woollen Manuf. Co. v. Smith*, 34 Conn. 463. In New Hampshire, *Scott v. Willson*, 3 N. H. 321; *Rix v. Johnson*, 5 N. H. 520; *State v. Gilmanton*, 9 N. H. 461; 14 N. H. 467; *Greenleaf v. Kilton*, 11 N. H. 530; *State v. Canterbury*, 28 N. H. 195; *Boscawen v. Canterbury*, 23 N. H. 189; *Nichols v. Suncook Manuf. Co.*, 34 N. H. 345; *Kimball v. Schoff*, 40 N. H. 190; *Clement v. Burns*, 43 N. H. 609; *Norway Plains Co. v. Bradley*, 52 N. H. 86. (In *Nichols v. Suncook Manuf. Co.*, 34 N. H. 345, it was held that adverse possession of land bordering

upon a river not navigable, gives title to the thread of the stream.) *Claremont v. Carlton*, 2 N. H. 369; *Thompson v. Androscoggin Co.*, 54 N. H. 548; 58 id. 108; *Carter v. Thurston*, 58 N. H. 104. In Vermont, *Fletcher v. Phelps*, 28 Vt. 257, 262. In Maine, *Berry v. Carle*, 3 Maine, 269; *Morrison v. Keen*, 3 Maine, 474; *Lincoln v. Wilder*, 29 Maine, 169; *Spring v. Russell*, 7 Maine, 273, 290; *Spring v. Seavey*, 8 Maine, 138; *Wadsworth v. Smith*, 11 Maine, 278; *Bradley v. Rice*, 13 Maine, 198, 201; *Nickerson v. Crawford*, 16 Maine, 245; *Brown v. Chadbourne*, 31 Maine, 9; *Knox v. Chaloner*, 42 Maine, 150; *Moor v. Veazie*, 32 Maine, 343; 31 Maine, 360; 14 How. 568; *Bradford v. Cressey*, 45 Maine, 9; *Strout v. Millbridge Co.*, 45 Maine, 76; *Veazie v. Dwinell*, 50 Maine, 479, 484; *Granger v. Avery*, 64 Maine, 292; *Holden v. Robinson Manuf. Co.*, 65 Maine, 215; *Pejepscot Proprietors v. Cushman*, 2 Maine, 94. For the Massachusetts cases, see the next note.

<sup>4</sup> See *Hughes v. Providence Railroad Co.*, 2 R. L. 508, 512; *Olney v.*

case<sup>1</sup> in Massachusetts, Parker, C. J., said:<sup>2</sup> "The common-law right of public property, restricted as it seems to be except for easement or right of way, may be found very inconvenient in its application to many of the magnificent fresh-water rivers of the United States, which are navigable for small vessels and boats much above the flux of the tide, especially by the aid of steam power so rapidly getting into use." The rule has been held applicable to the Connecticut River above the tide, in Connecticut,<sup>3</sup> Massachusetts,<sup>4</sup> and New Hampshire,<sup>5</sup> and to the Penobscot<sup>6</sup> and Saco<sup>7</sup> Rivers in Maine; and in Canada and the British provinces and colonies in which the question has arisen for decision,<sup>8</sup> it is held applicable to the smaller non-tidal rivers. In Vermont, Lake Champlain is public property, and the creeks and streams which empty into that lake, so far as they are ordinarily of the same level as the lake, and rise and fall with its waters, are held to be public also; and private conveyances of lands bounding upon such creeks and streams pass title only to the water's edge, or to the low-water mark, if there is a definite low-water line.<sup>9</sup>

Fenner, *id.* 211, 214. See *Tyler v. Wilkinson*, 4 Mass. 397, which related to the Pawtucket River; *Storer v. Freeman*, 6 Mass. 435, 438; *Hatch v. Dwight*, 17 Mass. 289, 298; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Chapin*, 5 Pick. 199; *Waterman v. Johnson*, 13 Pick. 261, 265; *Hopkins Academy v. Dickinson*, 9 Cush. 544, 547; *Commonwealth v. Alger*, 7 Cush. 53, 90, 97; *McFarlin v. Essex Co.*, 10 Cush. 304, 309; *Blood v. Nashua Railroad Co.*, 2 Gray, 187, 139; *Boston v. Richardson*, 13 Allen, 146, 154; 105 Mass. 351, 355; *Commonwealth v. Vincent*, 108 Mass. 441, 447; 1 Dane's Abr. ii, 692, § 13; *Knight v. Wilder*, 2 Cush. 199; *King v. King*, 7 Mass. 496.

<sup>1</sup> *Ingraham v. Wilkinson*, 4 Pick. 268. See, however, the opinion of the same judge in *Commonwealth v. Chapin*, 5 Pick. 199, 202.

<sup>2</sup> *Ibid.* 272.

<sup>3</sup> *Adams v. Pease*, 2 Conn. 481, and

cases above cited; *Welles v. Bailey*, 55 Conn. 292.

<sup>4</sup> *Commonwealth v. Chapin*, 5 Pick. 199; *Bardwell v. Ames*, 22 Pick. 333; *Hopkins Academy v. Dickinson*, 9 Cush. 544, 547.

<sup>5</sup> *State v. Canterbury*, 28 N. H. 195. In this case a town was bounded upon the river.

<sup>6</sup> *Veazie v. Dwinel*, 50 Maine, 479.

<sup>7</sup> *Berry v. Carle*, 3 Greenl. 269; *Spring v. Russell*, 7 Greenl. 273, 290.

<sup>8</sup> *Esson v. McMaster*, 1 Kerr (N. B.), 501; *Re Trent Valley Canal*, 12 Ont. 154; *Queen v. Robertson*, 6 Can. Sup. Ct. 52; *Attorney General v. Harrison*, 12 Ch. (Ont.) 466. In *Dixson v. Snetsinger*, 23 C. B. (Ont.) 235, it was held that the St. Lawrence River above the tide is the property of the Crown. See, also, *Gage v. Bates*, 7 C. P. (Ont.) 116; *Whelan v. McLachtlan*, 16 *id.* 102.

<sup>9</sup> *Fletcher v. Phelps*, 28 Vt. 257, 262; *Jakeway v. Barrett*, 38 Vt. 316, 323;



§ 57. **Same — In New York.**—In New York, the question has given rise to conflict of decision.<sup>1</sup> The later decisions adopt the common-law rule,<sup>2</sup> which has been held there applicable to streams of the first magnitude, such as the Hudson,<sup>3</sup> the Oswego,<sup>4</sup> and the Genesee<sup>5</sup> Rivers. The Mohawk River seems, however, to form an exception. In the case of *The People v. Canal Appraisers*,<sup>6</sup> Davis, J., delivered an elaborate opinion, in which he held that this river was public property, upon two grounds: (1) that the word “navigable” denotes

*Austin v. Rutland Railroad Co.*, 45 Vt. 215; 17 Fed. Rep. 466; *Newton v. Eddy*, 23 Vt. 319.

<sup>1</sup> *Palmer v. Mulligan*, 3 Caines, 307; *People v. Platt*, 17 Johns. 195; *Hooker v. Cummings*, 20 Johns. 90; *Canal Appraisers v. People*, 5 Wend. 423; *People v. Canal Appraisers*, 18 Wend. 355; 17 Wend. 571; *People v. Seymour*, 6 Cowen, 579; *Ex parte Jennings*, 6 Cowen, 518, and notes; *Ex parte Tibbetts*, 6 Cowen, 551; 5 Wend. 423; *People v. Seymour*, 6 Cowen, 518; *Arthur v. Case*, 1 Paige, 44, 75, 447; 3 Wend. 632; *Varick v. Smith*, 5 Paige, 137; 9 id. 547; *Starr v. Child*, 20 Wend. 149; 5 Denio, 599; 4 Hill, 369; *Jackson v. Halstead*, 5 Cowen, 216; *Jackson v. Louw*, 12 Johns. 252; *Munson v. Hungerford*, 6 Barb. 265; *Luce v. Carey*, 24 Wend. 451; *Commissioners v. Kempshall*, 26 Wend. 404; *Gould v. Hudson River Railroad Co.*, 6 N. Y. 522; *People v. Tibbetts*, 19 N. Y. 523; *Browne v. Scofield*, 8 Barb. 239; *Morgan v. King*, 35 N. Y. 454; 18 Barb. 277; 30 id. 9; *Mott v. Mott*, 68 N. Y. 246; 8 Hun, 474; *Pierrepont v. Loveless*, 72 N. Y. 211, 216; 4 Hun, 696; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 8 Hun, 292. See also *Shaw v. Crawford*, 10 Johns. 236; *Furman v. New York*, 5 Sand. 16; *Curtis v. Keesler*, 14 Barb. 511; *Lownes v. Dickerson*, 34 Barb. 586, 592; *People v. Allen*, 1 Lans. 248; *Champlain Railroad Co.*

*v. Valentine*, 19 Barb. 484, 489; *Roberts v. Baumgarten*, 110 N. Y. 380. As to the legislation in this State, bearing upon the ownership of rivers and restricting the power of the commissioners of the land office so that they can convey the soil of navigable rivers and lakes only to the adjacent owners, see *Canal Appraisers v. People*, 17 Wend. 571, 577; *Gould v. Hudson River Railroad Co.*, 2 Selden, 522; 1 Greenl. Laws, 280; Laws 1815, ch. 199, p. 201; 1 Rev. Laws, 293, § 4; Laws of 1850, ch. 283, p. 621; 1 Rev. Stats. 208, § 67; 1 Rev. Stats. (5th ed.), 552, § 82.

<sup>2</sup> See *Chenango Bridge Co. v. Paige*; *Pierrepont v. Loveless*; *Mott v. Mott*; *Morgan v. King*, above cited; *Smith v. Rochester*, 92 N. Y. 463; *Buffalo Pipe Line Co. v. New York R. Co.*, 10 Abb. N. Cas. 107, 116, note.

<sup>3</sup> *Palmer v. Mulligan*, 3 Caines, 307; *Ex parte Tibbits*, and *Ex parte Rogers*, 6 Cowen, 551, note; *Harris v. Thompson*, 9 Barb. 350; *Walton v. Tift*, 14 Barb. 216, 219. This river is not a highway of the city of Albany. *Coonley v. Albany*, 57 Hun, 331.

<sup>4</sup> *Varick v. Smith*, 9 Paige, 547; 5 Paige, 137.

<sup>5</sup> *Commissioners v. Kempshall*, 26 Wend. 404.

<sup>6</sup> *People v. Canal Appraisers*, 33 N. Y. 461; *Crill v. Rome*, 47 How. Pr. 398.



merely navigability in fact, and is so employed in the early authorities; (2) that the course of the State's legislation had been such as to amount to a reservation for public purposes of the Mohawk and other navigable rivers of the State.<sup>1</sup> This decision does not appear to have been expressly overruled in its application to the particular river,<sup>2</sup> but the first ground on which the judgment proceeds cannot now be regarded as tenable.<sup>3</sup> In the more recent case of *Smith v. Rochester*,<sup>4</sup> Ruger, C. J., considered that this and other previous cases relating to the Mohawk and Hudson Rivers might properly have been decided for reasons peculiar to those streams, saying: "The titles granted to the original settlers in the Hudson and Mohawk valleys, as construed by the rules of the civil law prevailing in the Netherlands, from whose government they were derived, did not convey to their riparian owners the banks or beds of navigable streams. Upon the surrender of this territory the guaranty assured by the English authorities to its inhabitants of the peaceful enjoyment of their possessions simply confirmed the right already possessed, and the beds of navigable streams, never having been conveyed, became, by virtue of the right of eminent domain, vested in the English government as ungranted lands, and the State of New York, as a consequence of the Revolution, succeeded to the rights of the mother country." The Niagara River, which is the national boundary between the United States and Canada, also forms another exception, under the decisions in New York, to the application of the common-law rule in that State.<sup>5</sup>

§ 58. **Same — In other States.**— The English rule is also adopted in New Jersey,<sup>6</sup> Delaware,<sup>7</sup> Maryland,<sup>8</sup> and Georgia.<sup>9</sup>

<sup>1</sup> 33 N. Y. 466, 467, 475, 500.

<sup>2</sup> See *Crill v. Rome*, 47 How. Pr. 398; *People v. Gutches*, 48 Barb. 656, 667; *Canal Appraisers v. People*, 17 Wend. 571, 608; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.

<sup>3</sup> See *ante*, §§ 42, 48, notes.

<sup>4</sup> 92 N. Y. 463, 482. See *ante*, § 30.

<sup>5</sup> *Kingman v. Sparrow*, 12 Barb. 201; *Canal Appraisers v. People*, 17

Wend. 571, 597. See §§ 82, 82*a*, *post*.

As to fishing in the Niagara River, see *People v. Gillette*, 11 N. Y. S. 461.

<sup>6</sup> *Arnold v. Mundy*, 1 Halst. 1; 10 Am. Dec. 385, note; *Gough v. Bell*, 2 Zab. 441, 490; *Bell v. Gough*, 3 Zab. 624; *Martin v. Waddell*, 3 Harr. 495; 16 Peters, 367; *Rundle v. Delaware Canal Co.*, 1 Wall. Jr. 275; 14 How. 80; *Attorney General v. Delaware*

In the last named State it is held that, as the western bank of the Chattahoochee River, and not the river itself, is the boundary between that State and Alabama,<sup>10</sup> the title of the riparian owners in Georgia, whose lands border upon this river, extends to the opposite bank, thus including the entire river-bed, and is not limited by the thread of the stream.<sup>11</sup>

§ 59. **Same — South Carolina.**— In South Carolina, the common-law rule was considered inapplicable to the condition of that State in the early case of *Cates v. Waddington*; <sup>12</sup> but, in the later case of *McCullough v. Wall*,<sup>13</sup> the court said: "The rivers of our own State are not of remarkable magnitude, and whether we adhere to the common-law definition, or consider as navigable all rivers that may be navigated by sea vessels, or all that are by nature floatable, we hesitate not to declare that this court, if it should feel itself at liberty, from considerations of public convenience, to assume legislative discretion in the matter, is not likely by any decision to extend the rules which by the common law are applicable to navigable rivers, to any stream above those falls which by nature obstructed the serviceable use of its water for transportation. Above those falls, as below, the right of the public to improve

*Railroad Co.*, 27 N. J. Eq. 1, 8, 681; *Society v. Low*, 17 id. 19; *Cobb v. Davenport*, 32 N. J. L. 369.

<sup>7</sup> *Delaney v. Boston*, 2 Harr. (Del.) 489; *Bickel v. Polk*, 5 id. 325.

<sup>8</sup> *Browne v. Kennedy*, 5 H. & J. 196; *Ridgely v. Johnson*, 1 Bland Ch. 316, note; *Baltimore v. McKim*, 3 id. 453; *Binney's Case*, 2 id. 99; *Casey v. Ingloes*, 1 Gill, 430; *Day v. Day*, 22 Md. 530, 537; *Goodsell v. Lawson*, 42 Md. 348; *Chapman v. Hoskins*, 2 Md. Ch. 485.

<sup>9</sup> *Young v. Harrison*, 6 Ga. 130, 141; *Jones v. Waterlot Co.*, 18 Ga. 539; *Stanford v. Mangin*, 30 Ga. 355; *Hendrick v. Cook*, 4 Ga. 241. See, generally, *Cobb's Digest of the Laws of Georgia*, p. 902 *et seq.*

<sup>10</sup> *Howard v. Ingersoll*, 13 How. (U. S.) 381; *Alabama v. Georgia*, 23 How. 505.

<sup>11</sup> *Young v. Harrison*, 6 Ga. 130; *Jones v. Waterlot Co.*, 18 Ga. 539; *Moses v. Eagle Manuf. Co.*, 62 Ga. 455; *Cook v. Winter*, 68 Ga. 259.

<sup>12</sup> 1 McCord, 580.

<sup>13</sup> *McCullough v. Wall*, 4 Rich. 68, 86; *Boatwright v. Bookman*, Rice, 447; *Jackson v. Lewis*, Cheves, 259; *State v. Hickson*, 5 Rich. 447; *Witt v. Jeffcoat*, 10 Rich. 388; *Noble v. Cunningham*, McMullan, 289. In *Shands v. Triplet*, 5 Rich. Eq. 76, 79, the court say of the passage quoted in the text: "We entirely concur in this doctrine as to rivers altogether within the State, reserving our opinion as to rivers which may be continuous between this and other States." See the numerous statutes upon the subject of rivers, in the ninth volume of the State Statutes, and *State v. Young*, 30 S. C. 399.

a river, and to use it as a highway, subsists; to that the proprietary right in the soil is subject; but so subject, the proprietary right exists in the owners to whom it has been granted, above the falls at any rate, as we may now safely say.”

§ 60. Same — North Carolina.— In North Carolina, this rule has frequently been declared by the courts to be inapplicable to the condition of the country.<sup>1</sup> An early statute of this State provided that where a survey is made upon any navigable waters, the water shall form one side of the survey; and it recognized islands as distinct from the property in the lands adjoining these waters by prescribing the manner of entering and surveying them.<sup>2</sup> Under these provisions, all waters, whether fresh or salt, which are capable of navigation by sea-going vessels, are held to be navigable.<sup>3</sup> Lands covered by such waters are not subject to entry and grant, under the entry laws of the State;<sup>4</sup> but islands and rocks which are above the surface of the water, are vacant property, and subject to those laws.<sup>5</sup> With respect to the right of fishing, it was held in an early case<sup>6</sup> in this State that neither the above statutory provisions, nor the absence of a grant of the fishery from the State, debar the owners of lands adjoining fresh navigable waters from claiming the common-law right of exclusive fishery opposite their lands to the thread of the stream. This appears, however, to be overruled by later adjudications in the same State.<sup>7</sup> In Tennessee, which was formerly included within the territory of North Carolina, the same rules prevail as to the ownership of the soil of navigable streams. Navigable waters are here considered to be those which, in the ordinary state of the water, are capable of navigation by ves-

<sup>1</sup> *Wilson v. Forbes*, 2 Dev. 80; *Ingraham v. Threadgill*, 3 Dev. 59; *Collins v. Benbury*, 8 Ired. 277; 5 id. 118; *Smith v. Ingram*, 7 Ired. 175; *Gilliam v. Bird*, 8 id. 280, 284; *Fagan v. Armistead*, 11 id. 433; *Lewis v. Keeling*, 1 Jones Law, 299; *State v. Dibble*, 4 id. 107; *Ward v. Willis*, 6 id. 183; *State v. Glen*, 7 id. 321; *Cornelius v. Glenn*, id. 512; *Skinner v. Hettick*, 73 N. C. 58; *State v. Pool*, 74 N. C. 402, 407; *State v. Tomlinson*, 77 N. C. 528.

<sup>2</sup> *Ibid.*; *Ingraham v. Threadgill*, 3 Dev. 59.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Tatum v. Sawyer*, 2 Hawks, 226; *Smith v. Ingram*, 7 Ired. 175.

<sup>5</sup> *Jones v. Jones*, 1 Hay, 488; *MacKenzie v. Hulet*, N. C. T. R. 181; 1 Battle's Dig. 404; *Ward v. Willis*, 6 Jones, 183.

<sup>6</sup> *Ingraham v. Threadgill*, 3 Dev. 59.

<sup>7</sup> See the cases above cited.

sels commonly used in commerce, whether foreign or inland, steam or sailing vessels; and riparian ownership on such waters is limited to the ordinary low-water mark.<sup>1</sup> Hence, a grant of the bed of a navigable stream, and of the exclusive right of taking deposits therefrom, is void.<sup>2</sup>

§ 61. **Same — Virginia.**— In Virginia, early acts of the legislature prohibited grants of the banks, shores, and beds of rivers and creeks,<sup>3</sup> and patents for land which form part of the bed of a navigable river are held to be void.<sup>4</sup> These provisions seem to apply to navigable waters whether fresh or salt. It is held here, as elsewhere, that a conveyance of land bounded upon an unnavigable stream carries with it the title to the thread of the stream.<sup>5</sup>

§ 62. **Same — Kentucky.**— The earlier cases in Kentucky tend to reject the common-law rule, and are in favor of limiting the title of the riparian owner to low-water mark.<sup>6</sup> But in the recent case of *Berry v. Snyder*,<sup>7</sup> it was held that an

<sup>1</sup> *Elder v. Burrus*, 6 Humph. 358; *Roberts v. Cunningham, Martin & Yerg.* 67; *Stuart v. Clark*, 2 Swan, 9; *Sigler v. State*, 7 Baxter, 493; *Martin v. Nance*, 3 Head, 649; *Memphis v. Overton*, 3 Yerger, 387; *Holbert v. Edens*, 5 Lea, 204; *Irwin v. Brown* (Tenn.), 12 S. W. 340.

<sup>2</sup> *Goodwin v. Thompson*, 15 Lea, 209.

<sup>3</sup> 1 Rev. Code, pp. 142, 423; Code of Virginia, tit. 19, ch. 62, § 1.

<sup>4</sup> *Norfolk City v. Cooke*, 27 Gratt. 430; *Mead v. Haynes*, 3 Rand. 33, 36; *Home v. Richards*, 4 Call, 441. See, also, *French v. Bankhead*, 11 Gratt. 136; *Richards v. Hoome*, 2 Wash. (Va.), 36; *Wroe v. Harris*, id. 126; *Martin v. Beverley*, 5 Call, 444.

<sup>5</sup> *Hayes v. Bowman*, 1 Rand. 417; *Mead v. Haynes*, 3 Rand. 33; *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Home v. Richards*, 4 Call, 441. As to the compact of 1785 between Virginia and Maryland, in its relation to the District of Columbia and ju-

risdiction over the Potomac River, see *Aitcheson v. Endless Chain Dredge*, 40 Fed. Rep. 253; *Hendricks v. Commonwealth*, 75 Va. 934; *State v. Hoofman*, 9 Md. 28. As to the interest of the United States in the Potomac River flats, see *United States v. Morris*, 6 Mackey, 90.

<sup>6</sup> *Louisville v. United States Bank*, 3 B. Mon. 138, 143; *Thurman v. Morrison*, 14 B. Mon. 367; *Morrison v. Thurman*, 17 id. 249; *Hawkesville v. Lander*, 8 Bush, 679. See also *Trustees v. Wagnon*, 1 A. K. Marsh. 243; *Cockrell v. M'Quinn*, 4 Mon. 61; *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Hart v. Rogers*, 9 B. Mon. 418, 422.

<sup>7</sup> 3 Bush, 266, 274, followed, applying the common-law rule to the Cumberland River, in *Williamsburg Boom Co. v. Smith*, 84 Ky. 372; *Kentucky Lumber Co. v. Green*, 87 Ky. 257. See *Louisville Bridge Co. v. Louisville*, 81 Ky. 189; *post*, § 71. In this case, Williams, J., suggests the following reasons for a distinction

early grant by the State of Virginia, which formerly possessed this territory, of land bordering upon the Ohio River, was to be construed by the laws of Virginia, and included the soil of the river to the centre of the main channel. The decision seems open to the following criticism: First, that by the law of Virginia, which is made the basis of the decision, the bed of a navigable river could not be granted;<sup>1</sup> second, that, as the jurisdiction and boundary line of the State extend to low-water mark on the northern shore,<sup>2</sup> it would seem that there is no reason for limiting private titles to the thread of the river, and reserving the more remote portion of its bed for the State, but that, if the common-law rule is adopted, the title of the riparian owner would extend across the river, as has been held in similar cases in Georgia,<sup>3</sup> which appear not to have been called to the attention of the court in *Berry v. Snyder*.

§ 63. **Same — Mississippi.**—The case of *The Magnolia v. Marshall*,<sup>4</sup> in Mississippi, related to the right of soil between high and low-water mark on the Mississippi River, but the title to the river-bed was fully considered by the court. Harris, J., after referring to the authorities usually cited upon the question, reasons: First, that the term “navigable,” as employed

between the title to the beds of fresh and salt waters: “So long as the ocean keeps its bed, and nature’s present frame shall continue to exist, there will always be water up to the ocean’s level in all those channels where the tide ebbs and flows, and this not dependent upon the water falling in rain; therefore, these channels are filled to ocean’s level twice every twenty-four hours, and are constantly and uniformly navigable. Their navigability does not depend upon a season more or less rainy, but on the constant, unvarying laws of nature, and will remain as surely navigable as the sea itself. Though not so deep, their surface level is the same; hence, without violence of expression or idea, they are called ‘arms of the sea.’ But it is different

with all the great rivers of the earth above tide water. These are dependent for their supply from the clouds.” In *Miller v. Hepburn*, 8 Bush, 326, it was held that *Berry v. Snyder* settled the rule in this State in favor of the doctrine of the common law.

<sup>1</sup> *Ante*, § 61.

<sup>2</sup> *Post*, § 71; *Handly v. Anthony*, 5 Wheat. 374; *Conway v. Taylor*, 1 Black, 603; *Church v. Chambers*, 3 Dana, 278; *McFall v. Com.*, 2 Met. (Ky.), 396; *Fleming v. Kenny*, 4 J. J. Marsh. 158; *McFarland v. McKnight*, 6 B. Mon. 510.

<sup>3</sup> *Ante*, § 58. See *Ravenswood v. Fleming*, 22 W. Va. 52.

<sup>4</sup> 39 Miss. 109. See also *Morgan v. Reading*, 3 S. & M. 366; *Commissioners v. Withers*, 29 Miss. 21.

in the common-law authorities, has reference to the right possessed by all nations of navigating the ocean and its arms as common highways of mutual intercourse and commerce, and that inland rivers, though capable of navigation, are not navigable for all the world except by permission of the sovereign having jurisdiction over them;<sup>1</sup> second, that, under the law of nations, while the shores of the sea, rivers, and other waters forming boundaries between different states or nations, and also sounds, straits, and other arms of the sea which lead through the territory of one nation to that of another, or to other seas common to all nations, are subject to the right of innocent passage,<sup>2</sup> not as controlled by the nearest nation, but according to the mutual convenience of the parties interested;<sup>3</sup> yet rivers and waters which are not national boundaries and do not constitute channels of international communication, including inland lakes and rivers, ports, harbors, and bays, the entrance of which can be defended, are a part of the adjacent nation and wholly subject to its control;<sup>4</sup> and that the term "navigable," as used in the common law, was thus borrowed from the law of nations, and has reference to the right of free navigation of the ocean and of the greater arms of the sea, not *mare clausum*, and to the usage of civilized nations extending this right as far as the sea ebbs and flows. The opinion proceeds: "The right of navigation was always wholly dependent on the will of the sovereign having the right of property in the soil; and, by the law of nations, such streams were 'not navigable' for other nations, except by treaty or special permission of the local sovereign. Hence they are called 'not navigable,' in contradistinction to such waters, etc., as were common to all nations." "It is certain that under the deed of cession from Georgia, as well as the several acts and ordinances in reference to the free navigation

<sup>1</sup> 39 Miss. 117. The reasoning of the court in this case has been approved in Wisconsin. *Olson v. Merrill*, 42 Wis. 203, 212; *Diedrich v. Northwestern Railway Co.*, 42 Wis. 248, 263.

<sup>2</sup> Citing Vattel's Law of Nations, bk. 2, pp. 180, 181; Wheaton's Int. Law, p. 243, § 12.

<sup>3</sup> Citing Wheaton's Int. Law, pp. 243, 244, §§ 13, 14; p. 251, § 18; p. 255, § 19; Vattel's Law of Nations, p. 129, §§ 290-292.

<sup>4</sup> Citing Wheaton's Int. Law, p. 256, § 19; Vattel's Law of Nations, p. 129, §§ 290-292. See Houck on Rivers, 59.



of the Mississippi river, as a common highway, no grant could have been made here, interfering with this great public right. There is, therefore, no inconsistency, but, on the contrary, as before suggested, perfect harmony between the *jus privatum* of riparian ownership in public fresh-water streams to the middle of the river and the *jus publicum* of free navigation thereof. The soil is granted to the riparian proprietor, subject to this public easement." The learned judge concludes that the plaintiff derived his title to the property in question under the common law; and that only under the common-law doctrine as to fresh-water streams could the deed of cession by Georgia to the United States and the act of Congress organizing the Mississippi Territory and the subsequent act admitting that Territory as a State, which acts referred to the Mississippi River as a boundary, be held to pass to Mississippi the right of soil and jurisdiction to the middle of the river; that the whole legislation of Mississippi in relation to her western boundary was founded upon this rule of the common law, and that its right of jurisdiction and property to the thread of the river had been frequently asserted and acted on. Handy, J., concurred in the conclusion reached, without assenting to all the views expressed in the above opinion.

§ 64. Same — Same.— With respect to the deed of cession from Georgia to the United States, and the acts of Congress referred to in this opinion, it may be remarked that, under the decisions of the Supreme Court of the United States, Mississippi acquired jurisdiction and property in its navigable waters;<sup>1</sup> and it seems equally clear that by the rules both of the law of nations and of the common law applicable to boundary rivers, the line of separation, if not controlled by treaty or the terms of the grant, would be fixed at the middle of the channel, irrespective of the question whether the water was salt or fresh.<sup>2</sup> The suggestion, therefore, that Congress

<sup>1</sup> *Martin v. Waddell*, 16 Peters, 367; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Goodtitle v. Kibbe*, 9 id. 471. "These cases," say the court, in *Barney v. Keokuk*, 94 U. S. 324, 338, "related to tide waters, it is true; but they enunciate principles which are equally applicable to all navigable waters." See, also, *Renwick v. The D. & N. W. R. Co.*, 49 Iowa, 664, 669.

<sup>2</sup> Lawrence's *Wheaton's Int. Law* (2d ed.), pp. 342, 346-360; *Wheaton's Law of Nations*, 577-583; *Vattel*, bk. 1, ch. 22, §§ 266, 274; *Marten, Precis*



adopted the common-law rule in fixing the western boundary of the State does not necessarily affect the question whether the riparian owner, upon the one hand, or the State, upon the other, owns the river-bed.<sup>1</sup> With respect to the law of nations, the opinion proceeds upon grounds not clearly established, and appears to disregard the distinction between those tide waters which are, and those which are not, within the territory of a nation. The territory of England extends to low-water mark on the external coast,<sup>2</sup> and between that line and the high-water mark the Crown's right of property is subject to the *jus publicum* of its subjects, but has never been regarded in that country as burdened with an easement in favor of foreign nations.<sup>3</sup> There appears, also, to be no authority for the suggestion that the technical use of the word "navigable" is derived from the law of nations; nor could it have been derived from a system which recognizes none of the peculiar distinctions of the English law<sup>4</sup> with respect to the admiralty jurisdiction and the *jus privatum*<sup>5</sup> of the Crown in navigable waters. Under the law of nations, the subjects of foreign powers have no greater rights in tidal rivers which are exclusively within the territory of one nation, and do not flow through distinct jurisdictions, than in large fresh-water rivers similarly situated.<sup>6</sup> That law does not distinguish be-

du Droit, bk. 2, ch. 1, § 39; Bluntschli, Int. Law, 298, 299; *State v. Milk*, 11 Fed. Rep. 389; *Handly v. Anthony*, 5 Wheat. 374; *The Apollon*, 9 Wheat. 362, 369; *The Fame*, 3 Mason, 147; *Corfield v. Coryell*, 4 Wash. C. C. 884; *Bennett v. Boggs*, Bald. 60; *Mississippi Railroad Co. v. Ward*, 2 Black, 485; *An Open Boat*, 1 Ware, 26, 28; *Spears v. State*, 8 Texas App. 467; *Stillman v. White Rock Manuf. Co.*, 3 Wood. & M. 538; *Missouri v. Kentucky*, 11 Wall. 395, 401; *Gilbert v. Moline Water Power Co.*, 19 Iowa, 319; *State v. Mullen*, 85 Iowa, 199; *Canal Appraisers v. People*, 17 Wend. 571, 597; *Mahler v. New York Transportation Co.*, 35 N. Y. 352; *People v. Central Railroad Co.*, 48 Barb. 478; *Tinicum Fishing Co. v. Carter*, 61

Penn. St. 21, 30; *Brown v. Camden Railroad Co.*, 83 Penn. St. 316; *Myers v. Perry*, 1 La. Ann. 372; *Phillips v. People*, 55 Ill. 429; *Attorney General v. Delaware Railroad Co.*, 27 N. J. Eq. 1, 631. If a nation possesses both banks of a river, and grants to another nation the territory on one side only, it retains the river within its domain, and the grantee takes to low-water mark only. *Handly v. Anthony*, 5 Wheat. 374.

<sup>1</sup> *Hagan v. Campbell*, 8 Porter, 9.

<sup>2</sup> *Regina v. Keyn*, 2 Ex. D. 63; *ante*, §§ 11, 12.

<sup>3</sup> See authorities cited *ante*, §§ 21, 28.

<sup>4</sup> *Ante*, §§ 8, 12.

<sup>5</sup> *Ante*, §§ 17-19.

<sup>6</sup> Lawrence's Wheaton's Int. Law

tween rivers by the absence or presence of the tide;<sup>1</sup> and it admits of little doubt that every State has full sovereignty, from their source to the sea, over all waters which are wholly within its territory and do not lead to other large waters, as well in places where the water is salt as where it is fresh.<sup>2</sup> The reasoning of Harris, J., appears to be at variance with these principles.

§ 65. **Same — Pennsylvania.**— In Pennsylvania the English doctrine has always been rejected.<sup>3</sup> The early case of *Carson v. Blazer*<sup>4</sup> proceeded upon three grounds: first, that such a rule was inapplicable to the condition of that State; second, that the title to the river-beds which Penn acquired by grant from the Crown of England either was not alienated in his grants of river lands, but was retained for the public benefit, or if such property was included in his concessions, which declared that all rivers, etc., shall be freely enjoyed, “and wholly by the purchasers into whose lots they fall,” yet these concessions were to be construed as personal and as confined to the first purchaser; third, that any exclusive private rights in the rivers of the State were inconsistent with its statutes and usages. In subsequent cases<sup>5</sup> stress was laid upon

(2d ed.), 342, 346–360; Hall’s *International Law*, 113, 114, and authorities above cited in this section, as to boundary rivers between States.

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Carson v. Blazer*, 2 Binney, 475; *Commonwealth v. Fisher*, 1 Penn. 462; *Cooper v. Smith*, 9 S. & R. 26; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Hart v. Hill*, 1 Whart. 124; *Ball v. Slack*, 2 Whart. 508; *Coover v. O’Conner*, 8 Watts, 470; *Bird v. Smith*, 8 Watts, 434; *Dalrymple v. Mead*, 1 Grant’s Cas. 197; *Union Canal Co. v. Landis*, 9 Watts, 228; *Zimmerman v. Union Canal Co.*, 1 Watts & S. 346; *Jones v. Janney*, 8 Watts & S. 436; *Johns v. Davidson*, 16 Penn. St. 512; *Bailey v. Miltenberger*, 31 Penn. St. 37; *Baker v. Lewis*, 33 Penn. St. 301; *Barclay*

*Railroad Co. v. Ingham*, 36 Penn. St. 194; *Solliday v. Johnson*, 38 Penn. St. 880; *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *McKeen v. Delaware Canal Co.*, 49 Penn. St. 424; *Stover v. Jack*, 60 Penn. St. 339; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Wainwright v. McCullough*, 63 Penn. St. 66; *Zug v. Commonwealth*, 70 Penn. St. 138; *Poor v. McClure*, 77 Penn. St. 214; *Allegheny City v. Moorehead*, 80 Penn. St. 118; *Philadelphia v. Scott*, 81 Penn. St. 80; *Fisher v. Haldeman*, 20 How. 186; 1 Wall. Jr. 79, 297; *Simpson v. Neill*, 89 Penn. St. 183; *Rundle v. Delaware Canal Co.*, 14 How. (U. S.) 80; *Fulmer v. Williams*, 122 Penn. St. 191.

<sup>4</sup> 2 Binney, 475.

<sup>5</sup> *Shrunk v. Schuylkill Navigation*

the fact that islands in navigable fresh-water rivers, which, at the common law, would belong to the riparian owners, together with the soil of the river, had been uniformly treated as distinct from the lands adjacent to the banks both under the proprietary and State governments, being sold by special contract and for higher prices than the ordinary river lands. The rule thus founded has been applied to the large fresh rivers of the State, such as the Susquehanna and its principal branches, and the Allegheny, Ohio, and Monongahela Rivers. In these the fishery is a common right, and grants from the State, or between private persons, of lands bordering upon them, when calling for the river as a boundary, do not extend the grantee's title beyond the ordinary low-water mark,<sup>1</sup> and will not include islands which are connected with the main land only in times of extraordinary drought.<sup>2</sup> So the wrongful diversion of a navigable stream from its bed does not extinguish the right of the State to the soil or add to that of private persons.<sup>3</sup> These rivers are often subject to marked fluctuations, and the title of the riparian owners to the shore, or space between high and low-water mark, is but a limited and qualified form of property. The public have the right of passage over it at high water, for the landing of boats and rafts,<sup>4</sup> and the State

Co., 14 S. & R. 71; *Hunter v. Howard*, 10 S. & R. 243; *Stover v. Jack*, 60 Penn. St. 339; *Wainwright v. McCullough*, 63 Penn. St. 66; *Poor v. McClure*, 77 Penn. St. 214, 220; *Allegheny City v. Moorehead*, 80 Penn. St. 118. With respect to private rights to the islands in the rivers of this State, see, also, *Moore v. Mundorff*, 4 Yeates, 209; *Shepherd v. Commonwealth*, 1 S. & R. 1; *McElear v. Elliot*, 14 S. & R. 242; *Johns v. Davidson*, 16 Penn. St. 512; *Allegheny City v. Reed*, 24 id. 39; *Allegheny City v. Nelson*, 25 id. 332; *Fuller v. Murphy*, 17 Pitts. L. J. 51; *Fisher v. Haldeman*, 20 How. (U. S.) 186; *Fisher v. Carter*, 1 Wall. Jr. 69; *Pennsylvania Coal Co. v. Winchester*, 109 Penn. St. 572. As to the jurisdiction of this State in Lake Erie, see *Dunlap v. Commonwealth*, 108 Penn. St. 607.

<sup>1</sup> *Hart v. Hill*, 1 Whart. 137; *Ball v. Slack*, 2 Whart. 508; *Cooper v. Smith*, 9 S. & R. 26; *Naglee v. Ingersoll*, 7 Penn. St. 185; *Lehigh Valley Railroad Co. v. Trone*, 28 Penn. St. 206; *Jones v. Janney*, 8 Watts & S. 436; *Stover v. Jack*, 60 Penn. St. 339, 343; *Freytag v. Powell*, 1 Whart. 536; *Hartley v. Crawford*, 33 Leg. Int. 24; s. c. 23 Pitts. L. J. 127; *Allegheny City v. Moorehead*, 80 Penn. 118; 16 Am. Jur. 286. So of the limits of a municipality. *Gilchrist's Appeal*, 109 Penn. St. 600.

<sup>2</sup> *Ibid.*; *Stover v. Jack*, 60 Penn. St. 339.

<sup>3</sup> *Wainwright v. McCullough*, 63 Penn. St. 66; *Zug v. Commonwealth*, 70 Penn. St. 138; *ante*, § 36, note.

<sup>4</sup> *O'Connor v. Bigler*, 2 Pearson (Pa.), 219; *Pursell v. Stover*, 110 Penn. St. 43, and cases in next note.

may use it for purposes connected with the navigation of the stream without compensation to the owners of the adjoining lands, and may protect it from any use by such owners which is not strictly authorized.<sup>1</sup> But, as the riparian owner's title extends, in the case of a navigable fresh river, to low-water mark, he is entitled to compensation from a railroad company, the construction of whose road causes the loss of a spring situated between high and low-water mark,<sup>2</sup> although he could not recover for the loss of a spring similarly situated on the shore of a tidal river.<sup>3</sup> In this State, as elsewhere, grants of land upon small unnavigable streams, following their courses and distances, pass the right of soil to the center of the stream.<sup>4</sup>

<sup>1</sup> *Stover v. Jack*, 60 Penn. St. 339; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Commonwealth v. Fisher*, 1 Penn. 462; *Zimmerman v. Union Canal Co.*, 1 Watts & S. 346; *Bailey v. Miltenberger*, 31 Penn. St. 37; *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Wainwright v. McCullough*, 63 Penn. St. 66; *Wood v. Appal*, id. 210; *Grant v. White*, id. 271; *Poor v. McClure*, 77 Penn. St. 214, 219; *Hartley v. Crawford*, 81 Penn. St. (pt. 2), 478; *Philadelphia v. Scott*, 81 Penn. St. 80, 86; *Lacy v. Green*, 84 Penn. St. 514; *Cooper v. Smith*, 9 S. & R. 26; *Balliet v. Commonwealth*, 17 Penn. St. 206. The State, or a company invested with its privileges, is the sole owner of the water in the streams declared public highways, and can use it all if deemed necessary for the public works. *Cameron Furnace Co. v. Penn. Canal Co.*, 2 Pearson (Pa.), 208.

<sup>2</sup> *Lehigh Valley Railroad Co. v. Trone*, 28 Penn. St. 206.

<sup>3</sup> *Commonwealth v. Fisher*, 1 Penn. 462.

<sup>4</sup> *Covert v. O'Conner*, 8 Watts, 470; *Ball v. Slack*, 2 Whart. 528; *Barclay Railroad Co. v. Ingham*, 36 Penn. St. 190. In *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71, 79, *Tilghman, C. J.*, said: "I consider it

settled in Pennsylvania, by the decision in *Carson v. Blazer*, that the owners of land on the banks of the Susquehanna and other principal rivers, have not an exclusive right to fish in the river immediately in front of their lands, but that the exclusive right to fisheries, in these rivers, is vested in the State, and open to all. It is unnecessary to enumerate at this time the rivers which may be called principal, but that name may be safely given to the Ohio, Monongahela, Youhiogeny, Allegheny, Susquehanna, and its north and west branches, Juniata, Schuylkill, Lehigh, and Delaware." The effect of the compact of 1783, between the States of Pennsylvania and New Jersey, upon rights of fishery, navigation, and jurisdiction in the Delaware River, is discussed in *Attorney General v. Delaware Railroad Co.*, 27 N. J. Eq. 1, 631; *McKeen v. Delaware Division Canal Co.*, 49 Penn. St. 424; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Hart v. Hill*, 1 Whart. 124; *Commonwealth v. Frazer*, 2 Phila. 191; 5 Am. L. Reg. 167; *Cobb v. Bennett*, 75 Penn. St. 326; *Bennett v. Boggs*, Bald. C. C. 60; 4 Am. Law Reg. 582. See *Rundle v. Delaware Canal Co.*, 14 How. 80; 1 Wall. Jr. 275.

§ 66. Same — Effect of admiralty decisions.— Private rights in the navigable fresh-water rivers of this country, especially those in the Western and Southern States, are materially affected by a series of decisions in the Supreme Court of the United States, with respect to the admiralty jurisdiction. The rule by which the navigability of a river is determined by the ebb and flow of the tide,<sup>1</sup> appears to have been first used in England to define the jurisdiction of the admiral who, by the king's commission, was charged with the care and protection of the Crown's prerogative rights in the sea.<sup>2</sup> The early acts of Parliament,<sup>3</sup> which limited the admiralty jurisdiction in civil cases to the "high seas," were usually construed by the common-law courts as meaning that portion of the sea which washes the open coast, and as prohibiting the exercise of this jurisdiction in the navigable arms and creeks of the sea which were within the countries, or *inter fauces terræ*,<sup>4</sup> however large or capable of navigation by sea-going vessels such places might be.<sup>5</sup> Such was considered to be the law of England when the question arose in this country.<sup>6</sup> But the Judiciary Act of 1789<sup>7</sup> conferred upon the district courts ex-

<sup>1</sup> Sir Henry Constable's Case, 5 Co. 106; Leigh v. Burley, Owen, 122; De Lovio v. Boit, 2 Gall. 398.

<sup>2</sup> Sir Henry Constable's Case, 5 Co. 106; 2 Bacon's Abr. tit. Court of Admiralty; 8 id. tit. Prerogative, B. 3; Callis on Sewers, 39; 4 Inst. 124, 134; Bains v. The James and Catherine, Bald. C. C. 544, 537.

<sup>3</sup> 13 Rich. II. ch. 5; 15 Rich. II. ch. 3; 2 Henry IV. ch. 11; Ramsay v. Allegre, 11 Wheat. 611, 616.

<sup>4</sup> Ante, § 5.

<sup>5</sup> See Leigh v. Burley, Owen, 122; The Public Opinion, 2 Hagg. Adm. 398; United States v. Wiltberger, 5 Wheat. 106, note; De Lovio v. Boit, 2 Gall. 398; Ins. Co. v. Dunham, 11 Wall. 1; Johnson v. Twenty-one Bales of Cotton, 2 Paine, 601; 2 Bacon Abr. tit. Court of Admiralty; 4 Inst. 137; Bruce's Case, 2 Leach, C. C. 1093; 2 Brown's Civ. & Adm. Law, 92; Coombes's Case, 1 Leach, 388; 1 East,

367. The rule has since been enlarged by statute in England. See The Diana, 1 Lush. 539; The Courier, id. 541; The Griefswald, Swab. Adm. 430.

<sup>6</sup> Ibid.; Waring v. Clarke, 5 How. (U. S.) 241; Talbot v. The Commanders, 1 Dall. 98; New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344; Ramsay v. Allegre, 12 Wheat. 611; The Huntress, Davies, 93, note.

<sup>7</sup> The ninth section of this act (1 Stat. at Large, p. 77) provides that the district courts of the United States "shall also have exclusive jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons' burthen, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common-law

clusive cognizance of all civil causes of admiralty and maritime jurisdiction arising upon waters which are navigable from the sea, as well as upon the high seas; and in repeated decisions,<sup>1</sup> the Supreme Court of the United States declined to adopt the English rule as the test for the interpretation of the grant in the Constitution which extended the power of the Federal courts "to all cases of admiralty and maritime jurisdiction." They considered that rule contrary to the general practice and understanding in this country, when the States were colonies, and held that the admiralty had, in this country, concurrent jurisdiction with the common-law courts in navigable rivers and arms of the sea, as far as the tide ebbed and flowed in them. In 1845 an act of Congress<sup>2</sup> was passed extending the jurisdiction of the district courts to certain cases of a maritime nature in different States and Territories upon the lakes and navigable waters connecting the lakes. In the case of *Genesee Chief*,<sup>3</sup> the question arose whether this act was constitutional, it being urged that it was not within that clause of the Constitution which empowers Congress to regu-

remedy, where the common law is competent to give it; and shall have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States."

<sup>1</sup> *The Thomas Jefferson*, 10 Wheat. 428; *Peroux v. Howard*, 7 Peters, 324; *The Orleans v. Phœbus*, 11 Peters, 175; *Waring v. Clarke*, 5 How. 441; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; *The Huntress, Davies*, 82; *Thomas v. Lane*, 2 Sumner, 1. See also *Rossiter v. Chester*, 1 Dougl. (Mich.) 154; *General Buell v. Long*, 18 Ohio St. 521; *Bullock v. The Lamar*, 1 West. Law J. 444; *Respublica v. Davison*, 4 Yeates, 125. The admiralty jurisdiction does not extend over the land so as to include a cause of damage originating on the water, like a fire, and destroying storehouses upon the wharf. *The Plymouth*, 3 Wall. 20; *ante*, § 33.

<sup>2</sup> 5 Stats. at Large, 726. This act provided that "the district courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons' burthen and upwards, enrolled and licensed for the coasting trade, and at the same time employed in business of commerce and navigation between ports and places in different States and Territories, upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas or tide waters within the admiralty and maritime jurisdiction of the United States."

<sup>3</sup> 12 How. 443, 454, 457.



late commerce, and that if the constitutional grant of admiralty powers did not extend to waters above the tide, Congress could not extend it by legislation. The decision in this case overruled the earlier cases which limited the admiralty jurisdiction to tide waters, and the reasoning of Taney, C. J., who delivered the opinion of the court, proceeds upon the ground that the admiralty jurisdiction in this country extends to all waters, whether fresh or salt, where navigation aids commerce between different States, or with foreign nations. The learned judge said: "There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason, and, indeed, would seem to be inconsistent with it. In England, undoubtedly, the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence, the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters. At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States, the far greater part of the navigable waters are tide waters. And in the States which were at that period in any degree commercial, and where courts of admi-



ralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water. And that definition, having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably, here as well as in England, tide water must be the limits of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition, originally correct, was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters." It was accordingly held that the great lakes and the waters connecting them were originally public waters, and within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.<sup>1</sup>

§ 67. **Same — Same.**— Such is now the established rule with respect to the admiralty jurisdiction of the United States Courts, a jurisdiction which is no longer limited in locality by the English rule, or by the acts of 1789 and of 1845.<sup>2</sup> The ebb

<sup>1</sup> The great inland lakes of Canada are within the admiralty jurisdiction, like the high seas, and offenses committed on such lakes may be inquired into, although in American waters. *Reg. v. Sharpe*, 5 P. R. (Canada), 135. Inland lakes, wholly within a State, are not navigable waters of the United States. *Stapp v. Clyde*, 43 Minn. 192.

<sup>2</sup> *Fretz v. Bull*, 12 How. (U. S.) 466; *Walsh v. Rogers*, 18 How. 283; *The*

and flow of the tide does not now constitute the test of the navigability of American waters, and those rivers are public and navigable in law which are navigable in fact. If, in their ordinary condition, by themselves, or by uniting with other waters, they form a continued highway, over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water, they are "navigable waters of the United States" within the meaning of the acts of Congress in which

New World, 16 How. 469; *Ure v. Coffman*, 19 How. 56; *New York Steamboat Co. v. Calderwood*, 19 How. 245; *Jackson v. The Magnolia*, 20 How. 296; *Allen v. Newbury*, 21 How. 244; *Maguire v. Card*, 21 How. 248; *Nelson v. Leland*, 22 How. 48; *Philadelphia R. Co. v. Philadelphia Towboat Co.*, 23 How. 215; *The Commerce*, 1 Black, 574; *The St. Lawrence*, 1 Black, 522; *The Fashion*, 21 How. 244; *The Plymouth*, 3 Wall. 20, 34; *Ad Hine v. Trevor*, 4 Wall. 555; 17 Iowa, 349; *The Moses Taylor*, 4 Wall. 411; *The Rock Island Bridge*, 6 Wall. 213; *The Belfast*, 7 Wall. 624; *The Eagle*, 8 Wall. 15; *The Daniel Ball*, 10 Wall. 557; *The Cotton Plant*, 10 Wall. 577; *Insurance Co. v. Dunham*, 11 Wall. 1; *Leon v. Garceran*, id. 185; *Barney v. Keokuk*, 94 U. S. 324; *Ex parte Easton*, 95 U. S. 68, 72; *Ex parte Boyer*, 109 U. S. 629; *Healy v. Joliet R. Co.*, 116 U. S. 191; *Easby v. Patterson*, 28 Am. L. Reg. 145, note; *The Katie*, 40 Fed. Rep. 480; *Steamboat Co. v. Chase*, 16 Wall. 522; 9 R. L. 419; *The Montello*, 20 Wall. 430; *The Lottawanna*, 21 Wall. 558; *United States v. Wilson*, 3 Blatch. 435; *The Sarah Jane*, 1 Lowell, 203; *Raymond v. The Ellen Stewart*, 5 McLean, 269; *Roberts v. Skolfield*, 3 Ware, 184; *The Avon*, 1 Brown Adm. 180; *The Illinois*, id. 497; *Revenue Cutter No. 1*, id. 76; *The General Cass*, id. 334; *Eads v. The H. D. Bacon*, Newb. Adm. 274; *Parmlee v. The Charles Mears*, id. 197; *Williams v. The Jenny Lind*, id. 443; *McGinnis v. The Pontiac*, id. 130; *The Flora*, 1 Biss. 29; *The Elmira Shepherd*, 8 Blatch. 341; *The Mary Washington*, 1 Abb. (U. S.) 1; *Jones v. The Coal Barges*, 3 Wall. Jr. 53; *The Leonard*, 3 Ben. 263; *The Kate Tremaine*, 5 Ben. 60; *Wolverton v. Lacey*, 18 Law Rep. 672; *Scott v. The Young America*, 1 Newb. Adm. 101; *The Illinois*, 1 Brown Adm. 497; *McCormick v. Ives*, Abb. Adm. 418; *The Ella B.*, 24 Fed. Rep. 508; *Cope v. Vallette Dry Dock*, 10 Fed. Rep. 142. Damages, given by a State statute, for a marine tort occurring on any navigable water of the United States, may be recovered in the proper district court in admiralty. *Holmes v. O. & C. R. Co.*, 5 Fed. Rep. 75; *The Clatsop Chief*, 8 id. 163; *Dorr v. Waldron*, 62 Ill. 221; *The Josephine*, 39 N. Y. 19; 50 Barb. 501; *Vose v. Cockcroft*, 44 N. Y. 415; 45 Barb. 58; *Baird v. Daly*, 4 Lans. 426; *General Buell v. Long*, 18 Ohio St. 521; *Petrel v. Dumont*, 23 Ohio St. 602; *Walters v. The Mollie Dozier*, 24 Iowa, 192; *Tug Boat Dorris v. Waldron*, 62 Ill. 221; *Merrick v. Avery*, 14 Ark. 370; *Little Rock R. Co. v. Brooks*, 39 Ark. 403; 4 Am. L. Rev. 664; 5 id. 582; *Morse v. Home Ins. Co.*, 30 Wis. 496.

that phrase is employed.<sup>1</sup> This departure from the precedents of the English law tends to support the position that the large inland rivers of this country are public in respect to property. In *Barney v. Keokuk*,<sup>2</sup> in the Supreme Court of the United States, Bradley, J., in delivering the opinion of the court, observed that the confusion of navigable with tide waters, found in the monuments of the common law, had not only retarded the development of the admiralty jurisdiction, but had laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above the tide which were at variance with sound principles of public policy; and that, since the decision in the case of the Gen-

<sup>1</sup> Ibid. Such acts do not extend to small streams declared navigable by State statutes. *Duluth Lumber Co. v. St. Louis Boom Co.*, 17 Fed. Rep. 419. Nor to lakes and rivers wholly within the limits of a State and having no navigable outlet to any other State or country. *United States v. Burlington Ferry Co.*, 21 Fed. Rep. 331.

<sup>2</sup> 94 U. S. 324. The learned judge said: "The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines, with regard to the ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines, where they have been applied, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which prop-

erly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367; *Pollard v. Hagan*, 3 How. (U. S.) 212; and *Goodtitle v. Kibbe*, 9 How. (U. S.) 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of the *Genesee Chief*, 12 How. (U. S.) 443, has declared that the great lakes and other navigable waters of the country, above, as well as below, the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view, depended, as most cases must depend, on the local laws of the States in which the lands were situated."

essee Chief, there seemed to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters.

§ 68. **Same — The ordinance of 1787.**— The ordinance of the Confederate Congress of July 13, 1787, entitled "An ordinance for the government of the territory of the United States north-west of the River Ohio," provided<sup>1</sup> that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost or duty therefor." And by successive acts of Congress the navigable waters in the Western States and Territories have been declared to be public highways.<sup>2</sup> A similar provision appears in the constitutions or statutes of the Western States bordering upon the Mississippi River with respect to that river,<sup>3</sup> and in the acts of Congress admitting them into the Union;<sup>4</sup> and in the early treaties between Great Britain or the United States upon the one hand, and France or Spain upon the other, it was provided that the navigation of this river should be free throughout its course.<sup>5</sup> These provisions may now, perhaps, be regarded as

<sup>1</sup> Art. IV.

<sup>2</sup> Acts of May 18 and June 1, 1796; March 3, 1803; March 26, 1804; Feb. 20 and March 3, 1811; April 8 and June 4, 1812; March 1 and May 8, 1817.

<sup>3</sup> See, for example, Const. of Wisconsin, art. 9; Alabama Code of 1852, p. 267, § 1205, and of 1851, p. 126, § 389; Mississippi Code of 1851, p. 177; Tennessee Code (1858), p. 295; Gen. Stats. of Nebraska (1878), pp. 63, 65.

<sup>4</sup> See, *e. g.*, 2 Stats. at Large, 349, 642, 703, 747, 546; 8 id. 349, 543; 5 id. 428, 431; *Hatch v. Wallamet Iron Bridge Co.*, 7 Sawyer, 127; 6 Fed. Rep. 326, 780; 27 id. 675. In *Woodruff v. Bloomfield G. M. Co.*, 8 Saw-

yer, 628; 9 id. 441, such a provision, in the act of Congress admitting California into the Union, was held valid as a law under the authority of Congress to regulate commerce, which the State cannot violate. The act of March 6, 1820 (3 Stat. 545), admitting Missouri into the Union, left the rights of riparian owners on the Mississippi river to be determined by State law. *St. Louis v. Myers*, 118 U. S. 566. The same is declared in the act of Congress relating to the sale and disposition of the public lands. 1 U. S. Stat. at Large, 466, 468; U. S. Rev. Stats. § 2476.

<sup>5</sup> 8 Stats. at Large, 83, 117, 141, 204; Art. 7 of the Treaty of Paris (1763); 1 Halleck's Int. Law, 150.

declaratory<sup>1</sup> of the modern rule that all rivers which are capable of navigation in their natural condition are subject to public use for that purpose, whether in other respects they are held to be private property or not.<sup>2</sup> But at the time the ordinance of 1787 was enacted, the question whether a fresh river is a public highway was thought to be dependent upon proof of long user by the public.<sup>3</sup> The ordinance became inoperative, except as adopted by the States formed out of the Northwest territory, from the very conditions on which those States were admitted into the Union.<sup>4</sup> Where it has been adopted as a constitutional provision, it restrains the power of the legislature to authorize obstructions which materially or unnecessarily impair navigation upon waters within its scope.<sup>5</sup>

§ 69. Same — The public land system — Illinois.— The system of surveys and grants of the public lands, adopted by the general government, is also important in this connection.<sup>6</sup>

<sup>1</sup> *Stuart v. Clark*, 2 Swan (Tenn.), 9, 17; *Gavit v. Chambers*, 3 Ohio, 496; *Hickok v. Hine*, 23 Ohio St. 523, 527; *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155, 165; *Lorman v. Benson*, 8 Mich. 18, 26; *Woodman v. Kilbourn Manuf. Co.*, 1 Abb. (U. S.) 158, 165; *The Montello*, 20 Wall. 430, 441; *Schurmeir v. St. Paul Railroad Co.*, 10 Minn. 82, 103; *Castner v. The Dr. Franklin*, 1 Minn. 73; *Morgan v. Reading*, 3 S. & M. 366, 405; *Commissioners v. Withers*, 29 Miss. 21, 38.

<sup>2</sup> *Ante*, §§ 51-54; *post*, § 75.

<sup>3</sup> *Ante*, § 53, note.

<sup>4</sup> *Sands v. Manistee River Imp. Co.*, 123 U. S. 288; *Wallamet Iron Bridge Co. v. Hatch*, 19 Fed. Rep. 347; *Cardwell v. American River Bridge Co.*, *id.* 562; 113 U. S. 205; *Louisville Bridge Co. v. Louisville*, 81 Ky. 189, 195; *Moore v. Sanborne*, 2 Mich. 519, 525; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Schurmeir v. Railroad Co.*, 10 Minn. 82; *McManus v. Carmichael*, 3 Iowa, 1; *Benson v. Morrow*, 61 Mo. 345; *Ross v. Faust*, 54 Ind. 471; *Holmes v. Mallett*, *Morris*

(Iowa), 82; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Reed v. Wright*, 2 G. Greene, 15. In *Attorney General v. Lake Superior Canal Co.*, 32 Mich. 233, it was held that the provision in an act of Congress, that a canal should be a public highway free from toll or charge, for United States vessels, simply secured a right of free passage, and did not create a trust for the United States in the possession of the State.

<sup>5</sup> *Sweeney v. Chicago Railway Co.*, 60 Wis. 60; *post*, §§ 76, 138. See *State v. St. Croix Boom Co.*, *id.* 565, refusing the exercise of *original* jurisdiction by the Supreme Court of Wisconsin to remove obstructions from a navigable boundary river.

<sup>6</sup> By the act of Congress of May 20, 1785, surveyors were directed to divide the territory, ceded by individual States, into townships of six miles square by lines running due north and south, and others crossing these at right angles, "unless where the boundaries of the tracts purchased from the Indians rendered the

In the case of *Middleton v. Pritchard*,<sup>1</sup> the Supreme Court of Illinois held that where a government grant is made which

same impracticable." 1 Land Laws, 19; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 285. This system was preserved in the act of Congress of May 18, 1796, which provided for the sale of the lands of the United States northwest of the Ohio River, the exception being as follows: "Unless where the line of the late Indian purchase, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers may render it impracticable; and then this rule shall be departed from no further than such particular circumstances may require." 1 Stats. at Large, 466, § 2; 2 id. 73, 277, 313, 642, 665; 19 id. 348; U. S. Rev. Stats. § 2395. The second section of the act of May 18, 1796, further provides: "Every surveyor shall note in his field-book the true situation of all mines, salt licks, salt springs, and mill seats which shall come to his knowledge; all watercourses over which the line he runs shall pass, and also the quality of the lands. These field-books shall be returned to the Surveyor General, who shall therefrom cause a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales. He shall also cause a fair plat to be made of the townships, and fractional parts of townships, contained in the said lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; a copy thereof shall be kept open at the Surveyor General's office, for public information; and other copies sent to the places of the sale, and to the Secretary of the Treasury." See

also U. S. Rev. Stats. § 2395. The third section of this statute provided that salt springs should be reserved, but that "there shall be no reservations, except for salt springs, in fractional townships, where the fraction is less than three-fourths of a township." The act of Congress of May 24, 1824 (4 Stats. at Large, 34; U. S. Rev. Stats. § 2407), empowered the President of the United States to prescribe rules and regulations authorizing a departure from the ordinary mode of surveying the public lands on any river, lake, bayou, or watercourse, so that the lands so situated might be surveyed in tracts of two acres in width and running back the depth of forty acres, which tracts, so surveyed, should be offered for sale entire. As to islands in the Mississippi River, on the side of the Illinois Territory, see § 1 of the act of Feb. 27, 1815 (3 Stats. at Large, 218). The above act of 1796 is the foundation of the surveying system of the United States. The act of Congress of 1803 (2 Stats. at Large, 229) made the provisions of this act applicable to the lands south of the State of Tennessee. The act of 1804 (2 Stats. at Large, 277) extended these provisions to all the lands of the United States, to which the Indian titles had been, or should thereafter be extinguished, north of the River Ohio, and east of the Mississippi River. The act of 1805 (2 Stats. at Large, 329) extended them to the Territory of Orleans; and that of 1811 (2 Stats. at Large, 665), to the Territory of Louisiana. The act of 1812 (2 Stats. at Large, 748) extended them to the Missouri Territory, and that of 1816 (3 Stats. at

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<sup>1</sup> 3 Scam. 510.



does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does no act which indicates an intention to make such reservation, the grant includes all that would pass by it if it were a private grant; and that as the United States had not imposed any limitation upon its grant of the land in question, which was an island in the Mississippi River, separated from the adjoining land by a slough, the title of the riparian owners extended to the thread of the river and included the island. It was not denied that it was within the power of the government to exclude the *prima facie* right of the riparian owner to claim to the centre of the stream, but the court considered that it had not indicated such intention in the particular case. The island and slough, they say, "are not marked or mapped upon the plat of the government surveys. But it appears the surveyor of the government traced the courses and distances along the margin of the slough, next the main land, in order to estimate the quantity of land in the fraction; and which estimate did not include the *locus in quo*. But the plats in the land office and Surveyor General's office have no line marking these courses and distances as a boundary. They are taken from the field-notes of meandering in the Surveyor General's office." It was held that the meandered lines, which are run for the purpose of determining the quantity of land in the fraction, are not boundary lines; and that islands which have not been surveyed, platted, or marked upon the government surveyor's map, pass as incident to a grant of the river banks. Wilson,

Large, 325) required the surveyor of the Missouri and Illinois Territory to observe these provisions in making his surveys. The act of 1850 (9 Stats. at Large, 496) made the same provisions applicable to the public lands in Oregon and Washington Territories; and that of 1854 (10 Stats. at Large, 308), to those in New Mexico, Kansas, Nebraska, and Utah. The system of survey, by base and meridian lines, thus established under the acts of Congress, is part of the public law, of which judicial notice is taken by the courts in those States carved out of

the public territory. *Murphy v. Hendricks*, 57 Ind. 593; *Bannister v. Grassy Ford Ditching Association*, 52 Ind. 178; *Jordan Ditching Association v. Wagoner*, 33 Ind. 50; *Turpin v. Eagle Creek Co.*, 48 Ind. 45; *Dickenson v. Breeden*, 30 Ill. 279; *Gooding v. Morgan*, 70 Ill. 275; *Prieger v. Exchange Ins. Co.*, 6 Wis. 89; *Atwater v. Schenck*, 9 Wis. 160; *Bittle v. Stuart*, 34 Ark. 224. See, generally, as to the land system of the United States, *Zabriskie's Public Land Laws*; *Lester's Land Laws*; 2 Am. Law Rev. 383, and cases cited *post*, § 76.



C. J., dissented upon the ground that the agents of the government, in selling the public lands, could not legally dispose of lands which had not previously been surveyed and platted; and that the rule adopted by the majority of the court was contrary to the policy and practice of the government in which the purchasers had acquiesced. The decision of the majority has since been followed in this State, where the river-beds are the property of the owners of the adjoining lands, when the plats in the United States land office show the river as a boundary, and there is no visible government monument.<sup>1</sup> A grant from the United States of land upon the Mississippi River extends to the thread of the current.<sup>2</sup> The riparian owner has also, by the law of this State, an exclusive right, as against the public, to the river banks to low-water mark.<sup>3</sup> The fee in the streets of cities and towns in this State is vested in the corporation; and, under this rule, where a bridge over a stream forms part of a street, the fee in the portion of the river beneath the bridge is held to be in the corporation, which may devote it, if the navigation is preserved, to such uses as, in the judgment of its authorities, will be most advantageous for the public.<sup>4</sup>

§ 70. Same — Ohio.— In Ohio the owners of lands situated upon the banks of its navigable streams own the river-beds, subject to the public right of navigation.<sup>5</sup> In *Gavit v. Cham-*

<sup>1</sup> *Canal Trustees v. Haven*, 5 Gilman, 548; *People v. St. Louis*, 5 Gilman, 351; *Ensminger v. The People*, 47 Ill. 384; *Chicago v. Laffin*, 49 Ill. 172; *Chicago v. McGinn*, 51 Ill. 266; *Hubbard v. Bell*, 54 Ill. 110; *Rockwell v. Baldwin*, 58 Ill. 19; *Braxton v. Bressler*, 64 Ill. 488; *Chicago Railroad Co. v. Stein*, 75 Ill. 41; *McCormick v. Huse*, 78 Ill. 363; *Houck v. Yates*, 82 Ill. 179; *Cobb v. Lavalley*, 89 Ill. 331, 334; *Lavalley v. Strobel*, id. 370; *Brooklyn v. Smith*, 104 Ill. 429, 438; *Trustees v. Schroll*, 120 Ill. 509, 518; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 550; *People v. Supervisors*, 125 Ill. 9; *Healy v. Joliet Railroad Co.*, 2 Ill. App. 435;

*Bristol v. Carroll Co.*, 95 Ill. 84; *Washington Ice Co. v. Shortall*, 101 Ill. 46; 80 Am. L. Reg. 819, note; *Piper v. Connelly*, 108 Ill. 646; *St. Louis v. Rutz*, 138 U. S. 226, 242; 35 Fed. Rep. 188; *Illinois v. Illinois Central R. Co.*, 33 Fed. Rep. 730.

<sup>2</sup> *Houck v. Yates*, 82 Ill. 179.

<sup>3</sup> *Ensminger v. The People*, 47 Ill. 384; *Chicago v. Laffin*, 49 Ill. 172. The first of these decisions relates to the Ohio River (see *post*, § 71); the second to the Chicago River.

<sup>4</sup> *Chicago v. McGinn*, 51 Ill. 266; *Canal Trustees v. Havens*, 11 Ill. 554; *Hunter v. Middleton*, 13 Ill. 50.

<sup>5</sup> *Gavit v. Chambers*, 3 Ohio, 496; *Benner v. Platter*, 6 id. 504; *Lamb v.*

bers<sup>1</sup> it was held that the ordinance of 1787<sup>2</sup> reserved to the public only the use of such streams for the purpose of passage; that the United States had manifested no intention of reserving any interest in the bed, banks, or waters of navigable fresh rivers; that there was nothing in the trust vested in Congress, or in the manner in which that trust had been executed, to warrant the establishment of any other principle than that afforded by the common law, and that the taking of stones, soil, and fish would lead to innumerable controversies, if this property had been treated by the United States as unappropriated territory. In the recent case of *June v. Purcell*,<sup>3</sup> it was held that the common-law doctrine, having been regarded for many years as a rule of property in this State, should not be rejected, irrespective of the question of its correctness. In computing the number of acres in a survey of lands upon a river, the stream at low-water mark is regarded in Ohio as the boundary for this purpose, and no account is made of the land between low-water mark and the thread of the stream.<sup>4</sup>

§ 71. Same — The Ohio river.—In Ohio and Illinois a grant of land bordering upon the Ohio River carries title at least to low-water mark.<sup>5</sup> The original grant by the State of Virginia only conveyed the territory on the northern bank of the Ohio River to low-water mark. By the compact of 1792 between Virginia and Kentucky a concurrent jurisdiction over this river is accorded to Ohio and Kentucky.<sup>6</sup> In Indiana, it is held that, as the State of Virginia, when proprietor of the lands on both sides of the Ohio River, ceded to the United States its right to the territory north-west of this

*Ricketts*, 11 id. 311; *Blanchard v. Porter*, id. 188; *Walker v. Board of Public Works*, 16 id. 540; *Hickok v. Hine*, 23 Ohio St. 523; *Niehaus v. Shepherd*, 26 id. 40; *Sloan v. Biemiller*, 34 id. 492, 512; *June v. Purcell*, 36 id. 396; *James v. Howell*, 41 id. 696; *Day v. Pittsburgh R. Co.*, 44 id. 406. See, also, *McCulloch v. Aten*, 2 Ohio, 307; *Cowper v. Hall*, 5 id. 320; *Hogg v. Zanesville Canal Co.*, 5 id. 410; *Hopkins v. Kent*, 9 id. 18.

<sup>1</sup> 8 Ohio, 496.

<sup>2</sup> *Ante*, § 68.

<sup>3</sup> *June v. Purcell*, 36 Ohio St. 396; *State v. Shannon*, id. 423.

<sup>4</sup> *Lamb v. Ricketts*, 11 Ohio, 311.

<sup>5</sup> *Blanchard v. Porter*, 11 Ohio, 138; *Booth v. Hubbard*, 8 Ohio St. 243; *Ensminger v. People*, 47 Ill. 384.

<sup>6</sup> 11 Ohio, 142; *ante*, § 62. See remarks of Woodward, J., in *McManus v. Carmichael*, 3 Iowa, 1, 36, 50, 54.

river, whereby the ordinary low-water mark on the northern bank became the boundary of the granted territory,<sup>1</sup> grants by the United States, or its grantees, of lands in Indiana situated on the river, extend the owner's title only to ordinary low-water mark;<sup>2</sup> and that the southern counties of Indiana are bounded by the same line, although the courts of such counties have concurrent jurisdiction with those of Kentucky over the river.<sup>3</sup> The State of West Virginia has jurisdiction of a criminal offense committed on a vessel moored within low-water mark to the bank of this river within the boundaries of Ohio opposite,<sup>4</sup> but private titles extend only to low-water mark.<sup>5</sup>

§ 72. **Same — Iowa.**—In Iowa the opinion of Woodward, J., in *McManus v. Carmichael*,<sup>6</sup> is among the leading American authorities upon this subject. The question in that case was whether the plaintiff, being the owner of an island in the Mississippi River under a patent from the United States, could maintain an action of trespass against the defendant for taking sand from a sand-bar at the upper end of the island between high and low-water mark and beyond the meanders of the government survey. It was held, upon a full review of the earlier authorities, that, although the ebb and flow of the tide was the common-law test of navigability, yet the term “navigable” embraced not only the idea of capacity for navigation but also that of publicity; that the test of the naviga-

<sup>1</sup> See *Handly v. Anthony*, 5 Wheat. 374; *Indiana v. Kentucky*, 136 U. S. 479; *Conway v. Taylor*, 1 Black, 603; *Commonwealth v. Garner*, 3 Gratt. 624, 655; *Ravenswood v. Flemings*, 22 W. Va. 52.

<sup>2</sup> *Stinson v. Butler*, 4 Blackf. 285; *Cowden v. Kerr*, 6 id. 280; *Gentile v. State*, 29 Ind. 409; *Martin v. Evansville*, 32 Ind. 85; *Sherlock v. Bainbridge*, 32 Ind. 85; 41 Ind. 35, 41; *Bainbridge v. Sherlock*, 29 Ind. 364; *Commissioners v. Pidge*, 5 Ind. 18; *Sherlock v. Alling*, 44 Ind. 184; *Henderson Bridge Co. v. Henderson (Ky.)*, 14 S. W. 85, 493.

<sup>3</sup> *Welch v. State (Ind.)*, 25 N. E. 883; *Carlisle v. State*, 32 Ind. 55; *McFall v. Commonwealth*, 2 Met. (Ky.) 394;

*Church v. Chambers*, 3 Dana, 279; *Garner's Case*, 3 Gratt. 655. Cases in Indiana are: *Cox v. State*, 3 Blackf. 193; *Madison v. Hildreth*, 2 Ind. 274; *Sherlock v. Bainbridge*, 41 Ind. 35; *Ross v. Faust*, 54 Ind. 471; *Ridgway v. Ludlow*, 58 Ind. 248; *Edwards v. Ogle*, 76 Ind. 302; *Dawson v. James*, 64 Ind. 162; *Sphung v. Moore*, 120 Ind. 352; *Moore v. Auge (Ind.)*, 25 N. E. 816. In the last case the Wabash River is referred to as “a navigable stream, the bed of which has neither been surveyed nor sold.”

<sup>4</sup> *State v. Plants*, 25 W. Va. 119.

<sup>5</sup> *Brown Oil Co. v. Caldwell (W. Va.)*, 13 S. E. 42; *Barre v. Fleming*, 20 W. Va. 314.

<sup>6</sup> 3 Iowa, 1.

bility of the Mississippi River is ascertained by use or by public acts or declarations; that the repeated declarations that this river is a public highway were to be construed in a broad sense as placing the Mississippi upon the same ground with a river navigable at common law; that by the laws, regulations, and practice of the general land office, the beds of navigable rivers were excepted from the surveys, the rivers were meandered, the lines run, and the monuments set, upon the margin of the bank, the area of the lands was computed and the lands sold with reference to the plats and field-notes of the surveys thus made, and islands were often surveyed and sold separately; and that, as the common law limited the riparian owner's title to the high-water mark in the case of waters technically navigable, all the arguments in favor of an absolutely public water and bed to low-water mark applied equally to the space between high and low-water mark. In Iowa the meander lines are not lines of boundary,<sup>1</sup> and the title of the riparian proprietors on navigable streams extends only to ordinary high-water mark.<sup>2</sup> While such proprietors have the right to erect wharves, piers, and landing places beyond that line, if the navigation is not thereby impaired, this is merely an incident to the riparian ownership and not the subject of independent sale.<sup>3</sup> The soil of a navigable river below high-water mark is the property of the State, and not of the United States;<sup>4</sup> and if, by act of Congress, a navigable river is declared non-navigable, this does not extend the title of riparian owners to the center of the stream or entitle such an owner to the possession of land below high-water mark which a railway company has begun to occupy while the river was yet navigable in contemplation of law.<sup>5</sup>

<sup>1</sup> *Kraut v. Crawford*, 18 Iowa, 549;  
<sup>2</sup> *Musser v. Hershey*, 42 Iowa, 356.

<sup>3</sup> *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199, 212; *Grant v. Davenport*, 18 Iowa, 179, 183; *Tomlin v. Dubuque Railroad Co.*, 32 Iowa, 106; *Houghton v. The C. D. & M. R. Co.*, 47 Iowa, 370; *Barney v. Keokuk*, 94 U. S. 324; *Renwick v. The D. & N. W. R. Co.*, 49 Iowa, 664, 669; *Moffett v. Brewer*, 2 G. Greene, 348.

<sup>4</sup> *Musser v. Hershey*, 42 Iowa, 356.

<sup>5</sup> *Renwick v. The D. & N. W. R. Co.*, 49 Iowa, 664, 669; *Martin v. Waddell*, 16 Peters, 367; *Pollard v. Hagan*, 3 How. 212; *Den v. Jersey City*, 15 id. 426; *Barney v. Keokuk*, 94 U. S. 324; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403.

<sup>6</sup> *Wood v. C., R. I. & P. R. Co.*, 60 Iowa, 456.

§ 73. **Same — Missouri.**— In Missouri the early case of *Mullanphy v. Daggett*<sup>1</sup> was decided according to the Spanish law, and it was held that the grants from the Spanish government of land upon the Mississippi River conveyed title to the water's edge. In the recent case of *Benson v. Morrow*,<sup>2</sup> it was held, following the decision of the Supreme Court of the United States in *Railroad Co. v. Schurmeir*,<sup>3</sup> that, the Missouri River, being treated in the acts of Congress as a navigable stream and public highway, the proprietors of lands on its banks, whose titles are derived from the United States, own only to the water's edge; and that islands in the river, which remain unsold, still belong to the United States. Under the act of Congress of June 7, 1836, ceding to this State the "Platte Purchase," the western boundary of the State is in the centre of the channel of the Missouri River.<sup>4</sup>

§ 74. **Same — Alabama.**— In Alabama the common-law rule is rejected.<sup>5</sup> In *Bullock v. Wilson*,<sup>6</sup> the court, referring to the early acts of Congress,<sup>7</sup> which declared that all navigable rivers within the territory of the United States south of the State of Tennessee "shall be deemed to be and remain public highways," said: "According to the laws and practice of the United States government, relating to the surveys and sale of the public domain, the Coosa, as well as other similar water-courses, is virtually excepted from all private grants. The lines of the survey stop at the margin of the river, by which means fractions (as in the case before us) are created; and the

<sup>1</sup> 4 Mo. 343.

<sup>2</sup> 61 Mo. 345. See, also, *Myers v. St. Louis*, 8 Mo. App. 266; *St. Louis v. Myers*, 113 U. S. 566; *Primm v. Walker*, 38 Mo. 94, 99; *Smith v. St. Louis*, 21 Mo. 36, 41; *Shelton v. Maupin*, 16 Mo. 124; *Smith v. Public Schools*, 30 Mo. 301; *Le Beau v. Gaven*, 37 Mo. 556; *Jones v. Soulard*, 24 How. (U. S.) 41; *The Schools v. Risle*, 10 Wall. 91; 40 Mo. 365.

<sup>3</sup> 7 Wall. 272; *post*, § 77.

<sup>4</sup> *St. Joseph R. Co. v. Devereux*, 41 Fed. Rep. 14.

<sup>5</sup> *Bullock v. Wilson*, 2 Porter, 436;

*Hagan v. Campbell*, 8 Porter, 9; *Lewen v. Smith*, 7 Porter, 428; *Mobile v. Eslava*, 9 Porter, 577; 16 *Peters* (U. S.) 234; *Magee v. Hallett*, 22 Ala. 699; *Stein v. Ashby*, 24 Ala. 521; 30 Ala. 363; *Ellis v. Carey*, 30 Ala. 725; *Rhodes v. Otis*, 33 Ala. 578; *Peters v. New Orleans Railroad Co.*, 56 Ala. 528; *Williams v. Glover*, 66 Ala. 189; *Walker v. Allen*, 72 Ala. 456. See *Lane v. Jones*, 79 Ala. 156 (wharf lien).

<sup>6</sup> 2 Porter, 436, 445, 448.

<sup>7</sup> 2 *Stats. at Large*, 235; 3 *id.* 492.

purchasers of such are only charged for the true quantity of land, the bed of the river being excluded. In respect to grants of lands bounded by watercourses, where there is no statute regulation on the subject, or express exception in the grant, intricate and highly interesting questions may arise as to the extent of the proprietor's right on the margin. In such cases the character of the water, whether the sea, a navigable river where the tide ebbs and flows, a fresh-water navigable stream, or one not navigable, is material to be considered in determining the extent of the grant." "It is very obvious, however, that with us the question does not depend on the tide, or fresh water; that if the river has been expressly recognized as a public highway by the Federal and State governments; or even if it be of sufficient width and depth, and suited to the ordinary purposes of navigation, and the government has not expressly granted any part of the bed, or computed it in the quantity granted, which implies an exception, as in the case of navigable water, the stream is thereby constituted a public highway, and no individual can assert any private right of soil in the bed beyond the low-water mark. His claim could have no better foundation than that in the case of the oyster-bed planted in the tide water, both places being alike reserved for public use." The character of the smaller fresh streams, which are capable of passage or of floatage at certain seasons, is held to be a question of fact.<sup>1</sup> If they have not been declared public highways by the legislature, or excluded from the surveys by the government surveyors, and are not valuable for public transportation and travel, they are presumed to be not public highways, but exclusively private property.<sup>2</sup>

§ 75. Same — Michigan — Wisconsin.— In Michigan it was held in the early case of *La Plaisance Bay Harbor Co. v. Monroe*,<sup>3</sup> that meandered streams were not included in the original survey, and that the beds of navigable streams are public and belong to the State. But the doctrine of the com-

<sup>1</sup> *Rhodes v. Otis*, 33 Ala. 578.

*Olive v. State*, 86 Ala. 88; *Morrison*

<sup>2</sup> *Ellis v. Carey*, 30 Ala. 725; *Rhodes v. Coleman*, 87 Ala. 655.

*v. Otis*, 33 Ala. 578; *Peters v. New Orleans Railroad Co.*, 56 Ala. 528; <sup>3</sup> *Walk. Ch.* 155, 168. See *Bigelow v. Shaw*, 65 Mich. 841.



mon law is now the rule in that State,<sup>1</sup> with respect both to platted city lots<sup>2</sup> and other lands bordering on rivers and streams.<sup>3</sup> The same rules prevail in Wisconsin.<sup>4</sup> But the title of the riparian proprietor, extending *usque ad filum aquæ*, is held in this State to be not only subject to the public right of navigation, but also to the right of the State to regulate the flow of the water and to do any act within the banks which the interests of commerce require;<sup>5</sup> and presumably both a purchaser from the United States and a private grantee take to the thread of a navigable stream.<sup>6</sup>

§ 76. Same — The Western rule.— According to all the decisions in those States in which the lands were originally

<sup>1</sup> *Lorman v. Benson*, 8 Mich. 18; *Rice v. Ruddiman*, 10 Mich. 125; *Moore v. Sanborne*, 2 Mich. 519; *Norris v. Hill*, 1 Mich. 202; *Ryan v. Brown*, 18 Mich. 196; *Clark v. Campau*, 19 Mich. 325; *Watson v. Peters*, 26 Mich. 508; *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 182; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 836; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453, 466; *Backus v. Detroit*, 49 Mich. 110; *Lincoln v. Davis*, 53 Mich. 375; *Jones v. Lee*, 77 Mich. 35; *Turner v. Holland*, 65 Mich. 453.

<sup>2</sup> *Watson v. Peters*, 26 Mich. 508; *Fletcher v. Thunder Bay River Boom Co.*, 51 Mich. 277.

<sup>3</sup> *Ibid.*; *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626.

<sup>4</sup> *Jones v. Pettibone*, 2 Wis. 308; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; 46 Wis. 237; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Walker v. Shepardson*, 4 Wis. 486; 2 *id.* 384; *Kimball v. Kenosha*, 4 Wis. 321; *Mariner v. Schulte*, 13 Wis. 692; *Cobb v. Smith*, 16 Wis. 661; *Arnold v. Elmore*, 17 Wis. 509; *Wood v. Hustis*, 17 Wis. 417; *Yates v. Judd*, 18 Wis. 118; *Gove v. White*, 20 Wis. 425; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *Arimond v. Green*

*Bay Co.*, 31 Wis. 316; *Wright v. Day*, 33 Wis. 260; *Morse v. Home Ins. Co.*, 30 Wis. 496; *Greene v. Nunnemacher*, 36 Wis. 50; *Olson v. Merrill*, 42 Wis. 203; *Delaphine v. Chicago Railway Co.*, *id.* 214; *Diedrich v. Northwestern Railway Co.*, *id.* 248; *Boorman v. Sunnachs*, *id.* 233. The Constitution of this State contains the usual provision that the Mississippi and the navigable waters leading into it shall be public highways; and the Statutes provide that where meandered rivers and streams are returned as navigable by a United States surveyor, they shall be deemed navigable. Const. Art. 9; Rev. Stats. (1858) p. 373.

<sup>5</sup> *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *Arimond v. Green Bay Co.*, 31 Wis. 316; *Delaphine v. Chicago Railway Co.*, 42 Wis. 214; *Boorman v. Sunnachs*, 42 Wis. 233; *Janesville v. Carpenter (Wis.)*, 46 N. W. 128; *post*, § 246. The States of Wisconsin and Minnesota have concurrent jurisdiction upon the St. Croix River and its waters, and the jurisdiction of each State is not affected by the fact that the boat causing a personal injury was on the opposite side of the centre of the stream. *Opsahl v. Judd*, 30 Minn. 126.

<sup>6</sup> *Norcross v. Griffiths*, 65 Wis. 599.



surveyed under the laws of the United States, the lines run by the United States surveyors along the river banks are not lines of boundary, the owners of the adjacent lands taking at least to the water's edge,<sup>1</sup> thus giving them the benefit of the river frontage, with the right of access<sup>2</sup> to the river, and the incidents of riparian proprietorship as to the use of the water.<sup>3</sup> The true meander line of a navigable stream or lake is the point to which the water usually rises in ordinary seasons of high water. In a question of boundary the position of that line is a question of fact for the jury;<sup>4</sup> and it controls although the meander line of the survey is found not to be coincident therewith.<sup>5</sup> When land owners once become riparian proprietors, they are entitled to the accretions, or newly-formed ground which may be left by the river after the survey and sale by the United States of the adjacent land, and which, if not their property, would separate them from the river.<sup>6</sup> The

<sup>1</sup> *Railroad Co. v. Schurmeir*, 7 Wall. 272; 10 Minn. 82; *Middleton v. Pritchard*, 3 Scammon, 422; *Canal Trustees v. Haven*, 5 Gilman, 548; *Gavit v. Chambers*, 3 Ohio, 495; *Wood v. Appal*, 63 Penn. St. 210; *Kraut v. Crawford*, 18 Iowa, 549; *Boynton v. Miller*, 22 Iowa, 579; *Musser v. Hershey*, 42 Iowa, 356; *Morrow v. Benson*, 61 Mo. 345; *Meyers v. St. Louis*, 8 Mo. App. 266; *Minto v. Delaney*, 7 Oregon, 337; *Moore v. Willamette Transportation Co.*, id. 355, 356; *June v. Purcell*, 36 Ohio St. 396, 407; *Shoemaker v. Hatch*, 18 Nev. 261; *Lammers v. Nissen*, 4 Neb. 245, 250; *St. Paul Railroad Co. v. First Division Railroad Co.*, 26 Minn. 31; *Wright v. Day*, 33 Wis. 260; *Delaphine v. Chicago Railway Co.*, 42 Wis. 214; *Boorman v. Sunnachs*, id. 233; *Ladd v. Osborne*, 79 Iowa, 98; *Berry v. Snyder*, 3 Bush, 266; *Miller v. Hepburn*, 8 Bush, 326; *Quicksilver Mining Co. v. Hicks*, 4 Sawyer, 688; *Hills v. Houston*, id. 195; *Forsyth v. Smale*, 7 Biss. 201; *Ross v. Faust*, 54 Ind. 471, 475; *Twogood v. Hoyt*, 42 Mich.

609; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403.

<sup>2</sup> *Post*, ch. 5; *Yates v. Milwaukee*, 10 Wall. 497; *Dutton v. Strong*, 1 Black, 23; *Railroad Co. v. Schurmeir*, 7 Wall. 272; 10 Minn. 82; *Grant v. Davenport*, 18 Iowa, 179; *Rice v. Ruddiman*, 10 Mich. 125; *Sherlock v. Bainbridge*, 41 Ind. 35.

<sup>3</sup> *Post*, ch. 6.

<sup>4</sup> *Ibid.*; *Johnson v. Knott*, 18 Oregon, 308. See *Jackel v. Reiman (Texas)*, 14 S. W. 1001; *Bissell v. Fletcher*, 19 Neb. 725; *Sphung v. Moore*, 120 Ind. 852; *Rayburn v. Winant*, 16 Oregon, 318; *Clute v. Fisher*, 65 Mich. 48; *James v. Howell*, 41 Ohio St. 696.

<sup>5</sup> *Ibid.*; *Everson v. Waseca*, 44 Minn. 247; *Jefferies v. East Omaha Land Co.*, 134 U. S. 178; *Fuller v. Dauphin*, 124 Ill. 542; *Palmer v. Dodd*, 64 Mich. 474; *Menasha Woodenware Co. v. Lawson*, 70 Wis. 600; *Sphung v. Moore*, 120 Ind. 852; *post*, § 85.

<sup>6</sup> *Kraut v. Crawford*, 18 Iowa, 549. See *Boynton v. Miller*, 1 Stiles, 100:

tendency is to accept the decisions of the Supreme Court of the United States in *Railroad Co. v. Schurmeir*,<sup>1</sup> and *Barney v. Keokuk*,<sup>2</sup> in those States in which the rule extending the riparian owner's title to the centre of the stream had not been previously adopted. These decisions have been recently followed in Missouri,<sup>3</sup> Minnesota,<sup>4</sup> Arkansas,<sup>5</sup> Oregon,<sup>6</sup> Nevada,<sup>7</sup> Kansas,<sup>8</sup> Florida,<sup>9</sup> and California.<sup>10</sup>

§ 77. **Same — Limits of the river.**— In *Railroad Co. v. Schurmeir*,<sup>11</sup> the question was as to the title to an island in the Mississippi River, which at the time of the survey was a mere sandbar about ninety feet wide and one hundred and sixty feet long, separated from the mainland by a slough or channel twenty-eight feet wide. The island was submerged at high water (of which no notice was taken in making the survey), and the slough was insignificant in comparison with the main

*Minto v. Delaney*, 7 Oregon, 337; *Moore v. Willamette Transportation Co.*, id. 355; *Lammers v. Nissen*, 4 Neb. 245; *Shoemaker v. Hatch*, 13 Nev. 261; *Banks v. Ogden*, 2 Wall. 57; *Rex v. Yarborough*, 8 B. & C. 91; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122; *Bristol v. Carroll County*, 95 Ill. 84; *Chicago Dock Co. v. Kinzie*, 98 Ill. 415; *Middleton v. Pritchard*, 3 Scam. 510; *Lovington v. County of St. Clair*, 64 Ill. 56; *County of St. Clair v. Lovington*, 23 Wall. 46; *Stephenson v. Goff*, 10 Rob. (La.) 99; *Benson v. Morrow*, 61 Mo. 345; *Lamme v. Buse*, 70 Mo. 463; *Shelton v. Maupin*, 16 Mo. 124.

<sup>1</sup> 7 Wall. 272; *Packer v. Bird*, 137 U. S. 661; 71 Cal. 134.

<sup>2</sup> 94 U. S. 324.

<sup>3</sup> *Benson v. Morrow*, 61 Mo. 345; *Lamme v. Buse*, 70 Mo. 463; *Meyers v. St. Louis*, 8 Mo. App. 266; *ante*, § 73; *Swearingen v. The Lynx*, 13 Mo. 519; *Adams v. St. Louis*, 32 Mo. 25; *Jones v. Soulard*, 24 How. 41.

<sup>4</sup> *Castner v. Steamboat Dr. Franklin*, 1 Minn. 73, 78; *Schurmeir v. St. Paul Railroad Co.*, 10 Minn. 82, 102;

s. c. 7 Wall. 272; *Mankato v. Willard*, 18 Minn. 13, 27; *Brisbane v. St. Paul Railroad Co.*, 23 Minn. 114, 129, 130; *St. Paul Railroad Co. v. First Division Railroad Co.*, 26 Minn. 31; *Union Depot Co. v. Brunswick*, 31 Minn. 297.

<sup>5</sup> *St. Louis Ry. Co. v. Ramsey*, 53 Ark. 314.

<sup>6</sup> *Minto v. Delaney*, 7 Oreg. 337; *Moore v. Willamette Transportation Co.*, id. 355, 356; *Weise v. Smith*, 3 Oreg. 445, 448; *Felger v. Robinson*, id. 455; *Weise v. Oregon Iron Co.*, 13 id. 496.

<sup>7</sup> *Shoemaker v. Hatch*, 13 Nev. 261.

<sup>8</sup> *Wood v. Fowler*, 26 Kansas, 682. As to the fishery act of this State, see *State v. Stunkle*, 41 Kansas, 456. In Texas, see *Rhodes v. Whitehead*, 27 Texas, 304; *Muller v. Landa*, 31 Texas, 265; *Phillips v. Ayres*, 45 Texas, 601. In Arkansas, *Warren v. Chambers*, 25 Ark. 120, 122.

<sup>9</sup> *Bucki v. Cone*, 25 Fla. 1.

<sup>10</sup> *Lux v. Haggin*, 69 Cal. 255; *Packer v. Bird*, 71 Cal. 134; 137 U. S. 661; 32 Cent. L. J. 294, 297.

<sup>11</sup> 7 Wall. 272; 10 Minn. 82.

river. At the time of the action, the sandbar had been filled in and covered with valuable improvements, and the contest was between the owner of the adjoining fraction and a railroad company which claimed the bar under a new survey made by a United States surveyor, and a congressional grant of certain odd numbered sections. It was held that the sandbar was included in the first survey as part of the mainland. In general, where the waters of a river are separated into two channels by an island or sandbar, the question whether such island or bar was included in the survey as part of the adjoining land, is one of fact, depending chiefly upon the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the meander line and the main channel.<sup>1</sup> Mere rocks and shoals lying along the margin of navigable fresh rivers belong to riparian owners.<sup>2</sup> In the recent case of *Packer v. Bird*, in the United States Supreme Court, the doctrine was settled that a patent from the United States, which in terms bounds the land on the margin of a navigable fresh-water stream, conveys only to the water's edge.<sup>3</sup>

§ 78. Same — The West — Unnavigable streams. — At common law, the owners of lands bordering upon unnavigable streams own to the thread of the stream in severalty and not in common.<sup>4</sup> But the acts of Congress,<sup>5</sup> after declaring that "all navigable rivers, within the territory occupied by the public lands, shall remain and be deemed to be public highways," provide that, "in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."

<sup>1</sup> *Shoemaker v. Hatch*, 18 Nev. 261; *Lammers v. Nissen*, 4 Neb. 251; *Granger v. Swart*, 1 Woolw. 90; *Benson v. Morrow*, 61 Mo. 345; *Adams v. St. Louis*, 32 Mo. 25; *Minto v. Delaney*, id. 337; *St. Paul Railroad Co. v. First Division Railroad Co.* 26 Minn. 31; *Rock Island County v. Sage*, 88 Ill. 582; *Berry v. Snyder*, 3 Bush, 266, and cases cited; *ante*, § 78. See *post*, § 166, note; *De Guyer v. Banning* (Cal.), 25 Pac. 252.

<sup>2</sup> *Moore v. Willamette Transportation Co.*, 7 Oreg. 355; *Watson v. Peters*, 26 Mich. 508.

<sup>3</sup> *Packer v. Bird*, 137 U. S. 661; 71 Cal. 134; 32 Cent. L. J. 294, and note.

<sup>4</sup> See *Moffett v. Brewer*, 1 G. Greene, 348, 358; *Ingraham v. Wilkinson*, 4 Pick. 268.

<sup>5</sup> 1 Stats. at Large, 468, § 9; 2 id. 235, § 17; U. S. Rev. Stats. § 2476.

These provisions were construed in the case of *Railroad Co. v. Schurmeir*,<sup>1</sup> before the Supreme Court of Minnesota, a decision which was affirmed in the Supreme Court of the United States. It was here held that while there appears to be no law requiring watercourses to be meandered, yet, as the acts of Congress require the contents of each subdivision to be returned to the surveyor general, and a plat of the land surveyed to be made by him, the meander lines are necessarily employed, not as boundaries of the tract, but as a means of defining the sinuosities of the river banks and of ascertaining the quantity of land in the fraction which is subject to sale and is to be paid for by the purchaser; and that the watercourse, and not the meander line, is the boundary. Clifford, J., considered that the better opinion was that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream because of the provision that such rivers shall be deemed to be and remain public highways; that Congress had substantially adopted the common-law rule with respect to unnavigable streams, and that in distinguishing between streams navigable and those not navigable, it intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, and to them only.<sup>2</sup> In a later case in Indiana<sup>3</sup> this view was adopted,

<sup>1</sup> *Schurmeir v. Railroad Co.*, 10 Minn. 82; *Railroad Co. v. Schurmeir*, 7 Wall. 272; approved in *The Schools v. Risley*, 10 Wall. 91, 110; *Yates v. Milwaukee*, id. 497, 504; *Bates v. Illinois Central Railroad Co.*, 1 Black, 204.

<sup>2</sup> See *Stuart v. Clark*, 2 Swan, 1; *Chicago Railroad Co. v. Stein*, 75 Ill. 41; *Forsyth v. Smale*, 7 Biss. 201.

<sup>3</sup> *Ross v. Faust*, 54 Ind. 471, 474, 475; *Ridgway v. Ludlow*, 58 Ind. 248. In *Ross v. Faust*, which related to the title to the bed of a meandered unnavigable stream, Perkins, J., said: "We have in the United States three classes of rivers: one, in which the tide ebbs and flows, and may be called salt-water rivers; one, of fresh-water rivers which are navigable for vessels

used in interstate commerce; one, of fresh-water rivers which are not navigable for vessels used in interstate commerce. The ownership of the bed of the first class of rivers mentioned is in the public. The ownership of the bed of such of the second class as are in what is known as the North West Territory is in doubt. There is no such concurrence of judicial opinion on the point as enables us to say, upon authority, who owns the bed of these rivers, and it is not necessary that we should decide the point in this case. The ownership of the bed of the third class is, *prima facie*, in the proprietors of the opposite bank, each owning to the thread of the stream. . . . The idea that the power was given a surveyor or his deputy, upon casual ob-

although it was noticed that such a construction is in apparent conflict with the language of the statute.<sup>1</sup> In California it is held that a series of statutes which declare what streams and parts of streams are navigable, and which, after naming a part of a certain stream, and changing its limits repeatedly, omits the stream entirely, amounts to an implied declaration that such stream is non-navigable.<sup>2</sup> The repeal of a Federal statute, which declared a river to be navigable at a certain point, does not invest the riparian owners with title to the middle of the stream;<sup>3</sup> nor does it change the boundary upon such stream under a patent.<sup>4</sup>

§ 79. **Lakes and ponds.**—Fresh-water lakes and ponds are bodies of standing water distinguishable from rivers chiefly by the fact that they have no current.<sup>5</sup> Frequently, also, they are inaccessible from the sea or from a distance without trespassing upon private lands. The fact that there is a current from a higher to a lower level does not make that a river

servation, to determine the question of the navigability of rivers, and thereby conclude vast public and private rights, is an absurdity.” As to the objection that the surveyor had meandered the banks of the stream and had failed to survey its bed, and that the bed was not bought and paid for, and did not pass to the riparian owners, the learned judge said: “As to the fact, if it be so, that it was not paid for, we may observe that it is a fact of little importance. The Government was not selling her public lands for the purpose of making money. She did not sell them for their value. She was selling them for an almost nominal price, a dollar and a quarter an acre,—enough to cover the cost of survey and sale, possibly a little more. Her object was to induce the settlement in the country of a hardy, land-owning people. Her surveys of the whole were more or less inaccurate.”

<sup>1</sup> See *Moffett v. Brewer*, 1 G. Greene, 348, 358.

<sup>2</sup> *Caldwell v. Sacramento County*, 79 Cal. 347 (Thornton, J., dissenting).

<sup>3</sup> *Steele v. Sanchez*, 72 Iowa, 65; *C. B. & Q. Ry. Co. v. Porter*, id. 426. See, also, as to statutes declaring streams highways, *Walpole v. Charleston (S. C.)*, 11 S. E. 891.

<sup>4</sup> *Serrin v. Grefe*, 67 Iowa, 196.

<sup>5</sup> *Callis on Sewers*, 82; *Woolrych on Sewers*, 81; *ante*, § 41. *Callis* (p. 82) defines a pool as “a mere standing water, without any current at all;” but speaks of a pond as if it were always artificial and not natural. Doubtless it may have a broader meaning. In *Waterman v. Johnson*, 18 Pick. 261, 265, Shaw, C. J., said: “The word pond is indefinite. It may mean a natural pond, or an artificial pond raised for mill purposes, either permanent or temporary.” As to the right to pass or to fish beyond the *filum aquæ* of a lake, see *Mackenzie v. Bankes*, 3 App. Cas. 1824; *Scott v. Napier*, 7 Macph. H. L. 85; *Cochrane v. Minto*, 6 Paton, 189. See *McLaughlin v. Sandusky*, 17 Neb. 110.

which would otherwise be a lake, nor does a lake lose its distinctive character because there is a current in it for a certain distance tending towards a river which forms its outlet.<sup>1</sup> On the other hand, the fact that a river broadens into a pond-like sheet with a current does not deprive it of its character as a river.<sup>2</sup> Where it is admitted or not denied that the water is not a lake or a pond, the material difference between which is in size, the only criterion by which to determine whether it is a river, is the existence of a current, and this question cannot be answered by ascertaining what appellations have been given to it.<sup>3</sup>

§ 80. Same — In England and Ireland. — The early authorities lay down no definite rule respecting property in inland lakes and ponds otherwise than by limiting the property of the Crown to tide waters.<sup>4</sup> In *Marshall v. Ulleswater Steam Navigation Co.*,<sup>5</sup> decided in 1863, Wightman, J., remarked that it was not necessary to determine in that case “whether the soil of lakes, like that of fresh-water rivers, *prima facie* belongs to the owners of the land or of the manors on either side *ad medium filum aquæ*, or whether it belongs *prima facie* to the king in right of his prerogative;” and the case was decided upon another ground. The case of *Bristow v. Cormican*,<sup>6</sup> before the House of Lords in 1878, was an action of trespass for taking fish in Lough Neagh, a fresh-water lake in Ireland, over the whole of which the plaintiff claimed a several fishery under a grant of a fishery and of islands in the lake from King Charles II. The fishery described in this grant did not clearly include the whole lake, and no evidence was introduced as to the title of the Crown to the

<sup>1</sup> *Per* Gilchrist, J., in *State v. Gilmanston*, 14 N. H. 467; 9 *id.* 461.

<sup>2</sup> *Ibid.*; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569.

<sup>3</sup> *Ibid.* See *Rice v. Ruddiman*, 10 Mich. 125, 135, 136; *Phinney v. Watts*, 8 Gray, 269, 270.

<sup>4</sup> *Devonshire v. Pattinson*, 20 Q. B. D. 263; *Pery v. Thornton*, 23 L. R. Ir. 402. See remarks of Gray, J., in *Paine v. Woods*, 108 Mass. 160, 169 (1871), citing *Duke* (ed. 1676) 5, 135;

(ed. 1805) 8, 129; *Marshall v. Ulleswater Steam Navigation Co.*, 3 B. & S. 732; Hunt on Boundaries and Fences (2d ed.), 19; Greyes' Case, Owen, 20; *Pollenfen v. Crispin*, 1 Vent. 122; Bell's Law of Scotland, 171.

<sup>5</sup> 3 Best & Smith, 732, 742, citing Hale, De Jure Maris, ch. 1; Com. Dig. Prerogative (D. 50).

<sup>6</sup> 3 App. Cas. 641; s. c. Ir. R. 10 C. L. 398, 412; 2 L. R. Ir. 118.



soil and fishings of the lake. The issue was not whether a lake in which the tides of the sea had never flowed was a public navigable inland sea in which the right of fishing was common, but whether upon the royal grant, coupled with evidence of certain subsequent acts of possession in other parts of the lake, and in the absence of evidence of the extent of the Crown's ownership or possession at the time of the grant, the jury were properly directed to find for the plaintiffs, or whether the case should have been submitted to them on the evidence as to the plaintiffs' title and right to maintain the action. The Lord Chancellor<sup>1</sup> said: "The Crown has no *de jure* right to the soil or fisheries of a lough like Lough Neagh. Lough Neagh is, as your Lordships are aware, the longest inland lake in the United Kingdom, and one of the largest in Europe. It is from fourteen to sixteen miles long, and from six to eight miles broad. It contains nearly one hundred thousand acres; but though it is so large, I am not aware of any rule which would, *prima facie*, connect the soil or fishings with the Crown, or disconnect them from the private ownership either of riparian proprietors or other persons." Lord Blackburn said:<sup>2</sup> "It is clearly and uniformly laid down in our books, that where the soil is covered by the water, forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case or book of authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake." "It does not seem convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the lough, many miles in length, tacked on to his frontage. But no question arises in this case as to the rights of the riparian proprietors amongst themselves, for no title is made by either party through any one as riparian owner. . . . It is, however, necessary to decide whether the Crown has of common right a *prima facie* title to the soil of a lake; I think it has not. I know of no authority for saying it has, and I see no reason why it should have it."<sup>3</sup>

<sup>1</sup> Lord Cairns, pp. 652, 653.

<sup>3</sup> See *ante*, § 19, note.

<sup>2</sup> pp. 665, 667.



§ 81. **Same — Same.**— In *Bloomfield v. Johnston*,<sup>1</sup> the Exchequer Chamber in Ireland held that Lough Erne, an Irish fresh-water lake, which is forty-five miles in length, although navigable and commonly used by the public for travel and transportation, was not subject to a common of fishery in the public as of right. It appears, therefore, that by the law of England the Crown and the public have no such rights in fresh-water lakes as they possess in tide waters; that the soil and fishings in them are private property; and that, while the rule which extends the riparian owners' title *usque ad filum aquæ* does not appear to have been applied to lakes, as to unnavigable streams, and is an inconvenient rule for the determination of rights in large lakes,<sup>2</sup> yet the public have no greater privileges in them than in fresh-water rivers. The public right of navigation in them doubtless depends upon prescription and proof of long-continued user.<sup>3</sup>

§ 82. **Same — The American rule.**— In this country the question has received greater attention than in England. In the case of *Canal Commissioners v. People*,<sup>4</sup> decided in the Court of Errors in New York in 1830, Chancellor Walworth, while holding that the common-law rule was applicable to the navigable fresh rivers of the State, said: "The principle itself does not appear to be sufficiently broad to embrace our large fresh-water lakes, or inland seas, which are wholly unprovided for by the common law of England. As to these there is neither flow of the tide, or thread of the stream, and our own local law appears to have assigned the shores down to the ordinary low-water mark to the riparian owners, and the beds of the lakes with the islands therein to the public." The common-law rule as to fresh streams has been held in that State,<sup>5</sup>

<sup>1</sup> Ir. R. 8 C. L. 68.

<sup>2</sup> *Bristow v. Cormican*, *ante*, § 79.

<sup>3</sup> See *Marshall v. Ulleswater Steam Navigation Co.*, L. R. 7 Q. B. 166; *Bloomfield v. Johnston*, Ir. R. 8 C. L. 68; *Bristow v. Cormican*, 8 App. Cas. 641; Ir. R. 10 C. L. 398, 412; *Marshall v. Ulleswater Steam Navigation Co.*, 8 B. & S. 732; *Reg. v. Burrow*, 84 Justice of the Peace, 58; *Mackenzie v. Bankes*, 3 App. Cas. 1824.

<sup>4</sup> 5 Wend. 423, 446; *Canal Appraisers v. People*, 17 Wend. 571, 597, 616, 621; 3 Kent Com. 429, note (a), 430; *Kingman v. Sparrow*, 12 Barb. 301; *Ledyard v. Ten Eyck*, 36 Barb. 102. <sup>5</sup> *Champlain Railroad Co. v. Valentine*, 19 Barb. 484. See *Trustees v. Dennett*, 9 N. Y. Sup. Ct. 669. As to grants of land under navigable waters by the commissioners of the land office, under N. Y. Rev. Stats.

and also in Vermont,<sup>1</sup> to be inapplicable to Lake Champlain. In *Champlain and St. Lawrence Railroad Co. v. Valentine*,<sup>2</sup> in New York, it was held that proprietors on the borders of Lake Champlain are the owners to low-water mark, unless otherwise limited by the terms of their grants.<sup>3</sup> Lands in Vermont bounded on Lake Champlain, and upon the streams which empty into that lake, and ordinarily maintain the same level as its waters, also extend to the edge of the water at low-water mark,<sup>4</sup> and the State of Vermont has constitutional power to prohibit net fishing in that lake and in rivers emptying into it within ten miles of their mouth.<sup>5</sup> The United States has nothing to do therewith.<sup>6</sup>

§ 82a. **Same — Same.**— The distinction between public and private lakes depends upon the size and navigability of the particular lake, and its relation to other waters which flow into it or with which it is connected. Lake Winnipiseogee, which is of irregular shape, being about twenty-five miles in length, and varying in width from one to ten miles, and is considerably used for purposes of navigation,<sup>7</sup> is held in New Hampshire to be public property, both with respect to its bed and the right of fishing in its waters.<sup>8</sup> The common-law rule as to fresh waters is wholly inapplicable to Lake Erie and the bays which form a part of it.<sup>9</sup> The right of fishing in the great lakes, remote from the land, is as much a common right

(7th ed.) 573 *et seq.*, etc., see *People v. Jones*, 112 N. Y. 597; *Rumsey v. New York R. Co.*, 114 N. Y. 423; *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382; *Bedlow v. New York Dry-Dock Co.*, 112 N. Y. 263.

<sup>1</sup> *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 316, 323; *Austin v. Rutland Railroad Co.*, 45 Vt. 215; 17 Fed. Rep. 466.

<sup>2</sup> 19 Barb. 484, 492.

<sup>3</sup> As to boundaries upon lakes and ponds, see *post*, § 203.

<sup>4</sup> *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 316, 323; *Austin v. Rutland Railroad Co.*, 45 Vt. 215.

<sup>5</sup> *Drew v. Helliker*, 56 Vt. 641.

<sup>6</sup> 17 A. G. Op. 74.

<sup>7</sup> *State v. Franklin Falls Co.*, 49 N. H. 240, 250.

<sup>8</sup> *State v. Gilmanton*, 9 N. H. 461; s. c. 14 N. H. 467; *State v. Franklin Falls Co.*, 49 N. H. 240, 250.

<sup>9</sup> A navigable land-locked bay or harbor connected with the lake may be held by private ownership, subject to public navigation and fishery, when the holder derives his title from an express grant made or sanctioned by the United States. *Hogg v. Berman*, 41 Ohio St. 81. The grantee or patentee then owns to low-water mark. *Hardin v. Jordan*, 16 Fed. Rep. 823, and note; 140 U. S. 371; *post*, § 203.

as in tide waters,<sup>1</sup> and may be there exercised with stakes, if this is not forbidden by law and does not impede navigation.<sup>2</sup> In Canada the soil beneath Lake Ontario and the other great lakes is held to be vested in the Crown.<sup>3</sup> In *Rice v. Ruddiman*,<sup>4</sup> the Supreme Court of Michigan passed upon the title to the soil of Lake Muskegon, which was shown to be about six miles long, with an average width of two and one-half miles, and to be separated from Lake Michigan by an outlet about sixty rods long. The fact that the level of Lake Muskegon was affected by the rise and fall of the waters of Lake Michigan was held not to make the former lake necessarily a part of the latter, rather than a mere widening of Muskegon River which flowed into it; and the common-law rule as to fresh streams was held so far applicable to this lake as to entitle the riparian owner to such parts of its bed as were near the shore and capable of beneficial private use, subject, however, to the common right of navigation.<sup>5</sup>

§ 83. Same — Same.— A lake or pond which is not really useful for navigation, although of considerable size compared

<sup>1</sup> *Sloan v. Biemiller*, 34 Ohio St. 492. See, also, *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155, 168; *Bay City Gas-light Co. v. Industrial Works*, 28 Mich. 182, 185; *Verplank v. Hall*, 27 Mich. 79.

<sup>2</sup> *Lincoln v. Davis*, 53 Mich. 375; 17 A. G. Op. 59; 13 Cent. L. J. 1; 82 id. 291.

<sup>3</sup> *Attorney General v. Perry*, 15 C. P. (Can.) 329; *ante*, § 56.

<sup>4</sup> 10 Mich. 125. See *Jones v. Lee*, 77 Mich. 35; *Webber v. Pere Marquette Boom Co.* 62 Mich. 626.

<sup>5</sup> In *Diedrich v. North-western Railway Co.*, 42 Wis. 248, 271, the court say of this case: "The same ground of the rule in *Rice v. Ruddiman*, 10 Mich. 125, that the riparian owner takes *usque ad medium filum aquæ* upon Muskegon Lake, is that the lake is only a widening of the river. With the same view of the lake, we should hold the same view

of the law. It is true that some of the opinions speak of extending the same rule of ownership *usque ad medium filum aquæ* to all small lakes within the State; but not so to Lake Michigan. It is also true that some of the opinions speak, and we cannot help thinking somewhat loosely, of some measure of riparian right of use, 'not exclusively or unrestricted,' of the bed of navigable waters under the shallow water by the shore." In Vermont it seems that the creeks and inlets which empty into Lake Champlain, so far as they are of the same level as the lake and ordinarily rise and fall with it, are public like the lake. *Fletcher v. Phelps*, 28 Vt. 257, 262; *Jakeway v. Barrett*, 38 Vt. 316, 323. So Sodus Bay in Wayne county, N. Y., is a part of Lake Ontario with respect to the New York game laws. *People v. Featherly*, 12 N. Y. S. 389.

with ordinary fresh-water streams, may be private property. In North Carolina it is held that a lake, which is fifteen miles long, eight miles wide, and only three and one-half feet deep, with no important outlet, and not forming a link in a chain of water communication, is non-navigable, and that the riparian owners are not entitled to land made by a withdrawal of its waters.<sup>1</sup> In New York, it has been held that an inland lake, five miles long and three-quarters of a mile wide, which has no important inlet, and does not form a part of a chain of connecting waters, is subject to the common-law rule as to fresh-water streams.<sup>2</sup> In New Jersey, where there are no large inland lakes extensively used for commerce,<sup>3</sup> it is held that the test by which to determine whether waters are public or private is the ebb and flow of the tide, and that the decisions in other States, by which the great lakes and navigable rivers were held to be public, otherwise than for purposes of navigation, are alike a departure from the common law.<sup>4</sup> It has accordingly been held in that State that a fresh-water pond or lake, which was three miles long and one mile wide, and of sufficient depth to float large vessels, but which had no navigable outlet, and had never been navigated by vessels larger than fishing craft thirty feet long, was private property with respect to its soil and fishings.<sup>5</sup>

§ 84. Same — Massachusetts and Maine — “Great ponds.” In Massachusetts the colony ordinance of 1641–47 provided in

<sup>1</sup> *Hodges v. Williams*, 95 N. C. 331.

<sup>3</sup> *Cobb v. Davenport*, 32 N. J. L. 369,

<sup>2</sup> *Ledyard v. Ten Eyck*, 36 Barb. 880.

<sup>4</sup> *Ibid.*

101; *Gouverneur v. National Ice Co.*, 57 Hun, 374; *School Trustees v. Schroll*, 120 Ill. 509; *Atwood v. Canandaigua*, 56 Hun, 293; *Smith v. Rochester*, 92 N. Y. 463. In New York, by statute, the State's title to its navigable waters is a trust for the owners of the upland as well as for the public, and the State can only convey the soil under such waters, whether they are lakes or tide waters, to the owner of the adjoining land. *Ibid.* See *Rumsey v. N. Y. R. Co.*, 114 N. Y. 423; *Wright v. Eldred*, 46 Hun, 12.

<sup>5</sup> *Ibid.* p. 377. In Pennsylvania a pond is not a “private pond” which covers the soil of a person who stocks it with fish, and also the soil of others. It is an entirety, and the whole or none is private. *Reynolds v. Commonwealth*, 93 Penn. St. 458. When an easement is acquired in and to the waters of a pond, a permanent dam and sluiceway connected therewith are taxable as real estate. *Flax Pond Water Co. v. Lynn*, 147 Mass. 31.

substance that great ponds containing more than ten acres of land, and lying in common, though within the bounds of a town, should be free for fishing and fowling; and that the public might "pass and repass on foot through any man's property for that end, so they trespass not upon any man's corn or meadow."<sup>1</sup> This ordinance of 1641-47, as appears by the Code of 1649, prohibited the towns from granting great ponds, but affirmed their power to regulate the fisheries both in them and in tide waters, and that of the legislature to dispose of great ponds and of tidal bays, coves, and rivers, or of the common rights of fishing and fowling in them.<sup>2</sup> This is the foundation of the law of that State and of Maine upon the subject,<sup>3</sup> by which ponds of sufficient size, which were not granted before the year 1641 or 1647, are public property like tide waters, both with respect to the soil under them,<sup>4</sup> and the right of reasonable use for all lawful purposes, including fishing, fowling, boating, skating, bathing, the taking of ice<sup>5</sup> for use or for sale, or of the water for domestic or agricultural purposes, or for use in the arts.<sup>6</sup> The owners of lands bordering upon great ponds have no peculiar right in them, except by grant from the legislature or by prescription,<sup>7</sup> and the only restriction

<sup>1</sup> Commonwealth v. Alger, 7 Cush. 53, 67, 68; West Roxbury v. Stoddard, 7 Allen, 158; Commonwealth v. Vincent, 108 Mass. 441, 445, 446; Paine v. Woods, id. 160, 169; Commonwealth v. Tiffany, 119 Mass. 300, 303; Hittinger v. Eames, 121 Mass. 539; Tudor v. Cambridge Water Works, 1 Allen, 164; Barrows v. McDermott, 73 Maine, 441.

<sup>2</sup> Commonwealth v. Vincent, 108 Mass. 441, 446; Fay v. Salem Aqueduct Co., 111 Mass. 27; Berry v. Rad-din, 11 Allen, 577; Tudor v. Cambridge Water Works, 1 Allen, 164; Commonwealth v. Weatherhead, 110 Mass. 177; Commonwealth v. Tiffany, 119 Mass. 300.

<sup>3</sup> Ibid.

<sup>4</sup> Paine v. Woods, 108 Mass. 160, 169. The term "great pond" as used in the Massachusetts ordinance and the statute of 1869, ch. 384, means a pond

of a certain area created by the natural formation of the land at a particular place. Commonwealth v. Tiffany, 119 Mass. 300, 303. Under the statute of 1869 the public have no right of fishing in a pond which is not more than *twenty* acres in extent. Ibid. Mass. Pub. Sts. ch. 91. The St. of 1888, ch. 318, "for the protection of great ponds," applies to ponds of more than ten acres.

<sup>5</sup> Post, § 191; Brastow v. Rockport Ice Co., 77 Maine, 100; Hittinger v. Eames, 121 Mass. 539; Gage v. Steinkrauss, 131 Mass. 222; Rowell v. Doyle, id. 474.

<sup>6</sup> West Roxbury v. Stoddard, 7 Allen, 158; Cummings v. Barrett, 10 Cush. 186, 188; Fay v. Salem Aqueduct Co., 111 Mass. 27.

<sup>7</sup> Ibid.; Hittinger v. Eames, 121 Mass. 539, 546.

upon their enjoyment by all persons is that they shall not interfere with the reasonable use of the ponds by others, or with public rights in cases where the legislature has made no special provision.<sup>1</sup> The waters of great ponds or lakes cannot be raised above their natural level at high-water, or drawn off below their natural low-water mark, without legislative authority or under the mill acts, and an excavation of the channel or a deepening of the outlet which thus draws off the water may be restrained by injunction at suit of a riparian owner.<sup>2</sup> The mill acts probably have no application to the waters of a great pond.<sup>3</sup> For an abstraction of the waters an information in equity in the name of the attorney general or an indictment will lie for the public wrong;<sup>4</sup> especially if there is detriment to the public health.<sup>5</sup> A person who suffers special damage therefrom may also have his private remedy, and one whose land is flowed by means of a dam, or whose land is cut off from the pond, when the water is lowered, by a strip of land intervening between his land and the water, suffers such special damage.<sup>6</sup> In *Watuppa Reservoir Co. v. Fall River*,<sup>7</sup> it was held that the legislature could authorize a municipal corporation to appropriate, without compensation, the waters of great ponds for domestic purposes, and such municipal uses as the extinguishment of fires, although such waters were thereby materially lessened to the injury of land-owners upon the ponds and their outlets. This decision has been the subject of

<sup>1</sup> *West Roxbury v. Stoddard*, 7 Allen, 158.

<sup>2</sup> *Fernald v. Knox Woolen Co.*, 82 Maine, 48; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396; *Attorney General v. Revere Copper Co.*, 152 Mass. 444.

<sup>3</sup> *Ibid.*; *Bates v. Weymouth Iron Co.*, 8 Cush. 548; *Potter v. Howe*, 141 Mass. 357.

<sup>4</sup> *Fernald v. Knox Woolen Co.*, 82 Maine, 48, 56.

<sup>5</sup> *Attorney General v. Jamaica Pond Aqueduct*, 183 Mass. 361.

<sup>6</sup> *Potter v. Howe*, 141 Mass. 357. As to a preservation of the riparian owners' right of access to the pond when land along the pond is taken, see

*Tyler v. Hudson*, 147 Mass. 609. As to leases of "great ponds," see Mass. Pub. Sta. ch. 91; St. of 1885, ch. 109; *Commonwealth v. Eliot*, 146 Mass. 5; *Same v. Richardson*, 142 Mass. 71; *Same v. Perley*, 130 Mass. 469. Other decisions relating to great ponds are, *Warren v. Spencer Water Co.*, 143 Mass. 155; *Smith v. Concord*, id. 253; *Cowdrey v. Woburn*, 136 Mass. 400.

<sup>7</sup> 147 Mass. 548. See 134 Mass. 267; *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394; *Proprietors of Mills v. Braintree Water Supply*, 149 Mass. 478; *Attorney General v. Revere Copper Co.*, 152 Mass. 444; *Cole v. Eastham*, 133 Mass. 65.



some discussion<sup>1</sup> and is again before the court for consideration. In *Attorney General v. Revere Copper Co.*,<sup>2</sup> it was held that, under the statute of limitations<sup>3</sup> applicable to real actions brought by the State of Massachusetts, the right to lower a great pond below its natural low-water mark, by withdrawing water therefrom, could be acquired by prescription; that such prescriptive right once acquired was not affected by an act passed in 1867<sup>4</sup> making that statute of limitations inapplicable to great ponds; that, after the passage of the Code of 1649, a town could not appropriate a great pond to any person; and that the rule that length of time does not legalize a public nuisance does not apply to the same extent to interference with public rights of property as to an injury involving real criminality, such as detriment to the public health. In New Hampshire the colony ordinance appears never to have been in force, although littoral proprietors have certain rights to wharf out even beyond one hundred rods; but large ponds of more than ten acres are held to be public by usage.<sup>5</sup>

§ 85. **Same — Smaller lakes of the West.**— In the Western States it is held that the owners of lands bordering upon unnavigable lakes situated within the congressional surveys, own the bed of the lake to its centre,<sup>6</sup> as in the case of unnavigable streams.<sup>7</sup> In the recent case of *Lembeck v. Nye*,<sup>8</sup> in Ohio, it was held with respect to an oval, non-navigable lake, having an area of about four hundred acres, that neither the public

<sup>1</sup> 2 Harvard L. Rev. 195, 316; 3 id. 1.

<sup>2</sup> 152 Mass. 444; 25 N. E. 605.

<sup>3</sup> Rev. Stat. of 1836, ch. 119, § 12.

<sup>4</sup> Ch. 275.

<sup>5</sup> *Nudd v. Lamprey* (N. H. 1847, unreported); *Percy Summer Club v. Welch*; *State v. Welch*; *Concord Manuf. Co. v. Robertson* (Dec. Term, 1889, not yet reported); *Clement v. Burns*, 43 N. H. 621; *post*, § 169.

<sup>6</sup> *Ridgway v. Ludlow*, 58 Ind. 48; *Edwards v. Ogle*, 76 Ind. 302; *Stoner v. Rice*, 121 Ind. 51; *Forsyth v. Smale*, 7 Biss. 201. In the above case of *Ridgway v. Ludlow*, it was also held that a title, by adverse possession, to land bordering upon an unnavigable

lake, gives title to the centre of the lake.

<sup>7</sup> *Ante*, § 78. The admiralty has no jurisdiction of inland lakes lying within the limits of a State. *Stapp v. The Clyde*, 43 Minn. 192.

<sup>8</sup> 24 N. E. 686. Under the Indiana statutes, swamp lands conveyed to the State by U. S. Stat. of Sept. 28, 1850, cannot be conveyed by the State until they have been surveyed and patented; hence a conveyance of surveyed tracts bordering on a lake passes no title to the bed of the lake. *State v. Portsmouth S. Bank*, 106 Ind. 435. See 8 L. R. A. 578, note.



nor a riparian owner, whose title extends only to the water's edge, has a right to boat upon, or to fish in the lake, but that such owner is of right entitled to use the water for domestic and agricultural purposes connected with his land. In Wisconsin, although a riparian owner upon a river or stream takes *prima facie* to its thread, yet the owner of land which borders upon a natural lake, whether navigable or unnavigable, is entitled only to the accretions which are added to his land and to the soil which may be left by the recession of the water, and has no title to the soil which remains submerged.<sup>1</sup> Such owner takes, however, to the water's edge, even when the meandered line of the lake differs from the actual water line.<sup>2</sup> In Michigan it was said that it had always been customary to permit the public to take fish in the small lakes and ponds of that State, and it was therefore held that the plaintiff in that case, who had never given notice forbidding the exercise of this customary right, could not maintain an action of trespass against the defendant for passing upon his land with the intention of fishing and for taking fish in a pond which was almost exclusively enclosed by the plaintiff's farm.<sup>3</sup> In this State the owner of a fractional subdivision of land, made so by a non-navigable lake, owns so much of the soil under the lake as would fall within the lines of his description, if fully extended.<sup>4</sup>

<sup>1</sup> Delaphine v. Chicago Railway Co., 42 Wis. 214; Boorman v. Sunnuchs, 42 Wis. 283; Diedrich v. Northwestern Railway Co., 42 Wis. 248; 47 Wis. 662; Olson v. Merrill, 42 Wis. 203; Wright v. Day, 33 Wis. 260; Shufeldt v. Spaulding, 37 Wis. 662; Mariner v. Schulte, 13 Wis. 692; Jones v. Pettibone, 2 Wis. 308.

<sup>2</sup> Boorman v. Sunnuchs, 42 Wis. 283; Delaphine v. Chicago Railway Co., id. 214; *ante*, § 76; Huntsman v. Hendricks, 44 Minn. 423; Hanford v. St. Paul R. Co., 43 Minn. 104. See 13 Cent. L. J. 1; 32 id. 291.

<sup>3</sup> Marsh v. Colby, 39 Mich. 627. Elsewhere it has been held that a right to take fish in a private river or

lake is a *profit à prendre* which could not be acquired by custom unless pleaded with a *que estate*. Waters v. Lilley, 4 Pick. 145; Murphy v. Ryan, Ir. R. 2 C. L. 143; Bland v. Lipscomb, 24 L. J. Q. B. 155, note; Gatewood's Case, 6 Co. 60; Grimstead v. Marlowe, 4 T. R. 717; Cobb v. Davenport, 33 N. J. L. 223; 32 id. 369, 389; Decker v. Baylor (Penn.), 19 Atl. 351; Winder v. Blake, 4 Jones (N. C.), 332. In Iowa, the boards of supervisors have no authority, without an express statutory license, to construct a bridge across a navigable lake the bed of which belongs to the State. Snyder v. Foster, 77 Iowa, 638.

<sup>4</sup> Clute v. Fisher, 65 Mich. 48.

## CHAPTER IV.

### THE PUBLIC RIGHT OF NAVIGATION.

#### SECTIONS.

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- 87, 88. The right of navigation paramount to private and other public rights in these waters.
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- 91. Protection of navigation in England.
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- 113. Duty to keep wharves in repair.
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§ 86. **Navigable waters — What are.**— The privilege of navigation upon all waters which are capable of such use in their natural condition, and are accessible without trespassing upon private lands, is a common and paramount right. It is not confined to the channel or to those parts of the water highway which are most frequently used by vessels, but extends to high-water mark in tidal rivers and tide waters generally;<sup>1</sup> and to the line along the shore of navigable fresh waters at which navigability ceases.<sup>2</sup> In England, the right of navigation is public in tide water, but depends upon user in the case of navigable fresh waters.<sup>3</sup> In this country, tide waters and fresh waters which are navigable in fact are alike open to the public for passage.<sup>4</sup> The purpose of the navigation is immaterial, it is said, and those who pass upon the water for purposes of pleasure, fishing, or fowling have equal rights with those who navigate for business, trade, or agriculture.<sup>5</sup> In the recent English case of *Bourke v. Davis*,<sup>6</sup> it was held that the

<sup>1</sup> *Williams v. Wilcox*, 8 Ad. & El. 314; *Colchester v. Brooke*, 7 Q. B. 339; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Commonwealth v. Church*, 1 Penn. St. 105; *Mobile v. Eslava*, 9 Porter, 577; 16 Pet. 234; *Hagan v. Campbell*, 8 Porter, 9; *Simpson v. Seavey*, 8 Maine, 138; *State v. Babcock*, 30 N. J. L. 29; *Porter v. Allen*, 8 Ind. 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ante*, §§ 51, 52.

<sup>4</sup> *Ante*, §§ 53, 54.

<sup>5</sup> *West Roxbury v. Stoddard*, 7 Allen, 158, 171; *Attorney General v.*

*Woods*, 108 Mass. 436, explaining *Rowe v. Granite Bridge*, 21 Pick. 344; *Charlestown v. County Commissioners*, 8 Met. 202, and *Murdock v. Stickney*, 8 Cush. 113; *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *The Montello*, 20 Wall. 430.

<sup>6</sup> 44 Ch. D. 110. See also 24 Ir. L. T. 235; same article in 54 J. P. 177; *Hammerton v. Honey*, 24 W. R. 603; *Burroughs v. Whitwam*, 59 Mich. 279. In *Bourke v. Davis*, it was doubted whether a lake on private grounds, touched at only one point by a public road, could be made a highway for boats launched upon it from the road

public generally cannot have upon private lands a right of recreation by custom, which must be confined to the inhabitants of a particular district; and that, while riparian owners may possibly gain a right of boating for recreation for themselves and their friends by custom, the existence of such right or custom does not enable the public to boat on a non-navigable river, which a dam makes partially navigable, or support the claim that it is a highway.

§ 87. **Navigation — The paramount right.**— Riparian proprietors, and those who have private rights in the water or the soil beneath, cannot lawfully obstruct or limit the navigation in any part of the channel without a special power conferred by competent legislative authority. The master of a vessel is not required to shorten sail, or yield the channel to a fishing net, but may lawfully prosecute his voyage, or approach the shore at any point, without regard to seines or nets drawn across the way.<sup>1</sup> If, under the pretense of exercising the right of navigation, he turns out of his course to run upon a net, or lies in wait until it is spread, and then crowds sail to reach it; or, if he unnecessarily anchors on a fishing ground, or loiters about it to prevent its use as such, or does not change his course, when he can do so without prejudice to the reasonable prosecution of his voyage, and has warning that he is approaching the net, he is answerable in damages, because the right of navigation, though superior, does not take away the right of fishery, and cannot be so abused as to excuse wantonness or malice.<sup>2</sup> But if, in an action for injury to a fishing net by a raft navigating down a river, the declaration only charges carelessness and mismanagement against the raft, the only

<sup>1</sup> for pleasure; citing *Marshall v. Ulleswater Steam Nav. Co.*, L. R. 7 Q. B. 166.

<sup>1</sup> *Anon.*, 1 Camp. 517, note; *Colchester v. Brooke*, 7 Q. B. 339; *Post v. Munn*, 1 South. (N. J.) 61; *Jones v. Keeling*, 1 Jones (N. C.), 299; *Davis v. Jerkins*, 5 id. 290; *Cobb v. Bennett*, 75 Penn. St. 326; *Moulton v. Libbey*, 87 Maine 472; *Flanagan v. Philadelphia*, 42 Penn. St. 219, 228; *Mason v.*

*Mansfield*, 4 Cranch C. C. 580; *The City of Baltimore*, 5 Ben. 474; *Commonwealth v. Chapin*, 5 Pick. 199; *ante*, § 1.

<sup>2</sup> *Ibid.*; *Post v. Munn*, 1 South. (N. J.) 61, 62; *Cobb v. Bennett*, 75 Penn. St. 326; *Jones v. Keeling*, 1 Jones (N. C.), 299; *Lord v. Turner*, 2 Hannay (N. B.), 18; *Wright v. Mulvaney* (Wis.), 46 N. W. 1045; 9 L. R. A. 807, and note.

question for the jury is negligence, not wantonness or malice.<sup>1</sup> In a tidal river the right of navigation is not suspended at low tide when the channel is too shallow to float vessels. It is not an unreasonable user of the highway to so propel the vessel along the stream that she cuts through the soil of the river bed;<sup>2</sup> and a vessel, which is waiting until the tide serves, is not liable for injury caused without wantonness or negligence to an oyster bed upon which the vessel settles.<sup>3</sup>

§ 88. *Same — Same.*— At common law the right of navigating a public stream is paramount to the right of passage across the stream by means of a bridge.<sup>4</sup> It is so far superior to a ferry privilege across the stream, exercised by means of a cable, that a steamboat which has not given warning of its approach is not required to wait for the cable to be lowered, if any damage to the steamer, or chance of damage, could be reasonably apprehended from delay.<sup>5</sup> So the right of a gas

<sup>1</sup> *Wolhauper v. Foley*, 4 Allen (N. B.), 90, 167.

<sup>2</sup> *Ferguson v. Union S. Co.*, 10 Vict. L. R. 279.

<sup>3</sup> *Colchester v. Brooke*, 7 Q. B. 889; 9 Jur. 1090; *ante*, § 20. See *The Octavia Stella*, 6 Asp. M. C. 182; 2 Law Mag. & Rev. (4th Series), 114, 216.

<sup>4</sup> *Castello v. Landwehr*, 28 Wis. 522; *Scott v. Chicago*, 1 Biss. 510; *Thurlow v. Bogart*, 15 C. P. (Can.) 9, 601. The legislature is the only tribunal that is to reconcile these conflicting interests. *Commonwealth v. Breed*, 4 Pick. 460; *Commonwealth v. Essex Co.*, 13 Gray, 239; *Middlesex R. Co. v. Wakefield*, 103 Mass. 261, 265; *Lister v. Newark Plank Road Co.*, 36 N. J. Eq. 477. If a city, being duly authorized by the State, provides by ordinance for the alternate passage of vessels through one of its draw-bridges and of travelers over the bridge, and that the draw shall be closed against vessels for one hour each morning and evening, this does not conflict with the commerce clause

of the United States constitution. *Escabana Co. v. Chicago*, 107 U. S. 678; 12 Fed. Rep. 777.

<sup>5</sup> *Steamboat Globe v. Kurtz*, 4 G. Greene (Iowa), 433; *Babcock v. Herbert*, 3 Ala. 392; *Albina Ferry Co. v. The Imperial*, 88 Fed. Rep. 614. A wire ferry cable across a navigable river is not an unlawful obstruction to navigation, unless it actually prevents the navigation or renders it hazardous. *The Vancouver*, 2 Sawyer, 381. In *Steamboat Globe v. Kurtz*, 4 G. Greene, 433, 436, Hall, J., said: "The lawful navigation of the river can never be a nuisance to a ferry owner, but a ferry may become a nuisance by obstructing the navigation. While the ferry owner is protected in the enjoyment of his franchise and property pertaining to the ferry, against wanton and wilful injury from those who are engaged in navigating the river, where he has received the usual courtesies that are extended between man and man, he has no cause of complaint. His interest is at best but a servient right,

company to lay its pipes in the bed of a river is subordinate to the right of navigation; and a vessel which is dragging its anchor as a proper and usual act of navigation under the circumstances in which it is placed, is not responsible, in the absence of negligence or malice, for injury thus caused to the pipes.<sup>1</sup>

§ 89. Same — Care required as to riparian interests.— The public right of passage must also be exercised with due regard for the rights of riparian proprietors. A vessel in motion is required to use ordinary care not to injure, by its swell or suction,<sup>2</sup> other vessels, rafts, or property attached to the shore, as well as to avoid striking them.<sup>3</sup> If a man obstinately refuses to remove his ship from opposite a wharf, and it would be as convenient for himself a little one way or the other, this would be an abuse of the common right, and the owner of the wharf may recover for such injury as he thereby sustains.<sup>4</sup> In a case in Michigan,<sup>5</sup> a steamboat was

and cannot be extended beyond the naked object of his license. He is allowed to keep a ferry, not to obstruct the navigation or place a nuisance in the river." A license to keep a ferry upon a navigable stream does not authorize the grantee to place any obstruction across the stream. *Babcock v. Herbert*, *supra*.

<sup>1</sup> *Milwaukee Gas Light Co. v. The Gamecock*, 23 Wis. 144; *Omslaer v. Philadelphia Co.*, 31 Fed. Rep. 354.

<sup>2</sup> *The Canima*, 17 Fed. Rep. 271; *The Drew*, 22 id. 852; *The Rhode Island*, 24 id. 295; *The Atlanta*, 34 id. 918; *The New York*, id. 757; *The City of Richmond*, 43 id. 85; *Saulter v. New York S. S. Co.*, 88 N. C. 123.

<sup>3</sup> *Wright v. Brown*, 4 Ind. 95; *The Rhode Island*, 8 Ben. 50; *The Massachusetts*, 10 id. 177; *The C. H. Northam*, 13 Blatch. 31; 7 Ben. 249; *The Morrisania*, 13 Blatch. 512; *The Daniel Drew*, id. 523; *The Tiger Lily*, 11 Fed. Rep. 744; *The Southfield*, 19 id. 841; *Cornwall v. The New York*,

38 id. 710; *Robson v. The Kate*, 21 Q. B. D. 13; *Passano v. The New Brunswick*, 43 Fed. Rep. 174; *Browne v. Stone*, 1 Phila. 241; 5 Penn. Law Jour. 75. A vessel which involuntarily causes injury to another vessel lying alongside, in consequence of the swell caused by a passing steamer, is not liable. *Kissam v. The Albert*, 21 Law Rep. 41. The owner of rafts or vessels moored to banks or wharves are required to take reasonable precautions to prevent injuries liable to be caused by the swell of passing steamers. *Fawcett v. The Natchez*, 3 Woods, 16; *The Greenpoint*, 18 Fed. Rep. 186. Admiralty has jurisdiction of a libel *in rem* against a vessel which has damaged a raft of logs in navigable waters. *The Flint & Marquette*, 33 Fed. Rep. 511.

<sup>4</sup> *Anon.*, 1 Camp. 517, note. See *Hall v. Ewart*, 33 Q. B. (Can.) 491.

<sup>5</sup> *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229; 43 Mich. 386.

run to and fro in the Detroit River so unnecessarily near a boom which an ice company had constructed near the shore, that the ice within the boom was broken up by the agitation of the water, and the company being unable to procure sufficient ice to fill its houses, the steamboat was held responsible for the loss. The court, in its opinion, after referring to the obligation imposed upon those who use a highway to avoid unnecessary injury to trees, carriages, and other articles that may be within the limits of the way,<sup>1</sup> and to the case of the wanton destruction of a fishing-net by a vessel,<sup>2</sup> said: "The right of navigation, while paramount, is not exclusive, and cannot be exercised to the unnecessary or wanton destruction of private rights or property, where both can be freely and fairly enjoyed. But in this case the vessel did not run into the boom, and therefore it may be said the case is not parallel with those we have been considering. The principle, however, is the same, which recognizes the superior right of the vessel, but punishes any abuse of that right. It is also clearly apparent that vessels have not an exclusive right to use the entire channel, which may be narrowed or used for purposes, some of which are but remotely, if at all, connected with the subject of navigation." "A vessel has no right to wantonly run so close to the shore, to a boom, or to a dock, as to cause damage which could easily be avoided by standing farther off." The owner of a vessel is not responsible for injuries caused by inevitable accident,<sup>3</sup> but is liable for the resulting consequences, as well as the immediate consequences, of negligence on the part of those in charge.<sup>4</sup> If a vessel runs aground in consequence of a mistake as to the channel, and another vessel collides with it under the same mistake, the grounding of the first vessel is not the proximate cause of the injury, nor is that vessel bound to signal the approaching vessel as to the course the latter should take, but the owner of the second vessel is

<sup>1</sup> Citing *Clark v. Dasso*, 84 Mich. 86; *Cary v. Daniels*, 8 Met. 478. Louisiana, 8 Wall. 164; *Dygert v. Bradley*, 8 Wend. 469. See *Mark v.*

<sup>2</sup> Citing *Post v. Munn*, 1 South. (N. J.) 61. See *ante*, § 87. Hudson River Bridge Co., 56 How. Pr., 108; *The Oler*, 2 Hughes, 12.

<sup>3</sup> *Ibid.*; *Doward v. Lindsay*, L. R. 5 P. C. 388; *The Thornley*, 7 Jur. 659; *Brown v. Lynn*, 31 Penn. St. 510; *The* <sup>4</sup> *Spry Lumber Co. v. The C. H. Green*, 76 Mich. 320.



liable for the damage to the first.<sup>1</sup> Where a vessel, being disabled by a collision, and left helpless in the track of navigation, is afterwards injured by a passing vessel, the vessel at fault is liable for the additional injuries thus caused to the disabled vessel.<sup>2</sup> Where, also, a ship became unmanageable through the negligence of the captain and crew about three-quarters of a mile from a lee-shore, and was then driven by the wind and tide upon a sea-wall, which it damaged, it was held that the negligence was the proximate cause of the injury, and that the owners of the ship were liable therefor.<sup>3</sup> In this, and similar cases, the fact that the riparian owner, in the lawful use of his own property, and by his own act, builds out from the shore or river bank, thereby exposing his property to danger of accidental injury from the lawful acts of others, does not deprive him of his remedy for an injury caused by the culpable negligence of such other persons.<sup>4</sup> But the riparian owner will be liable for any act on his part which causes injury to vessels lawfully navigating the stream. If a vessel or raft, moored without his consent against the front of his land, interferes with his right of access thereto, he may unfasten it and set it adrift, and, if it floats away or is wrecked, he is not liable to the owner for the loss.<sup>5</sup> But he is not justified in setting adrift anything that will injure vessels navigating the stream. Where the enjoyment of such owner's property was interfered with by a large log, which landed opposite his premises, and he towed it to another part of the river and there left it, he was held liable for the loss of a vessel which struck upon the log and was injured.<sup>6</sup>

<sup>1</sup> *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75.

<sup>2</sup> *The Oler*, 14 Am. L. Reg. 800; 2 Hughes, 12.

<sup>3</sup> *Romney Marsh v. Trinity House*, L. R. 5 Ex. 204; L. R. 7 Ex. 247; *The George and Richard*, L. R. 3 Adm. & Ecc. 446; *The Buckhurst*, 6 P. D. 152; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Bowas v. Tow Line*, 2 Sawyer, 21; *The Austria*, 14 Fed. Rep. 298.

<sup>4</sup> *Cook v. The Champlain Transportation Co.*, 4 Denio, 91; *Kerwhaker v.*

*The Cleveland R. Co.*, 3 Ohio St. 172, 193.

<sup>5</sup> *Dutton v. Strong*, 1 Black, 23; *Harrington v. Edwards*, 17 Wis. 586.

<sup>6</sup> *Porter v. Allen*, 8 Ind. 1. In *Satterly v. Hallock*, 5 Hun, 178, the defendant unlawfully removed the plaintiff's vessel from the dock, in which it was lying, to a position where it was injured by settling at low water upon a log which the plaintiff had previously thrown overboard. The plaintiff was held not guilty of contributory negligence.

§ 90. **Same — Same.**— The public right is only limited in this respect by the requirement that it shall be exercised in a reasonable manner; and the fact that the riparian owner sustains damage from this cause does not, in all cases, give him a cause of action. Lands adjoining a river may, without compensation, be legally flowed, to some extent, by persons exercising the right of navigation. Vessels, boats, or logs floating in the water may cause it to rise above its natural level; and, when numerous, they may be the source of appreciable damage to the riparian owners from this cause, as well as from jams, the washing of the banks, and the striking of the logs against them.<sup>1</sup> Damage thus caused to the lands of riparian proprietors would be *damnum absque injuria* in the case of rivers navigable for vessels and boats, and a boom company, engaged in driving logs down a stream, is bound to exercise ordinary prudence and skill,<sup>2</sup> but is not an insurer that the riparian owners shall not suffer damage.<sup>3</sup> If a log or other prop-

<sup>1</sup> Field v. Apple River L. D. Co., 67 Wis. 569; Miller v. Sherry, 65 Wis. 129; Goodin v. Kentucky Lumber Co. (Ky.), 14 S. W. 775; Kroll v. Nester, 52 Mich. 70; Watts v. Tittabawassee Boom Co., id. 203; Butterfield v. Gilchrist, 53 Mich. 22; Anderson v. Maloy, 32 Minn. 76; Witheral v. Muskegon Booming Co., 68 Mich. 48; 18 Am. State Rep. 336, note; St. Cloud W. P. Co. v. Miss. River Boom Co., 48 Minn. 380.

<sup>2</sup> Haines v. Welch, 14 Oregon, 319.

<sup>3</sup> White River Booming Co. v. Nelson, 45 Mich. 578, and authorities cited below; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, 318; Edwards v. Wausau Boom Co., 67 Wis. 463. In the second case cited the court said: "In addition to the fact that waters in which ships and other vessels of such burden as would be likely materially to retard the currents, ever become collected or crowded together to such an extent as might, in the shallow and narrow waters, impede the current, are of necessity so much deeper (and gen-

erally of much greater width) than rivers like this, whose navigation can be rendered valuable principally for the running of logs, such ships and vessels, by their shape and construction, are so entirely different from saw-logs in respect to the facility afforded for the passage of the current under and around them, that the analogy between the two becomes exceedingly faint, if it does not disappear. But when we consider further, that saw-logs, without any bond of connection, coming down a river, each in its own careless way, and stopped by a boom or other obstruction, collecting into a jam, run over and under each other in a confused mass, pile upon and across each other in every conceivable direction, and fill the stream from the surface to the bottom, setting back the water like a dam; while ships and vessels, if they do occasionally run others down, have not acquired so general a habit of running over, and across, and under one another, several tiers in depth, as to make the danger of the

erty is lodged upon the adjoining lands by a subsiding freshet, without fault chargeable to any person, the owner may reclaim it, and, doing no unnecessary damage, may go upon the land for that purpose, without being liable for such mishaps or for trespass.<sup>1</sup> So, if a bridge, which was properly constructed and has been kept in repair, is carried away by an extraordinary flood, and is lodged upon the land of a riparian proprietor, the land-owner or the owner of the bridge may remove it, but the former cannot convert it to his own use, and the latter is neither liable for injuries caused by the wreck, nor bound to remove it until he is notified so to do, and even then he may abandon the property.<sup>2</sup> The property near a water highway is thus held subject to the risks incident to the reasonable exercise of the public right.<sup>3</sup> But a boom company cannot rightfully, by using a dam, or neglecting to pick a channel, increase the damage to adjacent land beyond what is incident to the ordinary course of navigation.<sup>4</sup>

§ 91. Same — Protection of, in England.—In England the right of navigation has always been jealously guarded as a great public interest. In *Rex v. Clark*,<sup>5</sup> Holt, C. J., said that to hinder the course of a navigable river was against *Magna Charta*; and, by numerous acts of Parliament,<sup>6</sup> annoy-

setting back of a river from this cause, an ordinary or probable incident of navigation."

<sup>1</sup> *Chase v. Corcoran*, 106 Mass. 286; *Proctor v. Adams*, 113 Mass. 376; *Barker v. Bates*, 13 Pick. 255; *Dunwich v. Sterry*, 1 B. & Ad. 831; *Thompson v. Androscoggin Co.*, 54 N. H. 545, 558; *Etter v. Edwards*, 4 Watts, 65; 2 Kent Com. 322, 359, 360; 1 Black. Com. 293, 297.

<sup>2</sup> *Livezey v. Philadelphia*, 64 Penn. St. 106; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, 94; *Forster v. Juniata Bridge Co.*, 16 Penn. St. 393; *Sheldon v. Sherman*, 42 N. Y. 484; 42 Barb. 368; *post*, § 98.

<sup>3</sup> *Thompson v. Androscoggin Co.*, 54 N. H. 545, 558; 58 *id.* 108; *Brown v. Collins*, 53 N. H. 442, 449; *Eaton v.*

*B. C. & M. R. Co.*, 51 N. H. 504, 530; *Carter v. Thurston*, 58 N. H. 104.

<sup>4</sup> *Anderson v. Thunder Bay River Boom Co.*, 61 Mich. 489.

<sup>5</sup> 12 Mod. 615. See, also, *Warren v. Prideaux*, 1 Mod. 105; *Magna Charta*, ch. 23; *Oldbury v. Stafford*, 1 Sid. 145; *Carter v. Murcot*, 4 Burr. 2162; *Rex v. Smith*, 2 Dougl. 441; *Blundell v. Catterall*, 5 B. & Ald. 91; *Greenwich Board of Works v. Maundslay*, L. R. 5 Q. B. 397; *Barclay R. Co. v. Ingham*, 36 Penn. St. 194, 201; *Browne v. Kennedy*, 5 Harr. & J. 195, 203.

<sup>6</sup> These early statutes are cited and considered in *Hale, De Jure Maris*, chs. 3, 5; *Hargrave's Law Tracts*, 9, 22; *Woolrych on Waters*, 155; *Fitz. N. B.* 113; *Callis on Sewers*, 255, 256;

ances to this common privilege were punished with specific penalties. The intention to preserve the navigation unobstructed in all navigable rivers of England was manifested in the ancient laws relating to sewers,<sup>1</sup> the purpose of which was both to prevent inundations and to assist navigation.<sup>2</sup> According to Coke and Callis, the king might, even before the making of any statute of sewers, grant commissions for surveying and repairing walls, banks, and rivers, and other defenses,<sup>3</sup> the decay of which might tend to choke up the navigable channels. The prerogative of the Crown includes, also, the right and duty to protect the realm from the inroads of the sea.<sup>4</sup> The attorney general may proceed by information, on behalf of the Crown, to prevent a subject from removing a natural barrier against the sea,<sup>5</sup> and the injuring of such a barrier appears to be an indictable offense at common law.<sup>6</sup> In England the preservation of harbors, ports, navigable rivers, and docks is now entrusted to corporate bodies of trustees or conservators, and the powers of commissioners of sewers are restricted to such parts of the coast as are not under the regulation of these bodies.<sup>7</sup>

Weld v. Hornby, 7 East, 195, 198; Robson v. Robinson, 3 Dougl. 307; Williams v. Wilcox, 8 Ad. & El. 314; Case of Chester Mill, 10 Rep. 138; 13 Rep. 38; Flanagan v. Philadelphia, 42 Penn. St. 219, 229.

<sup>1</sup> See Callis on Sewers, *passim*; Woolrych on Waters, 8, 54-63, 68; Hunt on Boundaries (2d ed.), 33; Bishop v. Tripp, 16 R. L. 198.

<sup>2</sup> The King v. Hide, Styl. 60; Yeaw v. Holland, 2 Wm. Bk. 717; Dore v. Gray, 2 T. R. 336; Callis on Sewers, 89; 4 Inst. 276; Rex v. Pagham, 8 B. & C. 355; Queen v. Baker, L. R. 2 Q. B. 621.

<sup>3</sup> Case of the Isle of Ely, 10 Rep. 143; Callis on Sewers, 2, 25, 79; Royal Fishery of the Banne, Sir John Davies, 149, 153; Dore v. Gray, 2 T. R. 358; Jean v. Holland, 2 T. R. 365; 4 Inst. 276; Queen v. Westham, 10 Mod. 159. The Commissioners of Sewers could not maintain trespass

against one who broke down embankments, but the remedy is by indictment in the name of the king. Newcastle v. Clark, 1 Moore, 666; Driver v. Simpson, *id.* 682.

<sup>4</sup> Attorney General v. Tomline, 12 Ch. D. 214; Hudson v. Tabor, 2 Q. B. D. 290; Callis on Sewers, 80; Woolrych on Waters, 42; *ante*, § 24.

<sup>5</sup> Attorney General v. Tomline, 12 Ch. D. 214. This case apparently applies only "to the natural protecting banks, or to banks erected by the Crown, either under the Crown itself, or through the agency of the Commissioners of Sewers." West Norfolk Co. v. Archdale, 16 Q. B. D. 754.

<sup>6</sup> Ball v. Herbert, 3 T. R. 253, 263; Newcastle v. Clark, 1 Moore, 666; Driver v. Simpson, *id.* 682; Attorney General v. Tomline, 12 Ch. D. 214, 222; Callis on Sewers, 73, 74.

<sup>7</sup> Woolrych on Sewers, 49; Greenwich Board of Works v. Maudsley,

§ 92. **Same—Public nuisances.**—All annoyances and impediments to navigation are *prima facie* public nuisances, whether created by the riparian owners or by strangers.<sup>1</sup> The public may enforce their abatement or removal by indictment, or by an information in equity, and individuals to whom they cause special damage may recover damages at law against those who have created them.<sup>2</sup> But no indictment will lie for a nuisance in a public river when the injury to navigation is likely to be only slight and of rare occurrence.<sup>3</sup> Lord Hale instances<sup>4</sup> the following nuisances, among others, that may be common to all having occasion to frequent ports: (1) Silting or choaking up the port, either by the sinking of vessels in the port, or throwing out of filth or trash into the port, whereby it is choaked.<sup>5</sup> (2) Decays of the wharfs, keys, and piers, which are for the landing of merchandise and safe-guard of shipping. (3) The leaving of anchors in the port without buoys or marks, whereby ships or vessels may strike against them and be spoiled. (4) The building of new wears or enhancing of old, whereby navigation or passage of vessels is obstructed. (5) The straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden. (6) “The impediment or hindrance of moreing of ships in the ground adjacent, if it hath been so anciently used, without paying anything for it. Or if it be a new port, yet it seems, the moreing of ships being for the general good of commerce, it must be suffered upon reasonable amends.” If

L. R. 5 Q. B. 397. See authorities, *post*, § 119; Coulson & Forbes on Waters, 26, 80; Cory v. Bristow, 2 App. Cas. 262; Watkins v. Milton, L. R. 3 Q. B. 350; Forrest v. Greenwich, 8 E. & B. 890; Grant v. Oxford, L. R. 4 Q. B. 9; Rex v. London, 4 T. R. 21; Brown v. Reed, 2 Pugsley (N. B.), 206; Attorney General v. London, 18 L. J. Ch. 314 (as to conservators of the Thames); Exeter v. Devon, L. R. 10 Ex. 232.

<sup>1</sup> Williams v. Wilcox, 8 Ad. & El. 314; Brucklesbank v. Smith, 2 Burr. 656; Commonwealth v. Caldwell, 1 Dall. 150; Knox v. Chaloner, 42 Maine, 150; Veazie v. Dwinel, 50

Maine, 479, 484; Gerrish v. Brown, 51 Maine, 256; Lancey v. Clifford, 54 Maine, 487; Cox v. State, 3 Blackf. 193.

<sup>2</sup> *Post*, §§ 121–128.

<sup>3</sup> Rex v. Tindall, 6 Ad. & El. 143.

<sup>4</sup> Hale, De Portibus Maris, ch. 7; Hargrave's Law Tracts, 85. It is a criminal offense in Georgia to throw out ballast in a harbor. Wallace v. State, 46 Ga. 199.

<sup>5</sup> Easton R. Co. v. Central R. Co., 52 N. J. L. 267. As to New York harbor, see act of Congress of June 29, 1888 (25 Stat. 209); United States v. The Sadie, 41 Fed. Rep. 896, 823.

unreasonably large masses of oysters be planted or deposited in the bed of a navigable river, they are a nuisance so far as they obstruct the navigation.<sup>1</sup> So logs or rafts, for mere private convenience, and for no purposes connected with the rights of navigation in a channel which is susceptible of use for navigation, deposited for an unreasonable time, constitute a nuisance in judgment of law.<sup>2</sup> The diversion of water from a river may so impair its navigable capacity as to amount to a public nuisance,<sup>3</sup> and a city is liable for the detention of navigators caused by diverting the water for purposes subordinate to the right of navigation, as for use in the arts, for driving or lifting power, the washing of pavements, baths, etc., or even for domestic consumption beyond the requirements of necessity.<sup>4</sup> The owners of lands bordering upon navigable waters may lawfully throw sewage and other refuse matter into them, provided they do not create a nuisance to others;<sup>5</sup> for it is a natural office of the sea and of all running waters to carry off and dissipate, by their perpetual motion and currents, the impurities and offscourings of the land;<sup>6</sup> but the public right of navigation is not limited at common law by any private or municipal right of sewerage.<sup>7</sup> The filling up by a city, by means of a sewer, of any portion of its harbor, to the injury of the navigation, is an indictable offense,<sup>8</sup> irrespective of any question of good judgment or reasonable care in its system of sewerage;<sup>9</sup> and if it causes injury to private rights, as by interfering with

<sup>1</sup> Colchester v. Brooke, 7 Q. B. 339, 375; State v. Taylor, 27 N. J. L. 117.

<sup>2</sup> Commonwealth v. Fleming, Lewis's Crim. Law, 533, 534; Commonwealth v. Strickler, id. 535; Moore v. Jackson, 2 Abb. N. C. 211; Hayward v. Knapp, 23 Minn. 431.

<sup>3</sup> Stokes v. Upper Appomattox Co., 3 Leigh, 318; Medway Navigation Co. v. Romney, 9 C. B. N. S. 575.

<sup>4</sup> Philadelphia v. Gilmartin, 71 Penn. St. 140; Philadelphia v. Collins, 68 Penn. St. 106; Commonwealth v. Tewksbury, 11 Met. 55, 57; Yolo Co. v. Sacramento, 36 Cal. 193.

<sup>5</sup> Haskell v. New Bedford, 108 Mass. 208, 214.

<sup>6</sup> Gray, J., in Haskell v. New Bedford, 108 Mass. 208, 214.

<sup>7</sup> Brayton v. Fall River, 113 Mass. 218; Franklin Wharf Co. v. Portland, 67 Maine, 46, 55; Boston Rolling Mills v. Cambridge, 117 Mass. 396; Washburn & Moen Manuf. Co. v. Worcester, 116 Mass. 458.

<sup>8</sup> Ibid.; Clark v. Peckham, 10 R. I. 35; 9 R. I. 455. But in such case, the obstruction must be against the front of the plaintiff's land. *Post*, § 97. And a municipal corporation may connect its sewers with a natural water-channel, without liability to keep the channel open to its mouth. Munn v. Pittsburgh, 40 Penn. St. 364.

<sup>9</sup> State v. Portland, 74 Maine, 268.



the access to a wharf or ferry slip, it affords a cause of action to individuals.<sup>1</sup> The owners of mills and manufactories are bound to see that filth, trash, and other waste cast from their works into a navigable stream do not obstruct the navigation,<sup>2</sup> and their negligence in this respect gives rise to private rights of action.<sup>3</sup> If a telegraph company, which is authorized by statute to lay its cable in navigable waters in such manner as not to "injuriously interrupt the navigation," causes the cable to be so laid or suspended that it comes in contact with vessels which would otherwise pass without difficulty or interruption, the cable is a nuisance, and the company is liable for any damage thereby caused to a vessel which is not at fault.<sup>4</sup> The facts that other vessels and the vessel injured have passed the obstruction safely, and that a projecting iron on the vessel caused it to catch upon the cable, do not necessarily relieve the company of liability, since, as against a wrong-doer, the owners of a vessel are not bound to keep it in the best possible repair.<sup>5</sup> The fact that an obstruction is a nuisance does not justify the master of the vessel in destroying or running upon it negligently, for one member of the public is not justified in causelessly injuring another's property by the fact that such property is so placed as to interfere with a public right.<sup>6</sup>

<sup>1</sup> Ibid. ; *Sleight v. Kingston*, 11 Hun, 594; 73 N. Y. 592. *Contra*, when such damages, being consequential and actionable if without legislative sanction, are caused under a valid act of the legislature and without negligence. *Malone v. Philadelphia*, 2 Penny. (Pa.) 370. It is not a nuisance to navigation for which a city is liable if a canal boat, moored at one of its wharves, alongside and beneath the opening of a large main sewer, is submerged and sunk at night from the great outpouring of water following a shower, the danger being obvious. *Behan v. New York*, 24 Fed. Rep. 239.

<sup>2</sup> Ibid. ; *Veazie v. Dwinel*, 50 Maine, 479; *Dwinel v. Veazie*, 44 Maine, 167, 175; *Gerrish v. Brown*, 51 Maine, 256; *Davis v. Winslow*, 51 Maine, 264;

*State v. Bunker*, 59 Maine, 366; *Washburn v. Gilman*, 64 Maine, 163; *Barrett v. Bangor*, 70 Maine, 335, 338; *Brackelsbank v. Smith*, 2 Burr. 656; *Simpson v. Seavey*, 8 Maine, 138.

<sup>3</sup> *Haskins v. Haskins*, 9 Gray, 390; *Washburn v. Gilman*, 64 Maine, 163.

<sup>4</sup> *Blanchard v. Western Union Telegraph Co.*, 60 N. Y. 510; 67 Barb. 228; 3 Supr. Ct. 775; *Stephens Transportation Co. v. Western Union Telegraph Co.*, 8 Ben. 502.

<sup>5</sup> Ibid.

<sup>6</sup> *Colchester v. Brooke*, 7 Q. B. 339; *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Bluck*, 18 Q. B. 870; *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 546; *Butterfield v. Forrester*, 11 East, 60; *State v. Antoine*, 40 Maine, 435; *Cummins v. Presley*, 4 Harr. (Del.) 315;



If the navigator casts his vessel upon the obstruction unnecessarily, he is guilty of contributory negligence, and cannot recover for the injury he may thereby sustain.<sup>1</sup> A vessel which comes to anchor negligently, or is otherwise guilty of negligent navigation, is liable for injuring a telegraph cable, laid at the bottom of the sea, with which its anchor comes in contact,<sup>2</sup> although this would be a peril of the sea, if the anchor dragged without apparent cause and so injured the cable.<sup>3</sup> The relative rights and duties of persons navigating vessels apply equally whether in ports or rivers, or within the three-mile belt along the coast, or on the high seas generally.<sup>4</sup> The fact that a ferry-boat lays such a course as to bring her near the corner of a pier, which is not the boundary of her slip, does not give her any superior right to the water around the pier.<sup>5</sup>

§ 93. Same — Same — Purprestures. — The distinction between a purpresture and a public nuisance was stated in a previous chapter.<sup>6</sup> Any unauthorized invasion of the soil of the seashore between high and low-water mark, or of the shore or *alveus* of a tidal river, or of the bed of an estuary or arm of the sea, while these remain the property of the Crown, or, in this country, of the State, is a purpresture.<sup>7</sup> In strictness, the question whether a wharf or building erected in tide waters is a purpresture depends upon the ownership of the soil which it covers.<sup>8</sup> At common law, if the person who makes such a structure establishes his right to the soil by producing a grant or license from the Crown, it is not a purpresture, although it may still be unlawful if it obstructs the navigation. In the latter case, the structure is abatable as

*Foster v. Holly*, 38 Ala. 76; *Steamboat v. McCraw*, 26 Ala. 189, 203; *Inman v. Funk*, 7 B. Mon. 538; *Pilcher v. Hart*, 1 Humph. 524; *Castello v. Landwehr*, 28 Wis. 522; *post*, § 128; *Brace v. Union Forwarding Co.*, 82 Q. B. (Can.) 43; *Auger v. Cook*, 89 id. 537.

<sup>1</sup> *Ibid.*; *Lane v. The A. Denike*, 8 Cliff. 117; *Knowlton v. Sanford*, 82 Maine, 148; *Markham v. Houston Direct Nav. Co.*, 73 Texas, 247.

<sup>2</sup> *Submarine Telegraph Co. v. Dick-*

*son*, 15 C. B. N. S. 759; *The Clara Killam*, L. R. 3 Adm. & Ecc. 161; *The Clan Gordon*, 7 P. D. 190.

<sup>3</sup> *The Carl Frederick*, 33 Fed. Rep. 589.

<sup>4</sup> See *Ibid.*, per Willes, J., p. 779.

<sup>5</sup> *Conover v. The John S. Daley*, 38 Fed. Rep. 619.

<sup>6</sup> *Ante*, § 21.

<sup>7</sup> *Ante*, § 21; *Blundell v. Catterall*, 5 B. & Ad. 268.

<sup>8</sup> *Ibid.*

a nuisance notwithstanding the king's license, for a common nuisance is not warrantable by the Crown.<sup>1</sup> The law upon this subject is thus stated by Lord Hale:<sup>2</sup> It is not "every building below the high-water mark, nor every building below the low-water mark, is *ipso facto* in law a nuisance. For that would destroy all the keys that are in all the ports in England. For they are all built below the high-water mark; for otherwise vessels could not come at them to unlade; and some are built below the low-water mark. And it would be impossible for the king to license the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straightens the port, for the king cannot license a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea-water from diffusing at large; and the water may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the king's, the building below the high-water mark is a purpresture, an encroachment and intrusion upon the king's soil, which he may either demolish or seize, or arent at his pleasure; but it is not *ipso facto* a common nuisance, unless, indeed, it be a damage to the port and navigation." Whether a wharf or building extended into tide waters is a nuisance is purely a question of fact.<sup>3</sup>

§ 93a. Same — Same — In navigable fresh rivers.— The above rules apply also to navigable fresh rivers in those localities where they are held to be public property like the sea. But when the title of the riparian proprietors extends *usque*

<sup>1</sup> Hale, De Portibus Maris, ch. 7; Boston, 98 Mass. 39, 41; Burnham v. Hotchkiss, 14 Conn. 318; Thornton v. Grant, 10 R. I. 477; The Erie v. Canfield, 27 Mich. 479; Clark v.

<sup>2</sup> Hale, De Portibus Maris, ch. 7; Hargrave's Law Tracts, 85; De Jure Maris, chs. 3, 5, 6; Hargrave's Law Tracts, 9, 21, 22, 23, 36.

<sup>3</sup> Ibid.; ante, § 21; Queen v. Betts, 16 Q. B. 1022; Abraham v. Great Northern Ry. Co., 16 Q. B. 586, 591; Dutton v. Strong, 1 Black, 23, 31; Columbus Bridge Co. v. Peoria Bridge Co., 6 McLean, 70; Nichols v.

Boston, 98 Mass. 39, 41; Burnham v. Hotchkiss, 14 Conn. 318; Thornton v. Grant, 10 R. I. 477; The Erie v. Canfield, 27 Mich. 479; Clark v. Lake St. Clair Ice Co., 24 Mich. 508; Attorney General v. Evart Booming Co., 34 Mich. 462; People v. Carpenter, 1 Mich. 273; Howard v. Robbins, 1 Lans. 63; Knox v. New York, 55 Barb. 404; 38 How. Pr. 67; Van Der Brooks v. Currier, 2 Mich. N. P. 21; Delaware Canal Co. v. Lawrence, 2 Hun, 163; 56 N. Y. 612.

*ad filum aquæ*, such proprietors are at liberty, as against the public, to erect any structure, or to do any act with respect to the water, or the portion of the river-bed owned by each, provided they do not interfere with the navigation,<sup>1</sup> and the public have no other right than that of free and unmolested passage.<sup>2</sup> This right of passage does not include the right to take rocks, gravel or soil from the bed of non-tidal rivers which are private property, and the owner of the adjoining land may maintain an action of trespass for this cause,<sup>3</sup> or replevy from the wrongdoer the rocks or soil so taken.<sup>4</sup> Stone cannot be quarried, without compensation, from the bed of a private stream, for the purpose of constructing a public bridge, even at that part of the bed which is beneath the proposed bridge.<sup>5</sup> In Pennsylvania, where the large fresh-water rivers belong to the public, paving stones taken from such rivers belong to the taker.<sup>6</sup>

§ 94. **Same — Same — Benefits to the public.**—In *Rex v. Russell*<sup>7</sup> the defendants were indicted for wrongfully continuing two coal staiths or geers in a navigable river to the public nuisance of the navigation. The geers extended over the space between high and low-water mark, and one or two feet below low-water mark, with spouts projecting therefrom, one of which extended outward thirty-six feet. The opinion of the majority of the court<sup>8</sup> was that the defendants should be acquitted if the abridgment of the navigation caused by these structures was for a public purpose, and produced a public benefit, by enabling coals to be supplied at a cheaper price and in better condition than before, provided that a reasonable space was left for the passage of vessels upon the river. In

<sup>1</sup> *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, 845, 853, 854, 870; *Walker v. Board of Works*, 16 Ohio, 544; *Attorney General v. Ewart Booming Co.*, 34 Mich. 462.

<sup>2</sup> *Ibid.* So in the case of a highway on land, the public have merely a right of passage, and no right to take waters from springs or streams in the highway. *Old Town v. Dooley*, 81 Ill. 255.

<sup>3</sup> *Braxton v. Bressler*, 64 Ill. 488;

*June v. Purcell*, 86 Ohio St. 396; *Ross v. Faust*, 54 Ind. 471; *Berry v. Snyder*, 3 Bush, 266, 285.

<sup>4</sup> *Braxton v. Bressler*, 64 Ill. 488.

<sup>5</sup> *Overman v. May*, 35 Iowa, 89.

<sup>6</sup> *Solliday v. Johnson*, 38 Penn. St. 380.

<sup>7</sup> 6 B. & C. 566; 9 D. & R. 561. See, also, *Rex v. Grosvenor*, 2 Starkie, 511, 514.

<sup>8</sup> *Bayley and Holroyd, JJ.*, Lord Tenterden, C. J., dissenting.

subsequent English cases<sup>1</sup> it was held that, upon an indictment for a public nuisance, the violation of rights which belong to any part of the public cannot be excused or vindicated by offsetting the benefit which may arise to another part of the public elsewhere. In the case of *Rex v. Ward*,<sup>2</sup> in which the decision of *Rex v. Russell* was reviewed, it was held that a finding by the jury, that an embankment in a water highway is a nuisance, as interfering with the navigation, but that the inconvenience is counterbalanced by the public benefit arising therefrom, amounted to a verdict of guilty. The rule now is that the inquiry for the jury is whether the structure is a nuisance to the navigation, and not whether it is beneficial to the public; and that counterbalancing benefits which may accrue to the public from that which is found to be a nuisance are immaterial.<sup>3</sup>

§ 95. **Same — Anchoring and mooring.**— The right of navigation includes the right to anchor as incidental to its beneficial enjoyment; and a claim by individuals or corporations, founded on royal grant or immemorial usage, for a toll or anchorage on all vessels which anchor in an arm of the sea which is not a port, cannot be maintained.<sup>4</sup> As against other

<sup>1</sup> *Rex v. Ward*, 4 Ad. & El. 384; 63 Maine, 434; *People v. St. Louis*, 5 Rex v. Morris, 1 B. & Ad. 441; Reg. Gilman, 351, 372; *Works v. Junction v. Betts*, 16 Q. B. 1022, 1037; Reg. v. R., 5 McLean, 425; *Thornton v. Grant*, Randall, 1 Car. & M. 496; Reg. v. 10 R. L. 477, 482; *Simon v. Atlanta*, Charlesworth, 16 Q. B. 1012. 67 Ga. 618, 623. But see *Mississippi*

<sup>2</sup> *Rex v. Ward*, 4 Ad. & El. 384.

<sup>3</sup> *Ibid.*; *Rex v. Tindall*, 6 Ad. & El. 143; 3 El. & Bl. 942; *Rex v. Morris*, 1 B. & Ad. 441; *Folkes v. Chad*, 3 Dougl. 340; Reg. v. *Betts*, 16 Q. B. 1022, 1037; Reg. v. *Randall*, 1 Car. & M. 496; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Commonwealth v. Wright*, 3 Am. Jur. 185; *People v. Vanderbilt*, 26 N. Y. 287, 297; *Hart v. Albany*, 9 Wend. 571, 582; *People v. Horton*, 64 N. Y. 610, 620; *Respublica v. Caldwell*, 1 Dallas. 150; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 577; *State v. Kaster*, 35 Iowa, 221; *Garitee v. Baltimore*, 53 Md. 422, 436; *Blanchard v. Moulton*, 63 Maine, 434; *People v. St. Louis*, 5 Gilman, 351, 372; *Works v. Junction R.*, 5 McLean, 425; *Thornton v. Grant*, 10 R. L. 477, 482; *Simon v. Atlanta*, 67 Ga. 618, 623. But see *Mississippi R. Co. v. Ward*, 2 Black, 485, 494; *Pilcher v. Hart*, 1 Humph. 524, modified in *Gold v. Carter*, 9 Humph. 369; *Commonwealth v. Bilderback*, 2 Parsons (Pa.), 447; *People v. Horton*, 64 N. Y. 610; 5 Hun, 516; *Delaware Canal Co. v. Lawrence*, 2 Hun, 163; 56 N. Y. 612; *Commonwealth v. May*, 3 Am. Jur. 190; *Commonwealth v. Crowninshield*, 2 Dane's Abr. 697; *State v. Woodward*, 23 Vt. 92; *State v. Smith*, 54 Vt. 403, 411.

<sup>4</sup> *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 266. A vessel is not "lying at anchor" within a statute when attached to a

vessels, but not against the riparian owners,<sup>1</sup> it includes the right to moor to wharves and to the shore, and thereby to occupy exclusively, for a reasonable time and in a proper manner, the portion of the channel covered by the vessel.<sup>2</sup> Ships may land and remain at the shore during such periods, and at such places as may be reasonably necessary for loading and unloading and awaiting cargoes.<sup>3</sup> So logs and rafts, floated down a stream, may be moored for a reasonable time to the shore for the purpose of making up the logs into rafts, or for breaking up the rafts, or to enable the owners to sell them;<sup>4</sup> and, if the logs of different owners are necessarily intermingled in passing down a stream which is only capable of floating them loose, one owner may reasonably detain the mass in order to select and separate his own logs.<sup>5</sup> The reasonableness of the time, place, and manner of the mooring under the foregoing rules is a question of fact for the jury,<sup>6</sup> and the privilege of stopping upon the water is practically the same as in the case of a carriage upon a road.<sup>7</sup> A boom built in a stream or in one of the great lakes is a nuisance if it prevents another from entering the common highway with a drive of logs from a tributary stream,<sup>8</sup> or interferes with the use of a dock built by a riparian proprietor in aid of navigation.<sup>9</sup> The

pier. *Walsh v. New York Dry Dock Co.*, 77 N. Y. 448.

<sup>1</sup> *Post*, § 98.

<sup>2</sup> *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713; *Booth v. Ratté*, 15 App. Cas. 188; *Wyatt v. Thompson*, 1 Esp. 252; *Hayward v. Knapp*, 23 Minn. 430; *Sherlock v. Bainbridge*, 41 Ind. 35; *Bainbridge v. Sherlock*, 29 Ind. 364; *Baker v. Lewis*, 33 Penn. St. 301; *Browne v. Stone*, 1 Phila. 241; 5 Clark, 75; *Gerrish v. Brown*, 51 Maine, 256, 263; *Culbertson v. The Southern Belle*, 1 Newb. 461; *The Granite State*, 3 Wall. 310; *Culbertson v. Shaw*, 18 How. 584.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Hayward v. Knapp*, 23 Minn. 430; *Davis v. Winslow*, 51 Maine, 264; *Weise v. Smith*, 3 Oreg. 445; *Brown v. Kentfield*, 50 Cal. 129; *Dalrymple v. Mead*, 1 Grant Cas. 197.

<sup>5</sup> *Osborne v. Knife Falls Boom Co.*, 32 Minn. 412, 419; *Watts v. Tittabawassee Boom Co.*, 52 Mich. 203. See *Kroll v. Nester*, 52 Mich. 70; *Butterfield v. Gilchrist*, 53 Mich. 22; *Chesley v. Miss. Boom Co.*, 32 Minn. 83.

<sup>6</sup> *Ibid.*; *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713, 722.

<sup>7</sup> *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713; *Sherlock v. Bainbridge*, 41 Ind. 35; *Rex v. Cross*, 3 Camp. 224; *Cary v. Daniels*, 8 Met. 478; *State v. Thompson*, 2 Strob. (S. C.) 12; *Sawyer v. Eastern Steamboat Co.*, 46 Maine, 400; *People v. Horton*, 64 N. Y. 610; 5 Hun, 516; *Sturgeon River Boom Co. v. Nester*, 55 Mich. 113; *State v. Holman*, 29 Ark. 58.

<sup>8</sup> *McPheters v. Moose River L. D. Co.*, 78 Maine, 329.

<sup>9</sup> *Union Mill Co. v. Shores*, 66 Wis. 476.

owner of floating logs who wishes to direct them into his mill-pond, may use, for that purpose, temporary guide booms which do not unreasonably obstruct the channel;<sup>1</sup> and, if a booming company encloses part of a floatable stream in a reasonable and prudent manner for its own purposes, the fact that another booming company upon the same stream is thereby inconvenienced, does not necessarily make the boom of the first company a public nuisance.<sup>2</sup>

§ 96. **Negligent navigation.**— All persons have an equal right to the reasonable use of public streams for travel and transportation; and a navigator who, in the proper exercise of this right, temporarily obstructs another, does not become guilty of a nuisance or trespass.<sup>3</sup> The occasional grounding of a vessel or raft is incidental to navigation,<sup>4</sup> and if it is driven into a position where it obstructs the channel, other navigators are bound to submit to a reasonable delay in order that the owner may remove it, before attempting to destroy it as a nuisance.<sup>5</sup> The fact that a portion of a vessel in landing at a wharf overlaps in front of an adjoining wharf or dock, thereby rendering access to the latter temporarily inconvenient, does not create any liability if the vessel exercise all proper skill and reasonable dispatch, and causes as little inconvenience as possible to others;<sup>6</sup> but, in the absence of wharfage regulations, a large vessel, which, in occupying a wharf for considerable time, overlaps the wharf next adjoining, is liable *pro rata*, after notice and demand, according to the frontage actually occupied at the latter wharf, for the customary wharfage charged there, although it is not made fast to that wharf and

<sup>1</sup> Ibid.; *Veazie v. Dwinel*, 50 Maine, 498.

<sup>2</sup> *Attorney General v. Evert Booming Co.*, 34 Mich. 462.

<sup>3</sup> *Davis v. Winslow*, 51 Maine, 264; *Lancey v. Clifford*, 54 Maine, 489; *Gerrish v. Brown*, 51 Maine, 263; *Canfield v. Erie*, 27 Mich. 479; 1 Mich. N. P. 105; *Attorney General v. Evert Booming Co.*, 34 Mich. 462.

<sup>4</sup> *Colchester v. Brooke*, 7 Q. B. 339; *The Ellen S. Terry*, 7 Ben. 401; *The Coleman*, 1 Brown Adm. 456; *The*

*Thomas A. Scott*, id. 503; *Cummins v. Spruance*, 4 Harr. (Del.) 315.

<sup>5</sup> *Lallande v. The C. D. Jr.*, Newb. Adm. 501.

<sup>6</sup> *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713; *The St. Lawrence*, 19 Fed. Rep. 328; *Sherlock v. Bainbridge*, 41 Ind. 35; *Bainbridge v. Sherlock*, 29 Ind. 364; *Delaware River Steamboat Co. v. Burlington Ferry Co.*, 81 Penn. St. 108 (case of ferry slips).



does not use it to land cargo.<sup>1</sup> Vessels have also the right to use a warp in getting in or out of harbor, if they do not interfere with navigation.<sup>2</sup> They may extend the warp across the entire channel if no other vessels are passing; but must take notice of the approach of another vessel, and slacken the warp so as to allow sufficient space for the approaching vessel to pass, and give timely notice of the space so left.<sup>3</sup> If this notice is disregarded, and injury results, the burden of proof will be upon the latter vessel.<sup>4</sup> Where a collision occurs between a vessel which is at anchor, moored to a wharf, or in stays,<sup>5</sup> and another which is in motion, the presumption of negligence is against the latter.<sup>6</sup> This rule of admiralty, which is also

<sup>1</sup> *The Wm. H. Brinsfield*, 39 Fed. Rep. 215; *The Hercules*, 28 id. 475; *Ranstead v. Fahey*, 44 id. 805. See *The Cornwall*, 10 Ben. 108; *The City of Hartford*, id. 150. Projecting bow-sprits and parts of moored vessels must not interfere with navigation. *The Fort Lee*, 31 Fed. Rep. 570; *The Mary Powell*, id. 622; *The City of Augusta*, 30 id. 844; *The Margaret J. Sandford*, id. 714; *The Industry*, 27 id. 767; *The Nicholson*, 28 id. 889; *The Martino Cilento*, 22 id. 859.

<sup>2</sup> *Potter v. Pettis*, 2 R. L. 483, 487; *McCord v. The Tiber*, 6 Biss. 409; *Annett v. Foster*, 1 Daly, 502; *The Maverick*, 1 Sprague, 23; 5 Law Rep. 106; *The Hope*, 2 W. Rob. 8; *The Echo*, 19 Fed. Rep. 453; *The Swan*, id. 455; *The Fulda*, 31 id. 351.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *The Charlotte Roab*, 1 Brown Adm. 453; *The City of Pekin*, 14 App. Cas. 40; 6 Asp. M. C. 396.

<sup>6</sup> *The Victoria*, 3 W. Rob. 52; *The Egyptian*, 1 Moo. P. C. N. s. 373; *The Otter*, L. R. 4 Adm. 203; *The Buckhurst*, 6 P. D. 152; *The Annot Lyle*, 11 P. D. 114; *The Indus*, 12 P. D. 46; *Cuthbertson v. Shaw*, 18 How. 584; *Ure v. Coffman*, 19 How. 56; *The Granite State*, 3 Wall. 310; *The*

*Louisiana*, 3 Wall. 164; *The Bridgeport*, 14 Wall. 116; *The Clarita*, 23 Wall. 1, 14; *Bill v. Smith*, 39 Conn. 206; *Baker v. Lewis*, 33 Penn. St. 301; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Foster v. Holly*, 38 Ala. 76; *The Fremont*, 3 Sawyer, 571; *Steamboat United States v. St. Louis*, 5 Mo. 230; *Buzzard v. The Petrel*, 6 McLean, 491; *The Indiana*, Abb. Adm. 330; *Sterling v. The Jennie Cushman*, 3 Cliff. 636; *The Lady Franklin*, 2 Lowell, 220; *The J. W. Everman*, 2 Hugh. 17; *Hall v. Little*, 18 Alb. L. Journal, 151; 6 Rep. 577; *The A. R. Whetmore*, 5 Ben. 147; *The Pennsylvania*, 4 Ben. 257; *Mercer v. The Florida*, 3 Hugh. 488; *The Midas*, 6 Ben. 173; *The Duchess*, id. 48; *The Planet*, 1 Brown Adm. 124; *The Masten*, id. 436; *Jerome v. Floating Dock*, id. 508; *The Milwaukee*, 2 Biss. 509; *Amoskeag Manuf. Co. v. The John Adams*, 1 Cliff. 404; *The Bridgeport*, 7 Blatch. 361; 1 Ben. 65; *The Helen R. Cooper*, id. 378; *The E. C. Scranton*, 2 Ben. 25; *The Baltic*, id. 452; *The Nebraska*, id. 500; *The Patterson*, 3 Ben. 299; *The Avid*, id. 434; *The Leo*, id. 569; *The City of Augusta*, 30 Fed. Rep. 844; *The City of Lynn*, 11 id. 339; *The Jeremiah Godfrey*, 17 id. 738; *Shields v. The Mayor*, 18 id. 748. When a ship is



applied by the common-law courts,<sup>1</sup> is a presumption of fact which may be rebutted. Want of a proper watch, or neglect to show proper lights or signals at night, especially when lying in a navigable channel, or failure to observe statutory regulations,<sup>2</sup> would be sufficient to overcome it,<sup>3</sup> if the neglect of such precaution contributed to the injury.<sup>4</sup> A vessel lying at anchor in a gale, which has the power to avoid a threatened collision with another vessel,<sup>5</sup> or a wharf,<sup>6</sup> or a boom,<sup>7</sup> is bound to do so. So, the anchoring of a vessel at an unsafe and improper place is a negligent act,<sup>8</sup> and if the improper anchorage is the proximate cause of a collision with a

about to be launched, and the navigation will thereby be obstructed temporarily, reasonable notice must be given to avoid collisions. *The Vianna*, Swa. Adm. 405; *The Cachapool*, 7 P. D. 217. The mere hoisting of a flag is not sufficient in such case. *Malster v. Humphreys*, 5 Hughes, 180. When a vessel which is hauled up on marine ways to be docked for the purpose of repairing her hull, breaks loose and collides with another vessel by reason of the insufficiency of her fastenings, the same principles govern as in ordinary cases of collisions. *Baker v. Power*, 14 Fed. Rep. 383.

<sup>1</sup> *Bill v. Smith*, 39 Conn. 206.

<sup>2</sup> *The Maryland*, 19 Fed. Rep. 551.

<sup>3</sup> *Sproul v. Hemingway*, 14 Pick. 1; *Carsley v. White*, 21 Pick. 254; *The Julia*, 2 Lush. 231; *The John Fenwick*, L. R. 3 Ad. & Ec. 500; *The Clara*, 102 U. S. 200; *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470; *Whitehall Transportation Co. v. New Jersey Steamboat Co.*, 51 N. Y. 369; *Nelson v. Leland*, 22 How. 48; *Silliman v. Lewis*, 49 N. Y. 379; *The Victoria*, 3 W. Rob. 52; *The City of Baltimore*, 5 Ben. 474; *The Express*, 1 Blatch. 355; *Bill v. Smith*, 39 Conn. 206; *The City of London*, Swa. Adm. 245; *Browne v. Stone*, 1 Phila. 241; 5 Clark, 75; *Baltimore R. Co. v. Wheel-*

*ing Transportation Co.*, 32 Ohio St. 116; *Billings v. Breinig*, 45 Mich. 65; *The Scioto*, Davies, 359; *The Saxonia*, Lush. Adm. 419; *The Industrie*, L. R. 3 Adm. & Ec. 308; *Rathbun v. Payne*, 19 Wend. 399; *Kennard v. Barton*, 25 Maine, 39, 47; *Union Steamship Co. v. Nottinghams*, 17 Gratt. 115; *The Clara*, 13 Blatch. 509; *The Indiana*, Abb. Adm. 330; *The Lyon*, Sprague, 40; *Lenox v. Winissimmet Co.*, id. 160; *Cuthbertson v. Shaw*, 18 How. 584; *Ure v. Coffman*, 19 How. 56; *Sparks v. Saladin*, 6 La. Ann. 764; *Beyer v. The Nurnberg*, 3 Hugh. 505.

<sup>4</sup> *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; *Mellon v. Smith*, 2 E. D. Smith, 462; *The Farragut*, 10 Wall. 334; *The Masters*, 1 Brown Adm. 342; *Meigs v. Steamship Northerner*, 1 Wash. Ter. 91; *The Buckeye*, 9 Fed. Rep. 666; *Shirley v. The Richmond*, 2 Woods, 58; *The Clara Killam*, 2 Quebec L. R. 56; *The Oscar Townsend*, 17 Fed. Rep. 93.

<sup>5</sup> *The Sapphire*, 11 Wall. 164; *The Worthington & Davis*, 19 Fed. Rep. 836.

<sup>6</sup> *Stearns v. Hooper*, 78 Cal. 341.

<sup>7</sup> *John Spry Lumber Co. v. The C. H. Green*, 76 Mich. 320.

<sup>8</sup> *Strout v. Foster*, 1 How. 89; 17 Pet. 107; *The Electra*, 6 Ben. 189; *The Indiana*, Abb. Adm. 330; *Knowl-*

vessel in motion, no action, according to the principles of the common law, lies against the latter vessel to recover compensation,<sup>1</sup> although in admiralty the loss would be divided if both vessels were at fault,<sup>2</sup> even when the faults are independent.<sup>3</sup> In the absence of a proved usage, a pound-keeper of logs is not an insurer, or liable for loss of logs in a storm, and without want of care on his part.<sup>4</sup> A vessel which breaks from her moorings, and strikes a seawall or another vessel, is required to show affirmatively that the drifting was caused by inevitable accident, and not by lack of proper precaution;<sup>5</sup> but if the injury clearly results from *vis major* or unavoidable accident, the loss is to be borne by the party on whom it falls.<sup>6</sup>

ton v. Sanford, 32 Maine, 148; The Thomas Carroll, 23 Fed. Rep. 912; The E. A. Packard, 10 Ben. 520.

<sup>1</sup> Vennall v. Garner, 1 Crompt. & M. 21; Luxford v. Large, 5 Car. & P. 421; Dowell v. General Steam Navigation Co., 5 El. & Bl. 195; Vanderplank v. Miller, Mood. & M. 169; The Marcia Tribou, 2 Sprague, 17; The Scioto, 2 Ware, 366; Strout v. Foster, 1 How. (U. S.) 89; Atlee v. Packet Co., 21 Wall. 389; Lambert v. Staten Island R. Co., 70 N. Y. 104; Arctic Fire Ins. Co. v. Austin, 9 N. Y. 470; 3 Hun, 195; The Clarita, 23 Wall. 1, 14; Halderman v. Beckwith, 4 McLean, 296; Broadwell v. Swigert, 7 B. Mon. 39; Steamboat v. McCraw, 26 Ala. 189, 203; Adams v. Wiggins Ferry Co., 27 Mo. 95; Stephen's N. B. Digest, p. 285, pl. 1, 2; The David Dows, 16 Fed. Rep. 154.

<sup>2</sup> Catharine v. Dickinson, 17 How. 170; Atlee v. Packet Co., 21 Wall. 389; The Morning Light, 2 Wall. 550; Union Steamship Co. v. New York Steamship Co., 24 How. 307; The Clara, 102 U. S. 200; The Rival, Sprague, 128; The Marcia Tribou, 2 Sprague, 17; O'Neil v. Sears, id. 52; The Comet, 1 Abb. (U. S.) 451; The Nautilus, Ware, 529; Vanderplank v. Miller, Mood. & M. 169; Simpson v. Hand, 6 Whart. 311; The Atlas, 98 U. S. 302; The S. Shaw, 6 Fed. Rep.

93; The Delaware, 12 Fed. Rep. 571; The Eliza Keith, 3 Quebec L. R. 143.

<sup>3</sup> The Monticello, 15 Fed. Rep. 474; The B. & C. 18 Fed. Rep. 543.

<sup>4</sup> Brown v. Cunard, 3 Allen (N. B.), 316.

<sup>5</sup> The Louisiana, 3 Wall. 164; The Titan, 8 Ben. 7; The Christopher Columbus, id. 239; The Petunia, id. 349; The Queen of the East, 4 Ben. 103; The Johannes, 10 Blatch. 478; The Fremont, 3 Sawyer, 571; Bodin v. The Thule, 3 Woods, 670; The Marpesia, L. R. 4 P. C. 212; The Agamemnon, 1 Quebec L. R. 333; The Buckhurst, 30 W. R. 232; Love v. Montgomery, 10 La. Ann. 113; The Florence P. Hall, 14 Fed. Rep. 408; The David Dows, 16 id. 154; Catarqui Bridge Co. v. Holcomb, 21 Q. B. (Can.) 273; Wilmot v. Jarvis, 12 id. 641; Stubbs v. Hilditch, 51 J. P. 758; Gifford v. McArthur, 55 Mich. 535.

<sup>6</sup> Arbo v. Brown, 9 Fed. Rep. 318; The Austria, id. 916; 14 id. 298; Dibble v. Seligson, 1 Woods, 406; The Energy, 10 Ben. 158; The Eloina, id. 458; River Wear Commissioners v. Adamson, 2 App. Cas. 743; 1 Q. B. D. 546; The Merle, 31 L. T. N. S. 447; Seabrook v. Raft, 41 Fed. Rep. 596; The Wallace, id. 894; Neel v. Blythe, 42 id. 457; Hibernia Ins. Co. v. St. Louis Trans. Co., 120 U. S. 166.

§ 97. **Mooring — Reasonable time.**— The right of moorage cannot be lawfully exercised in such a manner as to create a permanent obstruction to the navigation, even if the obstruction would be in the aid of commerce. A boom which obstructs the use of a river for navigation or floating lumber, or a raft of timber moored continually to its shores, is a public nuisance, as limiting the right of navigation;<sup>1</sup> and, also, a private nuisance, if it causes peculiar injury to a navigator, or deprives the riparian owners of access to their premises.<sup>2</sup> Keeping a raft moored for six weeks in one place has been held to be an unreasonable obstruction to the right of passage.<sup>3</sup> The proprietors of a dock privilege constructed in front of their lots, upon the Hudson River at Albany, a floating storehouse or vessel with a roof and convenient openings for receiving and discharging merchandise. This permanent occupation of a portion of the river was held to be an obstruction to its free and common use, the same as if it were erected in the open channel.<sup>4</sup> The same has been held with respect to a disused canal-boat, which, being nearly sunken, was fastened to the shore and rendered the navigation less safe and convenient.<sup>5</sup>

§ 98. **Wrecks — Care of.**— The duty of a person, using a navigable river as a highway, to exercise reasonable care and skill to prevent injury to other vessels, continues so long as he retains the management and control of the vessel. If he remains in possession, his liability is the same whether the vessel is in motion or stationary, floating or aground, under water

<sup>1</sup> *Moore v. Jackson*, 2 Abb. N. C. 211; *Lowber v. Wells*, 13 How. Pr. 454; *Commonwealth v. Fleming*, Lewis's Crim. Law, 534; *Bigler v. O'Connor*, 32 Leg. Int. 355; *Watts v. Tittabawassee Boom Co.*, 52 Mich. 208. So storing merchandise upon a street or road is not a lawful use of the public easement. *Coburn v. Ames*, 52 Cal. 385; *Orton v. Harvey*, 23 Wis. 99; *Hundhausen v. Bond*, 36 Wis. 29; *Canoe Creek v. McEniry*, 23 Ill. App. 227.

<sup>2</sup> *Harrington v. Edwards*, 17 Wis. 586.

<sup>3</sup> *Enos v. Hamilton*, 27 Wis. 256; 24 Wis. 658. See *Eagles v. Merritt*, 2 Allen (N. B.), 550.

<sup>4</sup> *Hart v. Albany*, 9 Wend. 570; 3 Paige, 213; *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 38 Barb. 282; *People v. Cunningham*, 1 Denio, 524. But see *Pilcher v. Hart*, 1 Humph. 524; *People v. Horton*, 64 N. Y. 610; 5 Hun, 516.

<sup>5</sup> *McLean v. Mathews*, 7 Brad. (Ill.) 599. See *Larson v. Furlong*, 63 Wis. 323.

or above it.<sup>1</sup> This liability may be transferred with the transfer of the possession and control to another person.<sup>2</sup> If an unavoidable accident causes a vessel to sink, the law does not add to the owner's misfortune by requiring him to remove the impediment to navigation, which the wreck may create, or to mark its position by a buoy or light.<sup>3</sup> If he abandons the vessel, his duty and responsibility cease; but if he retains the possession and control, he is bound to take proper precautions for the safety of the public.<sup>4</sup> These rules apply also where bridges, dams, or houses, swept away by extraordinary floods or by high winds, without negligence on the part of the owners, become obstructions to navigation, or encumber riparian estates.<sup>5</sup> So if a vessel is sunk by a collision, the owner is not generally required to be at any expense for the purpose of

<sup>1</sup> *Brown v. Mallett*, 5 C. B. 599; *White v. Crisp*, 10 Exch. 312, 321.

<sup>2</sup> *Ibid.* See *The Liffey*, 58 L. T. N. S. 351.

<sup>3</sup> *Ibid.*; *King v. Watts*, 2 Esp. 675; *Hancock v. York Ry. Co.*, 10 C. B. 348; *The Swan*, 3 Blatch. 285.

<sup>4</sup> *Harmond v. Pearson*, 1 Camp. 515; *White v. Crisp*, 10 Exch. 312; *Brown v. Mallett*, 5 C. B. 599; *The Douglas*, 7 P. D. 151; *Dormont v. Furness Ry.*, 11 Q. B. D. 496; *The Edith*, 11 L. R. Ir. 270; *The Modoc*, 26 Fed. Rep. 718; *Ball v. Berwind*, 29 id. 541; *Boston Steamboat Co. v. Munson*, 117 Mass. 34; *Taylor v. Atlantic Ins. Co.*, 37 N. Y. 275; 9 Bosw. 369; 2 Bosw. 106; *Sheldon v. Sherman*, 42 N. Y. 484; *Eads v. Brazelton*, 22 Ark. 499; *Winpenny v. Philadelphia*, 65 Penn. St. 135.

<sup>5</sup> *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, 9, 24; *Forster v. Juniata Bridge Co.*, 16 Penn. St. 393; *Livezey v. Philadelphia*, 64 Penn. St. 106; *Roush v. Walter*, 10 Watts, 86; *Winpenny v. Philadelphia*, 65 Penn. St. 135; *Withers v. North Kent Ry. Co.*, 3 H. & M. 969; 7 West. L. J. 567. A bridge or way is negligently con-

structed if built of earth in the channel of a stream, where it may be swept away by floods. *Kansas Pacific Ry. Co. v. Miller*, 2 Col. 442; *Kansas Pacific Ry. Co. v. Lundin*, 3 Col. 94. It seems to be doubtful whether at common law it was the duty of cities and towns to keep their ports free from obstructions. See *Hale, De Portibus Maris*, ch. 7; 1 *Hawk, P. C.* ch. 32, § 13; *Colchester v. Brooke*, 7 Q. B. 339; *Williams v. Wilcox*, 8 Ad. & El. 314; *The Maggie P.*, 25 Fed. Rep. 202. In *Winpenny v. Philadelphia*, 65 Penn. St. 135, 140, *Agnew, J.*, said: "The general understanding in this country is that the clearing out of streams and removing obstructions to navigation belong to the State or the United States, according to the character of the stream, as confined within State limits or as extending beyond, and necessary to interstate commerce. Yet it is not a duty of perfect obligation, but one of voluntary assumption or imperfect obligation, inasmuch as it cannot be enforced against the will of the State." See *ante*, § 90.

raising her.<sup>1</sup> If the owner of a bridge across a navigable stream has a right to keep in the river, in connection with the bridge, a pontoon, which is sunk by unavoidable accident, he is entitled to a reasonable time in which to remove it, but cannot lawfully leave it in the channel for an indefinite period.<sup>2</sup> In Kentucky, it has been held that the owner of a boat which sinks in a navigable stream between high and low-water mark is liable for any damages thereby caused to the owner of the soil on which it lies, if he does not remove it within a reasonable time.<sup>3</sup> Where a railroad company employed a contractor to build a bridge, and for that purpose to drive piles in a river, and, the contract being abandoned, the piles were left in the river in a condition dangerous to vessels, the company was held responsible<sup>4</sup> for injuries to a vessel which struck thereon, although the vessel was prosecuting her voyage on Sunday.<sup>5</sup> Where, however, piles were left by the defendants in a navigable river in such a condition that a vessel could not be injured by them without gross negligence, and, being then sold and cut off by the buyer even with the bottom of the river, they afterwards protruded above the bed in consequence of a washing away of the soil and injured a vessel, the defendants were held not liable.<sup>6</sup> A vessel which leaves an anchor in a navigable channel without a buoy is liable for the injury sustained by another vessel which runs foul of it.<sup>7</sup>

§ 99. **River banks—Use of.**—The early authorities were to the effect that, under the law of England, as by the civil law prevailing upon the continent of Europe and in Louisiana, the right of navigation includes the right to use the shores or banks of navigable waters for the purpose of fastening vessels,

<sup>1</sup>The *Columbus*, 3 W. Rob. 158; *The Franconia*, 16 Fed. Rep. 149.

<sup>2</sup>*Missouri River Packet Co. v. Hannibal R. Co.*, 1 McCrary, 281.

<sup>3</sup>*Morrison v. Thurman*, 17 B. Mon. 267.

<sup>4</sup>*Philadelphia R. Co. v. Philadelphia Towboat Co.*, 23 How. 209. In *Bearrs v. Sherman*, 56 Wis. 55, held that the owner of logs is not liable for the obstruction of a navigable river thereby, when they are under

the control of another person under a contract to run them down the stream.

<sup>5</sup>See, also, *Wallace v. Merrimack River Nav. Co.*, 134 Mass. 95 (collision on Sunday).

<sup>6</sup>*Bartlett v. Baker*, 3 H. & C. 158.

<sup>7</sup>*Philadelphia R. Co. v. Philadelphia Towboat Co.*, 23 How. 209; *The Alabama*, 18 Fed. Rep. 831; *Inland Coasting Co. v. The Commodore*, 40 id. 258.

and for towing barges, to whomsoever the soil belongs; and that, if the water of the river impairs the banks, the public have a right of way for the purpose of towing in the nearest part of the fields next adjoining to the river.<sup>1</sup> But in the case of *Ball v. Herbert*,<sup>2</sup> it was held that the right of towage depends upon usage or statute, and that there was no general right to use the banks of English rivers for this purpose; and it is now understood that the right to use a towing path is not a necessary incident to an inland navigation.<sup>3</sup> This decision determined the rule of the common law, by which, as now established, the right of navigation ceases at the high-water mark of tide waters, and at the water's edge in the case of navigable fresh waters.<sup>4</sup> The public have, therefore, as against the riparian owners, and as incident to the right of naviga-

<sup>1</sup> *Young v. —*, 1 *Ld. Raym.* 725; *Queen v. Cluworth*, 6 *Mod.* 163; *Pierse v. Fauconberg*, 1 *Burr.* 292; *Martin v. Leavers*, 46 *J. P.* 807; *Bracton*, lib. 1, ch. 12, fol. 6; *Just. Inst.* lib. 2, tit. 1, fol. 4; *Cooper's Justinian*, lib. 2, tit. 1; *Civil Code of La.* art. 443, 1446; *Com. Dig.* tit. *Chimin*, D. 4; *Hale, De Portibus Maris*, ch. 7; *Hargrave's Law Tracts*, 79, 85, 86; *Callis on Sewers*, 78; *Carrollton R. Co. v. Winthrop*, 5 *La. Ann.* 86; *Municipality No. 2 v. Orleans Cotton Press*, 18 *La.* 122; *Natchitoches v. Coe*, 3 *Martin*, N. S. 140; *New Orleans v. New Orleans R. Co.*, 27 *La. Ann.* 414; *Pulley v. Municipality No. 2*, 2 *La.* 278; *Hanson v. Lafayette*, 18 *La.* 295; *McKeen v. Kurfurt*, 10 *La. Ann.* 523; *Leonard v. Baton Rouge*, 39 *id.* 275; *Sweeney v. Shakspeare*, 41 *id.* 614.

<sup>2</sup> 3 *T. R.* 258.

<sup>3</sup> *Lee Navigation Conservators v. Button*, 6 *App. Cas.* 685.

<sup>4</sup> *Ball v. Herbert*, 3 *T. R.* 258; *Williams v. Wilcox*, 8 *Ad. & El.* 314; *Blundell v. Catterall*, 5 *B. & Ald.* 268; *Gray v. Bond*, 2 *Brod. & Bing.* 667; *Brown v. Chadbourne*, 31 *Maine*, 9, 25; *Treat v. Lord*, 42 *Maine*, 552, 564;

*Hooper v. Hobson*, 57 *Maine*, 278, 276; *Ledyard v. Ten Eyck*, 36 *Barb.* 102, 127; *Lorman v. Benson*, 8 *Mich.* 18, 27; *Reimold v. Moore*, 2 *Brown (Mich.)*, 15; *Ensminger v. People*, 47 *Ill.* 384, and *Chicago v. Laflin*, 49 *Ill.* 172 (overruling, apparently, the *dicta* in *Middleton v. Pritchard*, 3 *Scam.* 510, 521, 522); *Chambers v. Furry*, 1 *Yeates*, 167; *Bird v. Smith*, 8 *Watts*, 434; *Ball v. Slack*, 2 *Whart.* 530; *Morgan v. Reading*, 3 *S. & M.* 366; *The Magnolia v. Marshall*, 39 *Miss.* 109, 131; *Bell v. Gough*, 23 *N. J. L.* 624, 677; *Bainbridge v. Sherlock*, 29 *Ind.* 364; *Sherlock v. Bainbridge*, 41 *Ind.* 35; *Talbot v. Grace*, 30 *Ind.* 389; *Bickel v. Polk*, 5 *Harr. (Del.)* 325. See *Greenwich Board of Works v. Maudslay*, *L. R.* 5 *Q. B.* 397. In *O'Fallon v. Daggett*, 4 *Mo.* 342, in which the effect of an early grant from the king of Spain was discussed, the banks of navigable rivers were held to be public highways, upon the authority of writers upon the civil law. See, also, *Memphis v. Overton*, 3 *Yerger*, 387; *Benson v. Morrow*, 61 *Mo.* 345; *Lewis v. Keeling*, 1 *Jones (N. C.)*, 299; *Dalrymple v. Mead*, 1 *Grant's Cas. (Penn.)* 197.



tion, no common-law right to use the lands adjoining a river above high-water mark for the purpose of landing or embarkation, or of mooring.<sup>1</sup> Proof of necessity or danger would not apparently free the navigator from liability for appreciable damage thus caused to a riparian proprietor.<sup>2</sup> Those who travel upon the banks of streams for the purpose of propelling their logs are liable in trespass to the owner of the banks,<sup>3</sup> and he may require from navigators such price as he chooses for the use of the shore in loading and unloading vessels, if he gives notice of the charge before his property is so used.<sup>4</sup>

§ 100. **Same — By fishermen.**— It was early laid down that fishermen may go on land adjoining the sea to fish, that being for the common good, though they cannot justify digging there for the purpose of fixing stakes upon which to dry their nets;<sup>5</sup> but it is now settled that the public right of fishery affords no justification for any act committed upon dry land, in the absence of a prescriptive right.<sup>6</sup> A littoral proprietor has the

<sup>1</sup> *Ibid.*; *Ensminger v. People*, 47 Ill. 384; *Stewart v. Fitch*, 2 Vroom, 17, 20. As to the rule in Pennsylvania, see *ante*, § 65.

<sup>2</sup> *Post*, § 102; Hale, *De Portibus Maris*, ch. 8; Hargrave's *Law Tracts*, 51; *Blundell v. Catterall*, 2 B. & Ald. 268; *Wyatt v. Thompson*, 1 Esp. 252; *Morrison v. Thurman*, 17 B. Mon. 249, 257; 14 *id.* 367; *Morgan v. Reading*, 3 S. & M. 366, 407; *The Magnolia v. Marshall*, 39 Miss. 109, 132; *Bell v. Gough*, 23 N. J. L. 624, 677; *Weise v. Smith*, 3 Oreg. 445; *Bainbridge v. Sherlock*, 29 Ind. 864; *Sherlock v. Bainbridge*, 41 Ind. 35. See *Gunning on Tolls*, 126.

<sup>3</sup> *Hooper v. Hobson*, 57 Maine, 273. See *Weise v. Smith*, 3 Oreg. 445.

<sup>4</sup> *Steamer Magnolia v. Marshall*, 39 Miss. 109; *Morgan v. Reading*, 3 S. & M. 366; *Commissioners v. Withers*, 29 Miss. 21; *International Bridge Co. v. Canada Southern Ry. Co.*, 28 Grant's Ch. (Can.) 114; 7 Ontario App. 226; 8 App. Cas. 723. An agreement to clear a navigable

stream and run logs down it is not against public policy as involving trespasses upon riparian estates unless it appears that such trespasses are contemplated or that the riparian owners object. *Fuller v. Rice*, 52 Mich. 435.

<sup>5</sup> *Brooke's Abr.*, tit. Custom, pl. 46; *Fitz Barre*, 93.

<sup>6</sup> *Gray v. Bond*, 2 Brod. & Bing. 667; *Holroyd, J.*, in *Blundell v. Catterall*, 5 B. & Ald. 268; *Coolidge v. Williams*, 4 Mass. 140; *Hart v. Hill*, 1 Whart. 188; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. 71; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Jacobson v. Fountain*, 2 Johns. 170; *Whittaker v. Burhaus*, 62 Barb. 237; *Brink v. Ritchmyer*, 14 Johns. 255; *Lay v. King*, 5 Day, 72; *Sheppard's Epitome*, tit. Custom & Prescription, p. 392; *Woolrych on Waters*, 138; Hale, *De Jure Maris*, ch. 6; Hargrave's *Law Tracts*, p. 86; 2 *Dane's Abr.* 702, 707; *Duncan v. Sylvester*, 24 Maine, 482; *Parker v. Elliott*, 1 C. P. (Can.), 470; *ante*, § 26.



exclusive right to draw a boat or seine on his own land,<sup>1</sup> to erect fishing huts there,<sup>2</sup> or to fix stakes in his own flats below the high-water mark of tide waters for the purpose of spreading a seine.<sup>3</sup> If the proprietor of land on which a seine reel is placed, without his license, cuts it down and thrusts it toward the water, after notice to remove it, and neglect to do so, he is not liable if the reel floats away, although he might have prevented it.<sup>4</sup> The right to draw a seine upon the land of another person is an easement, and when acquired by prescription, its extent is commensurate with, and is determined by, the previous user.<sup>5</sup> A fishing place may be granted separate from the soil.<sup>6</sup> A grant of the exclusive privilege of using, as a fishing station, a lot on an unoccupied beach or island in tide waters does not convey any right of fishing, and the grantee cannot recover damages from a person who sets nets in front of his lot beyond low-water mark, and thus prevents the fish from entering his nets.<sup>7</sup>

§ 101. Same — Towing paths.— If the public acquire the right to use a river bank as a towing path by grant, user, or dedication, the title to the bank remains *prima facie* vested in the original owners, subject to the public right to use it as a highway in this particular manner.<sup>8</sup> Land taken under a statute by a canal company for a towing path may be dedicated by such company to the public as a foot-path subject to its use as a towing path, when the public use is not inconsistent with

<sup>1</sup> Ibid.; *Skinner v. Hettrick*, 73 N. C. 53; *Hettrick v. Skinner*, 82 N. C. 65, 68; *Bradley Fish Co. v. Dudley*, 37 Conn. 186; *Locke v. Motley*, 2 Gray, 265. A person who clears out a fishing place in a river acquires thereby no exclusive right of fishery. *Westfall v. Van Anker*, 12 Johns. 425; *Freary v. Cooke*, 14 Mass. 488. See *Pitkin v. Olmstead*, 1 Root, 219; *Munson v. Baldwin*, 7 Conn. 171.

<sup>2</sup> Ibid.

<sup>3</sup> *Locke v. Motley*, 2 Gray, 265; *Duncan v. Sylvester*, 24 Maine, 482; *Whittaker v. Burhaus*, 62 Barb. 237;

65 N. Y. 559; 2 Dane Abr. 692. See *Parsons v. Clark*, 76 Maine, 476.

<sup>4</sup> *Almy v. Grinnell*, 12 Met. 53.

<sup>5</sup> *Hart v. Hill*, 1 Whart. 138; Bald. Ct. Dig. 339, pl. 12, 13.

<sup>6</sup> *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21.

<sup>7</sup> *Hierlihy v. Loggie*, 3 Allen, (N. B.), 204.

<sup>8</sup> *Winch v. Conservators of the River Thames*, L. R. 7 C. P. 471; L. R. 9 C. P. 378; *Rex v. Severn Navigation Co.*, 2 B. & A. 646; *Hollis v. Goldfinch*, 1 B. & C. 205; *Lee Conservancy Board v. Button*, 12 Ch. D. 383; 6 App. Cas. 685; 15 Ir. L. T. 235.

its use as a towing path;<sup>1</sup> and the banks of a navigable stream may be appropriated by statute to the use of the public as a towing path.<sup>2</sup> In such case, also, the riparian proprietors retain the ownership of the soil subject to the public easement, unless the language of the statute shows an intention to take the fee for the purpose of the act;<sup>3</sup> the rule being that, in the absence of express words, the courts do not infer that a statute of this kind gives to the public, or to a board of conservators, or navigation companies, acting in the public interest, a greater interest in the soil than is necessary for the purposes of the navigation.<sup>4</sup>

§ 102. Same — Stranded property.— The only instance in which the common law recognizes the right of the public to enter upon the land of a riparian owner above high-water

<sup>1</sup> *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273; *Rex v. Leake*, 5 B. & Ad. 469. See *Alexander v. Tolleston Club*, 110 Ill. 65.

<sup>2</sup> *Winch v. Conservators of the River Thames*, L. R. 7 C. P. 471; *Lee Conservancy Board v. Button*, 12 Ch. D. 383; 6 App. Cas. 685; *Rex v. Leake*, 5 B. & Ad. 469; *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273; 68 L. T. 167.

<sup>3</sup> *Ibid.*; *Carpenter v. State*, 12 Ohio St. 457; *Indiana Central Canal Co. v. State*, 53 Ind. 575. A canal and its towing paths, which are directed by statute to be kept in repair for the use of the public, are highways. *Bosley v. Susquehanna Canal*, 3 Bland, 63.

<sup>4</sup> *Badger v. South Yorkshire Ry. Co.*, 1 El. & El. 346, 359, 368; *Reg. v. Archbishop of York*, 14 Q. B. 81; *Hollis v. Goldfinch*, 1 B. & C. 205; *Bruce v. Willis*, 11 A. & E. 463; *Lee Conservancy Board v. Button*, 12 Ch. D. 383; *Monmouthshire Canal Co. v. Hill*, 4 H. & N. 421; *Kinlock v. Neville*, 6 M. & W. 795; *Newcastle v. Clarke*, 2 B. Moore, 666; *Buckeridge v. Ingram*, 2 Ves. Jr. 652; *Stanley v. White*, 14 East, 332; *New Shoreham*

*Harbor Commissioners v. Lansing*, L. R. 5 Q. B. 489; *Rex v. Mersey Navigation*, 9 B. & C. 95; *Rex v. Thomas*, id. 114; *Rex v. Aire Navigation*, id. 820; 3 B. & Ad. 139; *Cory v. Bristow*, 2 App. Cas. 262; *Simpson v. Staffordshire Water Co.*, 4 De G. J. & S. 679; *Somerset Canal v. Harcourt*, 2 De G. & J. 596; *Chelsea Water Co. v. Bowley*, 17 Q. B. 358; *Patrick v. Beaufort*, 6 Exch. 498; *Robins v. Warwick*, 2 Bing. N. C. 483; *Harborough v. Shadlow*, 7 M. & W. 37; *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 794; *post*, § 241. If a canal falls into disuse, the owner's rights then stop at high-water mark. *Morgan v. Bass*, 14 Fed. Rep. 454. A person who, being seized of land, conveys to a canal company "such portion and quantity of his land as may be covered, used, or occupied by the said canal, or the necessary works thereof," and describes the premises conveyed, does not surrender the privilege of using public highways passing through the granted premises. *Leopold v. Chesapeake Canal Co.*, 1 Gill, 222; *Carpenter v. State*, 12 Ohio St. 457.

mark, in connection with the right of navigation, appears to be for the purpose of reclaiming stranded property which may have been washed ashore without fault on the part of its owner.<sup>1</sup> In Maine the right to reclaim stranded logs is expressly recognized by a statute which requires payment or tender of compensation for damages.<sup>2</sup> The common-law rule is that a person whose property is carried, by flood or inevitable accident, upon another's land, and who elects to reclaim and not abandon it, becomes responsible, immediately upon its removal, for the damage done by the property upon such land; and the law implies, in such a case, a promise of compensation, upon which, in the absence of an express promise, an action may be maintained.<sup>3</sup> In case a bridge is carried

<sup>1</sup> *Carter v. Thurston*, 58 N. H. 104, 107; *Hoit v. Stratton Mills*, 54 N. H. 109, 106; *Aldrich v. Wright*, 53 N. H. 396; *Brown v. Collins*, id. 442, 449; *Thompson v. Androscoggin Co.*, 54 N. H. 545, 558; *Eaton v. B. C. & M. R. Co.*, 51 N. H. 504, 530; *Brown v. Chadbourne*, 81 Maine, 9, 24; *Treat v. Lord*, 42 Maine, 552; *Colchester v. Brooke*, 7 Q. B. 339; *Rogers v. Judd*, 5 Vt. 223; *Forster v. Juniata Bridge Co.*, 16 Penn. St. 393. If the logs or timber of different owners, floated into a river, become so mixed that the property of each cannot be identified, they become tenants in common; unless the defendant's wrongful act was the cause of the confusion. *Gilmour v. Buck*, 24 C. P. (Can.) 187. See *Lane v. McDonald*, 2 Russell & G. N. S. 87; *Clark v. Nelson Lumber Co.*, 34 Minn. 289. This rule does not apply when the logs are distinctly marked. *Goff v. Brainerd*, 58 Vt. 468. In a suit brought by one such co-owner, the objection of non-joinder of the other owners as plaintiffs comes too late if not taken by answer or demurrer. *Weatherby v. Meiklejohn*, 61 Wis. 67. As to the recapture or appropriation of marked timber in a river, see *Macpherson v. Frederickton Boom Co.*, 1 Hannay

(N. B.), 337; *Arpin v. Burch*, 68 Wis. 619; *Libby v. Johnson*, 37 Minn. 220. An unmarked log, carried down stream and unreclaimed for two years, is lost property, and a former finder is entitled to it as against the riparian owner. *Deaderick v. Oulds*, 86 Tenn. 14; *Moore v. Erie Ry. Co.*, 7 Lans. 39; *Tiago Manuf. Co. v. Stimson*, 48 Mich. 213; *Hall v. Tittabawassee Boom Co.*, 51 Mich. 377; *Martin v. Mason*, 78 Maine, 452; *Norris v. United States*, 44 Fed. Rep. 735.

<sup>2</sup> Rev. Stats. of Maine (1857), ch. 42, § 8; Rev. Stats. (1871) ch. 42, §§ 7, 8; *Hooper v. Hobson*, 57 Maine, 267; *Brown v. Chadbourne*, 81 Maine, 9; *Treat v. Lord*, 42 Maine, 552. See *Young v. Clement*, 81 Maine, 512.

<sup>3</sup> *Ibid.*; *Sheldon v. Sherman*, 42 N. Y. 484. In an action of trespass *quare clausum fregit*, a plea justifying an entry upon the plaintiff's land in order to retake stranded timber should show that the defendant used his best endeavors to prevent the timber landing there, and it is questionable whether an injury to the soil and herbage would even then be excusable. *Read v. Smith*, Berton (N. B.), 173.

away and the materials do injury upon another's land, the owner would doubtless be liable if the bridge was negligently constructed.<sup>1</sup>

§ 103. **Same — Eminent domain — Compensation.**— A corporation which is authorized by statute to construct booms upon a river for the purpose of holding and storing logs, acquires thereby no right to appropriate and use the banks, except by the consent of the owners, or in the exercise of the power of eminent domain.<sup>2</sup> This property cannot be taken for a purely private purpose; and the fact that booming companies and companies for the improvement of the navigation are *quasi* public corporations, and hold their franchises for a public use,<sup>3</sup> does not give them the privileges of a riparian owner, or enable them, by legislative authority, to devote the river banks to the purposes of their charter, without compensation to the riparian owners.<sup>4</sup> Compensation is also neces-

<sup>1</sup> *Livezey v. Philadelphia*, 64 Penn. St. 106; *ante*, § 98, note. The carrying away, by flood, of a bridge not part of the demised premises, whereby their value is diminished, is no ground for an abatement of the rent. *Smith v. Ankrum*, 13 S. & R. 39.

<sup>2</sup> *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Carpenter v. State*, 12 Ohio St. 457. So when a bridge is authorized across a stream, a constructive or implied authority is not sufficient for the expropriation of lands. *Winnipeg v. Cauchon*, 1 Manitoba, 350. If a public road, which has been legally established along the banks of a river by condemnation of the land of an individual proprietor, is washed away by a flood, there is no right of necessity to use the adjoining land for the highway without a new condemnation and compensation for the same. *Commonwealth v. Beeson*, 3 Leigh, 821. They may, however, use such land temporarily for the purpose of passage, if the obstruction is sudden and makes the way impracticable. *Morey v. Fitzgerald*, 56 Vt.

487; *Ball v. Herbert*, 3 T. R. 253, 263; *ante*, § 55.

<sup>3</sup> *Attorney General v. Railroad Co.*, 35 Wis. 425; *Wisconsin R. Co. v. Manson*, 43 Wis. 255; *Delaphine v. Railroad Co.*, 42 Wis. 214; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; 44 Wis. 295; *Denniston v. Unknown Owners*, 29 Wis. 851; *Pound v. Turck*, 95 U. S. 459; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Lawler v. Boom Co.*, 56 Maine, 443; *Perry v. Wilson*, 7 Mass. 393; *Ten Eyck v. Delaware Canal Co.*, 18 N. J. Eq. 200, 204; *Sinnickson v. Johnson*, 2 Har. (N. J.) 129, 152; *Brady's Appeal*, 26 Md. 290; *Texas Navigation Co. v. Galveston Co.*, 45 Texas, 274.

<sup>4</sup> *Ibid.*; *Schoff v. Upper Connecticut River Co.*, 57 N. H. 110; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; 46 Wis. 237; *Reimold v. Moore*, 2 Brown (Mich.), 15; *Hargrave's Law Tracts*, 79; *Bath River Navigation Co. v. Willis*, 2 Railway & Canal Cases, 7; *Clay v. Pennoyer Creek Improvement Co.*, 34 Mich. 204; *Hooker*

sary where the banks are flooded by public improvements,<sup>1</sup> or by dams erected for the collection and storage of logs, or by a collection of logs in great numbers<sup>2</sup> where the value of the banks for boom purposes is injured by dams erected under legislative authority for supplying a city with water;<sup>3</sup> and where a landing and buildings used in connection with a fishery are destroyed by the construction of a railroad.<sup>4</sup> The liberty of a ferry is limited by high-water mark upon either shore;<sup>5</sup> and it has been held that such a franchise, conferred by the legislature, carries with it no right, without the riparian owner's consent, or the payment of compensation, to use the land adjoining the river above high-water mark as a landing, even though such land is already subject to an easement in favor of the public for the purpose of a highway.<sup>6</sup> It has also been held that if a highway extends to navigable waters, the riparian owner has no exclusive right of landing,<sup>7</sup> and that the public may approach navigable water from any part of the

*v. New Haven Co.*, 15 Conn. 321; *Monongahela Navigation Co. v. Coons*, 6 Penn. St. 379. See a reservation of the right to use the banks construed in *Bradley v. Tittabawassee Boom Co.*, 82 Mich. 9; 46 N. W. 24. A State may authorize a corporation to take the fee of private property for the purpose of constructing a boom. *Patterson v. Mississippi Boom Co.*, 3 Dillon, 465.

<sup>1</sup> *Harper v. Milwaukee*, 30 Wis. 365; *Arimond v. Green Bay Canal Co.*, 31 Wis. 316; 35 Wis. 41; *Cobb v. Smith*, 23 Wis. 261; 38 Wis. 21; *Sheboygan v. Sheboygan R. Co.*, 21 Wis. 667.

<sup>2</sup> *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; *Anderson v. Thunder Bay River Boom Co.*, 61 Mich. 489; *McKensie v. Miss. Boom Co.*, 29 Minn. 288; *Weaver v. Same*, 28 id. 530; 30 id. 477.

<sup>3</sup> *Barrett v. Bangor*, 70 Maine, 335.

<sup>4</sup> *Alexandria Ry. Co. v. Faunce*, 31 Gratt. 761.

<sup>5</sup> *State v. Wilson*, 42 Maine, 9; *French v. Camp*, 18 Maine, 433.

<sup>6</sup> *Prosser v. Wapello County*, 18 Iowa, 327; *Prosser v. Davis*, id. 367; *Cooper v. Smith*, 9 Serg. & R. 26; *Chambers v. Furry*, 1 Yeates, 16; *Chess v. Manown*, 3 Watts, 219; *Bird v. Smith*, 8 Watts, 434; *Pipkin v. Wynns*, 2 Dev. (N. C.) 402. See *Memphis v. Overton*, 3 Yerger, 387, 360; *Levisay v. Delp*, 9 Baxter, 415; *Douglas's Appeal*, 118 Penn. St. 85; *Singer v. Carondelet Canal Co.*, 39 La. Ann. 478; *St. Louis R. Co. v. Thomas*, 34 Fed. Rep. 774.

<sup>7</sup> *Backus v. Detroit*, 49 Mich. 110; *Fowler v. Mott*, 19 Barb. 204; *Burrows v. Gallup*, 32 Conn. 499; *Church v. Meeker*, 34 Conn. 429; *Somerville v. Wimbish*, 7 Gratt. 205; *Peter v. Kendal*, 3 B. & C. 703; *Newton v. Cubitt*, 12 C. B. N. s. 32; *Gant v. Drew*, 1 Oreg. 35; *Mills v. Learn*, 2 id. 215; *Mills v. Commissioners*, 3 Scam. 53; *Patrick v. Ruffner*, 2 Rob. 209; 3 Kent Com. 421; *Walker v. Armstrong*, 2 Kansas, 198; *New York v. N. Y. Ferry Co.*, 40 N. Y. Sup. Ct. 232, 246.

highway.<sup>1</sup> In England it has recently been held that statutory power to erect a pier authorized its projection on the line of a public highway, and that the public acquired no right, upon its erection, to pass over it in order to reach the sea.<sup>2</sup>

§ 104. *Same — Towage — Access.*—The right of towage along the banks of navigable rivers resembles the right of passage upon a highway. It may be acquired by the public by custom or prescription;<sup>3</sup> and Lord Kenyon suggests that small evidence of usage would be sufficient before a jury to establish the right by custom, upon grounds of public convenience.<sup>4</sup> Analogous to this is the right of way to navigable waters from lands lying inward. Tide waters are common property with respect to navigation and fishing, but the public have no general right of access to them over private lands.<sup>5</sup> This privilege cannot be claimed as a right of necessity,<sup>6</sup> but depends, as in the case of highways generally, upon statute, or upon grant, dedication, or prescription.<sup>7</sup> It is competent for the legislature to take private property for public use as a wharf, landing place, or ferry landing;<sup>8</sup> and to authorize a town to convert a promenade into wharfs and landings.<sup>9</sup> But

<sup>1</sup> *Ibid.*; *Parsons v. Clark*, 76 Maine, 476; *post*, § 157; *Demopolis v. Webb*, 87 Ala. 659.

<sup>2</sup> *Yarmouth v. Simmons*, 16 Ch. D. 518; *Standly v. Perry*, 3 Can. Supr. Ct. 356.

<sup>3</sup> *Ball v. Herbert*, 3 T. R. 253; *Kinlock v. Neville*, 6 M. & W. 794; *Badger v. South Yorkshire Ry. Co.*, 1 El. & El. 347; *Monmouth Canal Co. v. Hill*, 4 H. & N. 427; *Hollis v. Goldfinch*, 1 B. & C. 205; 1 Burr. 292; *Harrington v. Edwards*, 17 Wis. 586.

<sup>4</sup> *Ball v. Herbert*, 3 T. R. 253.

<sup>5</sup> *Blundell v. Catterall*, 5 B. & Ald. 268; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Coolidge v. Williams*, 4 Mass. 440; *Bickel v. Polk*, 5 Harr. (Del.) 325.

<sup>6</sup> *Lawton v. Rivers*, 2 McCord (S. C.), 445; *Turnbull v. Rivers*, 3 id. 131; *Seabrook v. King*, 1 Nott & McC. 140.

<sup>7</sup> *Ante*, § 99; *White v. Whittier*, 2 Dane's Abr. 702.

<sup>8</sup> *Memphis v. Wright*, 6 Yerger, 497; *Bainbridge v. Sherlock*, 29 Ind. 364; 41 Ind. 35; *Wetmore v. Atlantic White Lead Co.*, 87 Barb. 70; *Muire v. Falconer*, 10 Gratt. 12; *Anderson v. St. Louis*, 47 Mo. 479; *Leslie v. St. Louis*, 47 Mo. 474; *Phipp's Appeal*, 28 Md. 380; *Mayor v. State*, 4 Ga. 26; *Martin v. O'Brien*, 34 Miss. 21; *Yadkin Navigation Co. v. Benton*, 2 Hawks (N. C.), 10; *Barrington v. Neuse River Ferry Co.*, 69 N. C. 165. The right of jury trial, to determine the value of the land so taken, must be secured to the land-owner. *Day v. Stetson*, 8 Maine, 365. But a horse ferry is not of such public interest as to justify taking private property for its establishment. *Day v. Stetson*, 8 Maine, 365.

<sup>9</sup> *Memphis v. Wright*, 6 Yerger, 497.



without authority from the legislature, a town cannot convert a private wharf or landing into a town way.<sup>1</sup>

**§ 105. Same — Landings — Dedication — Prescription.**— In *Pearsall v. Post*,<sup>2</sup> in New York, in which it appeared that land adjoining a harbor had been used for many years as a place for the landing and deposit of large quantities of manure brought from the city of New York, it was held: first, That the right to encumber lands adjoining navigable waters with manure or merchandise, being more than a simple right of passage, could not be acquired by the public by custom or prescription; second, That the doctrine of parol dedication of highways, streets and public squares does not extend to public landings. In *Talbot v. Grace*,<sup>3</sup> in Indiana, there was evidence that the place in question had been long used both for the purpose of a landing, and for the loading and unloading of vessels, and one ground of the decision was, following *Pearsall v. Post*,<sup>4</sup> that the public right could not rest upon the ground of prescriptive user. In Massachusetts the public may, by immemorial usage, acquire the right to use the banks of a river for the purpose of landing;<sup>5</sup> and a tract of land or an open square in a town may be dedicated to the public as a park.<sup>6</sup> The same doctrine, as to landings, was early recognized in Maine.<sup>7</sup> But in the latter State a general right to

<sup>1</sup> *Kean v. Stetson*, 5 Pick. 492, 495.

<sup>2</sup> 20 Wend. 111; 22 Wend. 425; *Pearsall v. Hewlett*, 20 Wend. 111; 22 Wend. 559. See also *Cortelyou v. Van Brundt*, 2 Johns. 857; *Hunter v. Sandy Hill*, 6 Hill, 407, 411; *Cady v. Conger*, 19 N. Y. 256; *Bloomfield Gas Light Co. v. Calkins*, 62 N. Y. 386; *Munson v. Hungerford*, 6 Barb. 265; *Adams v. Rivers*, 11 Barb. 390; *Wiggins v. Tallmadge*, 11 Barb. 457; *Curtis v. Keesler*, 14 Barb. 511; *Smith v. Floyd*, 18 Barb. 522; *Fowler v. Mott*, 19 Barb. 204; *Etz v. Daily*, 20 Barb. 32; *Kelsey v. King*, 33 How. Pr. 39; 1 N. Y. Trans. App. 133.

<sup>3</sup> 30 Ind. 389.

<sup>4</sup> 20 Wend. 111; 22 Wend. 425.

<sup>5</sup> *Kean v. Stetson*, 5 Pick. 492;

*Coolidge v. Learned*, 8 Pick. 504; *Green v. Chelsea*, 24 Pick. 80; *Boston v. Richardson*, 105 Mass. 351, 357. In North Carolina the use of a landing by the public for twenty years as of right affords ground for a presumption of dedication to the public use. *Askew v. Wynne*, 7 Jones, 28. See also *Hardy v. Memphis*, 10 Heisk. 127; *Barney v. Baltimore*, 1 Hughes, 118.

<sup>6</sup> *Abbott v. Cottage City*, 143 Mass. 521. In this State, neither under the Province Charter nor by custom can permanent structures be erected upon a public landing place. *Attorney General v. Tarr*, 148 Mass. 309.

<sup>7</sup> *Sevey's Case*, 6 Maine, 118. See *Duley v. Kelley*, 74 Maine, 556.



use the river banks as a place of deposit cannot now be acquired by custom;<sup>1</sup> and a landing, even for the purpose of direct transit, is held to be more than a highway.<sup>2</sup> In Minnesota<sup>3</sup> and Wisconsin<sup>4</sup> the doctrine that land cannot be dedicated by parol as a landing has been disapproved; and in Iowa<sup>5</sup> and Kentucky<sup>6</sup> it has been held that land dedicated to the public use as a street or common may be used for the purposes of a wharf. In *Godfrey v. Alton*,<sup>7</sup> the Supreme Court

<sup>1</sup> *Littlefield v. Maxwell*, 31 Maine, 134; *Bethum v. Turner*, 1 Maine, 111; *Moor v. Lang*, 42 Maine, 29; *State v. Wilson*, id. 9; *Hill v. Lord*, 48 Maine, 83, 100; *Stetson v. Bangor*, 60 Maine, 813.

<sup>2</sup> *Ibid.*; *State v. Wilson*, 42 Maine, 9. See *Hasty v. Johnson*, 3 Maine, 282; *Thompson v. Androscoggin Bridge*, 5 Maine, 62; *Kaler v. Beaman*, 49 Maine, 207. The dedication must be accepted; but this may be proved by acts. *People v. Williams*, 64 Cal. 498; *Brakken v. Minneapolis Ry. Co.*, 29 Minn. 41. A dedication can properly be to public use only; a private right of way cannot be created by dedication. *Hall v. McLeod*, 2 Met. (Ky.) 98; *Steele v. Sullivan*, 70 Ala. 589, 594. In Alabama a presumption of dedication does not arise from user for a less period than twenty years, unattended by unequivocal acts evincing such intent, and may be disproved by protests on the owner's part. *Ibid.*; *Nichols v. Aylor*, 7 Leigh, 505. A user for twenty years will not raise a prescription where the right has always been contended. *Smith v. Miller*, 11 Gray, 148; *Livett v. Wilson*, 3 Bing. 115.

<sup>3</sup> *Mankato v. Willard*, 13 Minn. 13; *Brisbine v. St. Paul R. Co.*, 23 Minn. 114.

<sup>4</sup> *Gardiner v. Tisdale*, 2 Wis. 153; *Connehan v. Ford*, 9 Wis. 240. See also *Bird v. Smith*, 8 Watts, 434; *Chambers v. Furry*, 1 Yeates, 167.

<sup>5</sup> *Haight v. Keokuk*, 4 Iowa, 199, 214; *Grant v. Davenport*, 18 Iowa, 179; *Cowles v. Gray*, 14 Iowa, 1. See *Bingham v. Doane*, 9 Ohio, 165; *State v. Graham*, 15 Rich. (S. C.) 310; *Sloane v. McConahy*, 4 Ohio, 157, and note; *Price v. Methodist Episcopal Church*, id. 516; *Cincinnati v. First Presbyterian Church*, 8 Ohio, 298; *Cincinnati v. Hamilton Co.*, 7 Ohio, 88; *Commonwealth v. Philadelphia*, 16 Penn. St. 79; *State v. Randall*, 1 Strob. (S. C.) 110. As to the meaning of the words "reserved landing" upon a recorded plat, see above cases of *Grant v. Davenport* and *Cowles v. Gray*. See also *Emmons v. Milwaukee*, 32 Wis. 434; *Dietrich v. Northwestern Union Ry. Co.*, 42 Wis. 248; *Cook v. Burlington*, 30 Iowa, 94; 36 Iowa, 357; *Mankato v. Meagher*, 17 Minn. 265; *Arnold v. Elmore*, 16 Wis. 509; *Yates v. Judd*, 18 Wis. 118.

<sup>6</sup> *Newport v. Taylor*, 16 B. Mon. 699, 804; *Rowan v. Portland*, 8 B. Mon. 232; *Louisville v. Bank of the United States*, 3 B. Mon. 138; *Potomac S. Co. v. Upper Potomac S. Co.*, 109 U. S. 672, 686.

<sup>7</sup> *Godfrey v. Alton*, 12 Ill. 30; *Alton v. Illinois Transportation Co.*, id. 38; *Field v. Carr*, 59 Ill. 198, 200; *First Evangelical Church v. Walsh*, 57 Ill. 363, 369; *Smith v. Flora*, 64 Ill. 93; *McIntire v. Storey*, 80 Ill. 127, 130; *Warren v. Jacksonville*, 15 Ill. 236; *Waugh v. Leech*, 28 Ill. 488, 491; *Rees v. Chicago*, 38 Ill. 322. See *Newport*

of Illinois held that a parol dedication of land is not within the Statute of Frauds, and that, if the owner of the land makes a survey and lays it off by plat for public use as a landing, and makes sales in reference thereto, such acts amount to a dedication, although there are no declarations, either oral or on the plat, showing that a dedication was intended. The result of the authorities seems to be that a dedication of land adjoining a river for the purpose of public passage to and from the water, with perhaps the incidental right of temporary deposit,<sup>1</sup> although a definite grantee is not named or in existence, and no formal acceptance is shown,<sup>2</sup> or a claim of prescriptive user, for the purpose of landing and embarkation, is valid; but that the right to encumber the land with lumber, merchandise, and the like, to a greater extent or for a longer time than would be permissible in a highway,<sup>3</sup> is neither within the purpose of the dedication nor valid as a custom.<sup>4</sup>

*v. Taylor*, 16 B. Mon. 699, 803; *Rowan v. Portland*, 8 B. Mon. 232; *Hurley v. Miss. Boom Co.*, 34 Minn. 143.

<sup>1</sup> See *Gardiner v. Tisdale*, 2 Wis. 153, 191; *Knowles v. Dow*, 22 N. H. 387. The usage by which, in the South-west, goods are put off by carriers of goods by water at neighborhood or way landings on the river banks, where there is no wharf or warehouse and the consignee does not reside, and the person living near the landing is requested to look after them and notify the consignee, whereupon the liability of the carrier ceases, is valid. *The Mill Boy*, 4 McCrary, 383. Dedication "as a public levee" is supported by evidence of dedication as a public landing. *Napa v. Howland (Cal.)*, 25 Pac. 247.

<sup>2</sup> *Coffin v. Portland*, 27 Fed. Rep. 412.

<sup>3</sup> See *Herring v. Metropolitan Board of Works*, 19 C. B. N. s. 510; *Compton v. Hawkins (Ala.)*, 8 So. 75; *Smith v. Simmons*, 103 Penn. St. 32; *People v. Cunningham*, 1 Denio, 524; *Gerish v. Brown*, 51 Maine, 256, 263; *Graves v. Shattuck*, 35 N. H. 257;

*Maddox v. Cunningham*, 68 Ga. 431; *State v. Omaha*, 14 Neb. 265; *Lancaster v. Eve*, 5 C. P. N. s. (Can.) 717.

<sup>4</sup> See authorities above cited. Also, *Penny Pot Landing*, 16 Penn. St. 79; *Carrollton R. Co. v. Winthrop*, 5 La. Ann. 86. As to the reservation and dedication of landings by the government, or by cities, see *Cincinnati v. White*, 6 Peters, 431; *Barclay v. Howell*, id. 498; *Irwin v. Dixon*, 9 How. 10; *New Orleans v. United States*, 10 Peters, 662; *Cook v. Burlington*, 30 Iowa, 94; 36 id. 357; *Walker v. Columbus*, 4 B. Mon. 259, 260; *Alves v. Henderson*, 16 B. Mon. 131; *Burr v. Dana*, 22 Cal. 11; *Blanc v. Bowman*, 22 Cal. 23; *San Francisco v. Calderwood*, 31 Cal. 385; *Schermerhorn v. New York*, 3 Edw. Ch. 119; *Compton v. Hawkins (Ala.)*, 8 So. 75. Dedication may be presumed even against the sovereign. *Day v. Allender*, 22 Md. 511. In conveyances between individuals, a deed of a mill, dam, and falls, "and a right to the road and landing, to land logs, as has been customary," conveys only an easement in the

§ 106. **Same — Public landings.**— When a way in a city extends to navigable waters, and is dedicated to the public use as a street, it carries with it, by necessary implication, the right of the city to extend it into the water by the construction of a wharf at the end thereof.<sup>1</sup> Evidence that land has been used as a landing place by the inhabitants of the town in which it is situated, and, also, by those of other towns, is sufficient to establish a right in all the inhabitants of the State.<sup>2</sup> But evidence of user by the individual inhabitants of a town, unauthorized by the town, does not tend to show a possession by the town in its corporate capacity.<sup>3</sup> When a public landing place is once established, it may be discontinued by the legislature, but not by a town,<sup>4</sup> or by county commissioners.<sup>5</sup> Commissioners of highways, having authority to regulate public landings and watering places, have no power to lay out a new landing place.<sup>6</sup>

§ 107. **Floatable streams — Logs — Rafts.**— A stream is a public highway wherever it is suitable in its natural condition for general use in travel or in the transportation of property. Lord Hale says that the right of navigation extends to rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges, boats or lighters.<sup>7</sup> He does not refer to it as extending to streams

road and landing. *Hasty v. Johnson*, 3 Maine, 282. And the grant of a saw-mill "with a convenient privilege to pile logs, boards, and other lumber," conveys only an easement in the land used for piling. *Thompson v. Androscoggin Bridge*, 5 Maine, 62. The grant of certain land, together with a saw-mill thereon and a mill-dam and pond connected therewith, with all privileges and appurtenances, does not enable the grantee to use a stream flowing through the grantor's land for taking logs to and from the mill, although used for that purpose by the grantor previous to the conveyance. *Rogers v. Peck*, Berton (N. B.), 318. See *Hill v. Todd*, 2 Allen (N. B.), 261.

<sup>1</sup> *Backus v. Detroit*, 49 Mich. 110; *McMurray v. Baltimore*, 54 Md. 103; *Barney v. Keokuk*, 94 U. S. 324; *Haight v. Keokuk*, 4 Iowa, 199; *Bowman v. Portland*, 8 B. Mon. 253; *Newport v. Taylor*, 16 B. Mon. 700; *Barney v. Baltimore*, 1 Hughes, 118; *Ellerman v. Morgan's La. R. Co.*, 34 La. Ann. 698.

<sup>2</sup> *Coolidge v. Learned*, 8 Pick. 504.

<sup>3</sup> *Green v. Chelsea*, 24 Pick. 71, 79; *Hill v. Lord*, 48 Maine, 83, 97.

<sup>4</sup> *Commonwealth v. Tucker*, 2 Pick. 44; *Kean v. Stetson*, 5 Pick. 492, 495.

<sup>5</sup> *Bennett v. Clemence*, 6 Allen, 10.

<sup>6</sup> *Commissioners v. Queen's County*, 17 Wend. 9.

<sup>7</sup> Hale, *De Jure Maris*, ch. 2, 3; *Hargrave's Law Tracts*, 8, 9.

which are navigable during a part of the year, or to those which, being unnavigable for boats at ordinary water, are useful, either at all seasons or in times of freshets, for floating rafts and logs to market. In this country, where this question is more important than in England, notwithstanding the conflict respecting the title to large fresh-water rivers, the authorities agree that streams which in their natural condition are only useful for rafting purposes during the whole or a part of each year, are highways for that purpose, and that the title of the riparian owners to the beds of such streams is subject to this right of passage.<sup>1</sup>

§ 108. Same — What are.— Streams which are not floatable, or cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are absolutely private,<sup>2</sup> and if the stream is so small and shallow that logs cannot be driven in them without traveling upon the banks, it is not open to the public for passage.<sup>3</sup> It is not necessary that the stream,

<sup>1</sup> Shaw v. Oswego Iron Co., 10 Oregon, 371; Nutter v. Gallagher (Oregon), 24 Pac. 250; *post*, § 110.

<sup>2</sup> Berry v. Carle, 3 Maine, 269; Spring v. Russell, 7 Maine, 273; Wadsworth v. Smith, 11 Maine, 278; Dwinel v. Barnard, 28 Maine, 554; Brown v. Chadbourne, 31 Maine, 9; Treat v. Lord, 42 Maine, 552; Knox v. Chaloner, *id.* 150; Brown v. Black, 43 Maine, 443; Dwinel v. Veazie, 44 Maine, 167; Veazie v. Dwinel, 50 Maine, 479; Gerrish v. Brown, 51 Maine, 256; Davis v. Winslow, *id.* 264; Lancey v. Clifford, 54 Maine, 487; Holden v. Robinson Co., 65 Maine, 215; Lawler v. Baring Boom Co., 56 Maine, 443; Hooper v. Hobson, 57 Maine, 278.

<sup>3</sup> *Ibid.*; Morrison v. Bucksport R. Co., 67 Maine, 353; Olson v. Merrill, 42 Wis. 203; Morgan v. King, 35 N. Y. 454; 18 Barb. 277; 30 Barb. 9; Munson v. Hungerford, 6 Barb. 265; Curtis v. Keesler, 14 Barb. 511; Shaw v. Crawford, 10 Johns. 236; Varick v. Smith, 9 Paige, 547; Browne v. Schofield, 8 Barb. 239; Palmer v.

Mulligan, 3 Caines, 307; *Ex parte* Jennings, 6 Cowen, 518; Pierrepont v. Loveless, 72 N. Y. 211, 216; 4 Hun, 696; Slater v. Fox, 5 Hun, 544; Moore v. Sanborne, 2 Mich. 519; Lorman v. Benson, 8 Mich. 18; Ryan v. Brown, 18 Mich. 196; Middleton v. Flat River Booming Co., 27 Mich. 533; Brig City of Erie v. Canfield, 27 Mich. 479; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 345; Attorney General v. Ewart Booming Co., 34 Mich. 462; Wood v. Rice, 24 Mich. 423; Scott v. Willson, 3 N. H. 321; Barron v. Davis, 4 N. H. 338; State v. Gilmanton, 14 N. H. 467, 479; Thompson v. Androscoggin Co., 54 N. H. 545; 58 N. H. 108; Carter v. Thurston, 58 N. H. 104, 107; Whistler v. Wilkinson, 22 Wis. 572; Wisconsin River Co. v. Lyons, 30 Wis. 61, 66; Sellers v. Union Lumbering Co., 39 Wis. 525; Cohn v. Wausau Boom Co., 47 Wis. 314, 324; Stevens Point Boom Co. v. Reilly, 44 Wis. 295; 46 Wis. 237; Weatherby v. Meiklejohn, 56 Wis. 73; Barclay Rail-

in order to be a highway, should be capable of floating logs at all seasons of the year, but its public character depends upon its fitness to answer the wants of those whose business requires its use.<sup>1</sup> The fact that the banks are commonly used for the purpose of towing or propelling what is floating, is evidence merely of want of capacity for public use.<sup>2</sup> The test is the natural capacity of the stream, and the fact that those who drive logs trespass on the adjoining lands, or at times find it necessary or convenient to do so, does not deprive the stream of the public character which it may otherwise possess.<sup>3</sup> Subject to these rules the question whether a stream is a highway is a question of fact for the jury.<sup>4</sup> A riparian proprietor who, by means of a dam, and by accumulating his own logs above the dam, intentionally prevents the passage of another's logs down the stream, is liable in damages for the delay and injury so caused. The person thus injured may lawfully boom the proprietor's logs, and repair and open his sluices, if such means of effecting a passage is the least injurious to the proprietor; and in his action he may recover, with his damages, the expenses which he incurs in thus securing a passage.<sup>5</sup> Mill-owners whose dams interfere with the

road Co. v. Ingham, 36 Penn. 194; Hickok v. Hine, 23 Ohio St. 523; Weise v. Smith, 3 Oregon, 445; Felger v. Robinson, 3 Oregon, 455. See, also, Commonwealth v. Chapin, 5 Pick. 199, 202; Blood v. Nashua Railroad Co., 2 Gray, 137; Rowe v. Granite Bridge Co., 21 Pick. 344; Attorney General v. Woods, 108 Mass. 436; Neaderhouser v. State, 28 Ind. 257; Esson v. McMaster, 1 Kerr (N. B.), 501; Rowe v. Titus, 1 Allen (N. B.), 326; Boissonnault v. Oliva, Stuart (Low. Can.), 564; Hayward v. Knapp, 23 Minn. 430; Lamprey v. Nelson, 24 Minn. 304; Commonwealth v. Charlestown, 1 Pick. 180; Commonwealth v. Chapin, 5 Pick. 199; Knight v. Wilder, 2 Cush. 199, 209; Charlestown v. Middlesex Commissioners, 3 Met. 202; Attorney General v. Woods, 108 Mass. 436.

<sup>1</sup> Ibid. In Canada, by statute, lumbermen may use streams capable of

transporting timber only in times of freshets. McLaren v. Caldwell, 6 Ont. App. 456.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.; Holden v. Robinson Co., 65 Maine, 215. In Maine it is provided by statute that the banks of a stream may be used for driving logs. R. S. (1857) ch. 42, §§ 7, 8; R. S. (1871) ch. 42, §§ 7, 8. See Brown v. Chadbourne, 31 Maine, 9; Treat v. Lord, 42 Maine, 552; Hooper v. Hobson, 57 Maine, 273. See Smith v. Fonda, 64 Miss. 551; Goodwill v. Bossier Police Jury, 38 La. Ann. 752.

<sup>4</sup> Treat v. Lord, 42 Maine, 552; Bryant v. Glidden, 36 Maine, 36; Haines v. Welch, 14 Oregon, 319.

<sup>5</sup> Brown v. Chadbourne, 31 Maine, 9; Dwinel v. Veazie, 44 Maine, 167; 50 Maine, 479; Gerrish v. Brown, 51 Maine, 256; Veazie v. Dwinel, 50 Maine, 479. Upon the question what is a reasonable use of the stream, see

reasonable use of floatable streams by the public are liable to a private action by any citizen so injured.<sup>1</sup> They cannot by prescription acquire a right which will defeat or destroy the public right of floating logs.<sup>2</sup>

§ 109. *Same — Same.*—If the stream is not always navigable it must be capable of floatage, as the result of natural causes, at periods ordinarily recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway.<sup>3</sup> The mere possibility of occasional use during brief or extraordinary freshets does not give it a public character.<sup>4</sup> A similar principle applies in the case of small tidal creeks, in which, although *prima facie* they are public and navigable, private property may be maintained.<sup>5</sup> It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high tide which is deemed subject to public use; but in order to have a public character, it must be navigable for some purpose useful to business or pleasure.<sup>6</sup> The only decisions tending to limit the above right of floatage appear to be: first, that of *Hubbard v. Bell*,<sup>7</sup> in

*Ibid.*; *Davis v. Winslow*, 51 Maine, 264; *Lancey v. Clifford*, 54 Maine, 487; *Weise v. Smith*, 3 Oregon, 445; *Sewall's Fall Bridge v. Fisk*, 23 N. H. 171; *Carter v. Berlin Mills Co.*, 58 N. H. 52; *Brown v. Kentfield*, 50 Cal. 129; *Enos v. Hamilton*, 27 Wis. 256; 24 Wis. 658. See *Merriman v. Bowen*, 33 Minn. 455.

<sup>1</sup> *Ibid.*; *Parks v. Morse*, 52 Maine, 260.

<sup>2</sup> *Collins v. Howard*, 65 N. H. 190.

<sup>3</sup> *Lewis v. Coffee County*, 77 Ala. 190; *Shaw v. Oswego Iron Co.*, 10 Oregon, 371; *Haines v. Hall*, 17 id. 165; *Gaston v. Mace*, 33 W. Va. 14; *Walker v. Allen*, 72 Ala. 456; *Goodin v. Kentucky Lumber Co. (Ky.)*, 14 S. W. 775.

<sup>4</sup> *Munson v. Hungerford*, 6 Barb. 265; *Morgan v. King*, 35 N. Y. 45; 18 Barb. 277; 30 Barb. 9; *Curtis v. Keesler*, 14 Barb. 511; *Olson v. Merrill*, 42 Wis. 203; *Thunder Bay River*

*Booming Co. v. Speechly*, 31 Mich. 836; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Hubbard v. Bell*, 54 Ill. 110; *Cates v. Wadlington*, 1 McCord (S. C.), 580; *Brown v. Chadbourne*, 31 Maine, 9; *Treat v. Lord*, 42 Maine, 552; *Lewis v. Coffee County*, 77 Ala. 190; 5 Alb. L. J. 407.

<sup>5</sup> *Commonwealth v. Charlestown*, 1 Pick. 180, 186, and see next note; *Blood v. Nashua R. Co.*, 2 Gray, 137.

<sup>6</sup> *Ibid.*; *Commonwealth v. Breed*, 4 Pick. 460; *Rowe v. Granite Bridge Co.*, 21 Pick., 344, 347; *Charlestown v. County Commissioners*, 3 Met. 202; *Murdock v. Stickney*, 8 Cush. 113, 115; *West Roxbury v. Stoddard*, 7 Allen, 158, 171; *Attorney General v. Woods*, 108 Mass. 436; *The Montello*, 20 Wall. 442, 443; *Getty v. Hudson River R. Co.*, 21 Barb. 617.

<sup>7</sup> *Hubbard v. Bell*, 54 Ill. 110; 5 Am. Rep. 108, note.



Illinois, in which it is said that no such necessity exists in that State, as in Maine or Michigan, for requiring private rights to yield to the floating of logs; but the stream to which this case related seems to have been capable of bearing rafts and logs only in seasons of freshets, and then for a few days or weeks only.<sup>1</sup> Second, an early case in California in which it was held that a stream is navigable which has capacity to float rafts of lumber, but that the rule does not extend to streams which can only float logs or planks.<sup>2</sup> Third, decisions in Alabama in which the duration of previous enjoyment by the public, as well as the extent to which the stream is floatable, are considered material in determining whether it is a public highway, and the question whether it is a highway is held to be a question of law for the court, after the facts are determined by a jury.<sup>3</sup> In *Stump v. McNairy*,<sup>4</sup> it was held that a private unnavigable brook which flows into a public navigable river, and is floatable in times of high water, becomes a public thoroughfare by being publicly used without objection for twenty years as an inlet for rafts.

§ 110. Same — Navigation in — Relation to riparian rights.— The rights of the public are not superior to private rights, in streams which are merely floatable, to the same extent as in rivers which are capable of more extended navigation. In the latter the public right extends equally to all navigable portions of the river, and in the former also the right to drive logs is paramount to the right to obstruct the river by a boom.<sup>5</sup> But the right of floatage is not exclusive of the use of the water for machinery, and the rights of the public and those of the riparian owners are both to be enjoyed with a proper regard to the existence and preservation of the other.<sup>6</sup>

<sup>1</sup> *Ibid.* p. 114. See *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336, 343.

<sup>2</sup> *American River Water Co. v. Amsden*, 6 Cal. 443; *Caldwell v. Sacramento County*, 79 Cal. 350.

<sup>3</sup> *Ellis v. Carey*, 30 Ala. 725; *Rhodes v. Otis*, 33 Ala. 578; *Peters v. New Orleans R. Co.*, 56 Ala. 528; *Alabama v. Bell*, 5 Porter, 379.

<sup>4</sup> 5 Humph. 363; *post*, § 111.

<sup>5</sup> *Sullivan v. Jernigan*, 21 Fla. 264.

<sup>6</sup> *Pearson v. Rolfe*, 76 Maine, 380, 391; *Erie v. Canfield*, 27 Mich. 479; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; *Attorney General v. Evart Booming Co.*, 34 Mich. 462; *White River Log Co. v. Nelson*, 45 Mich. 578; *Buchanan v. Grand River*



If dams are so constructed as to limit the public passage to a small portion of the stream, and sufficient provision is made for the passage of logs, the public cannot complain, while those who exercise the right of floatage are liable to the riparian owners for such exercise of the common right as causes them an injury,<sup>1</sup> including damages for breaking the banks of the stream.<sup>2</sup> In streams which are only floatable, the riparian owner is only bound not to obstruct its reasonable use for that purpose.<sup>3</sup> His obligation to supply reasonable facilities for the passage of logs does not extend to the passage of rafts of considerable size.<sup>4</sup> If he obstructs the stream by making a new channel into which its waters are turned, the public may use it for floating logs and rafts as they had been accustomed to use the old channel,<sup>5</sup> the right of passage applying to the natural flow of the stream or its equivalent;<sup>6</sup> and if the new channel becomes obstructed, they may effect a suitable passage over the former channel, causing no unnecessary damage thereby.<sup>7</sup> If a break in a dam is permitted to remain without repair, and the water in the mill-pond is thereby so reduced as to make it difficult or impossible to pass logs through a chute in the dam, the owner of logs floating down the stream to market may pass them through a new channel

Log Co., 48 Mich. 364; *A. C. Conn Co. v. Little Suamico L. Co.*, 55 Wis. 580; *Anderson v. Munch*, 29 Minn. 414; *Bearrs v. Sherman*, 56 Wis. 55; *Newbold v. Mead*, 57 Penn. St. 487; *Enos v. Hamilton*, 27 Wis. 256; *Bassett v. Carleton*, 32 Maine, 553. See *Barnes v. Heath*, 58 N. H. 196; *State v. Gilmanton*, 14 N. H. 467, 479; *Sewall's Fall Bridge v. Fisk*, 23 N. H. 171; *George v. Fisk*, 32 N. H. 32, 43; *Thompson v. Androscoggin River Co.*, 54 N. H. 545; 58 N. H. 108; *Lancey v. Clifford*, 54 Maine, 487; *Brown v. Chadbourne*, 31 Maine, 9; *Knox v. Chaloner*, 42 Maine, 150, 157; *Veazie v. Dwinel*, 50 Maine, 479, 487; *Davis v. Winslow*, 51 Maine, 289; 81 Am. Dec. 582, note; *Parks v. Morse*, 52 Maine, 260; *Wood v. Hustis*, 17 Wis. 416; *Cobb v. Smith*, 16 Wis. 661;

*A. C. Conn Co. v. Little Suamico Lumber Co.*, 74 Wis. 652; *Harold v. Jones*, 86 Ala. 274. In *Harrington v. Edwards*, 17 Wis. 586, held that raftsmen cannot establish a custom among themselves which impairs the rights of the riparian proprietors.

<sup>1</sup> *Ibid.*

<sup>2</sup> *Silver v. Conn. River Lumber Co.*, 40 Fed. Rep. 192; *Haines v. Hall*, 17 Oregon, 165. In certain States the public right is regulated by statute. See *McLaughlin v. Hope Mills Manuf. Co.*, 103 N. C. 100.

<sup>3</sup> *Morgan v. King*, 18 Barb. 277.

<sup>4</sup> *Foster v. Searsport Spool Co.*, 79 Maine, 508.

<sup>5</sup> *Dwinel v. Barnard*, 28 Maine, 554.

<sup>6</sup> *Pearson v. Rolfe*, 76 Maine, 380.

<sup>7</sup> *Dwinel v. Veazie*, 44 Maine, 167; *Roush v. Walter*, 10 Watts, 86.

created by the break, doing no unnecessary damage.<sup>1</sup> In Maine a stream which is only capable of floating rafts or logs, is "not navigable" within the meaning of the mill act of 1841, which authorizes the erection and maintenance of water mills and dams upon and across any unnavigable stream.<sup>2</sup> In Pennsylvania, where the principal fresh-water rivers are held to be public property like tide waters, fresh streams which are merely floatable and have been included in the warrants and surveys of the land office as part of the public lands, belong to the riparian owners *usque ad filum aquæ*, subject to the public right of passage.<sup>3</sup> A similar rule prevails in Tennessee.<sup>4</sup>

§ 111. Same — Obstructions — Improvements.— When a river is capable of navigation in different parts of its course, but, by reason of rocks, sand-bars and other obstructions, does not admit of continuous navigation,<sup>5</sup> the public may pass and repass in those parts of the river which are navigable.<sup>6</sup> If the natural navigation of the river affords a channel for useful

<sup>1</sup> Whistler v. Wilkinson, 22 Wis. 572. See Roby Lumber Co. v. Gray, 73 Mich. 356, 363.

<sup>2</sup> Veazie v. Dwinel, 50 Maine, 479, 483; Stetson v. Bangor, 60 Maine, 313. See, also, State v. Cullum, 2 Speers (S. C.), 581; State v. Hickson, 5 Rich. (S. C.) 447; Witt v. Jefcoat, 10 id. 389; Wood v. Hustis, 17 Wis. 416; Waller v. McConnell, 19 Wis. 417; Crosby v. Smith, id. 449; Cobb v. Smith, 16 Wis. 661. In proceedings under a statute to obtain the right to dam an unnavigable stream, it is presumed, on appeal, in the absence of evidence to the contrary, that it appeared to the court below that the stream was not navigable. Siman v. Rhodes, 24 Minn. 25. That "dam" and "dyke" are synonymous, see Commonwealth v. Tolman, 149 Mass. 229, 232.

<sup>3</sup> Coover v. O'Conner, 8 Watts, 477; Barclay R. Co. v. Ingham, 36 Penn. St. 194.

<sup>4</sup> Stuart v. Clark, 2 Swan, 9; Sigler v. State, 7 Baxter, 493.

<sup>5</sup> The Montello, 20 Wall. 430; 11 Wall. 411; The Daniel Ball, 10 Wall. 557; Spooner v. McConnell, 1 McLean, 337, 350; Jolly v. Terre Haute Bridge Co., 6 McLean, 237; Brown v. Chadbourne, 31 Maine, 9, 23, 25; Treat v. Lord, 42 Maine, 552; People v. Canal Appraisers, 33 N. Y. 461; Mongan v. King, 35 N. Y. 459; Flanagan v. Philadelphia, 42 Penn. St. 219; Monongahela Bridge Co. v. Kirk, 46 Penn. St. 112; Cox v. State, 3 Blackf. 193; Hogg v. Zanesville Canal Co., 5 Ohio, 410; Hickok v. Hine, 23 Ohio St. 527; Rowe v. Granite Bridge Co., 23 Pick. 346; Attorney General v. Woods, 108 Mass. 436; Illinois River Packet Co. v. Peoria Bridge Co., 38 Ill. 467; Harrington v. Edwards, 17 Wis. 586.

<sup>6</sup> Ibid.; Brown v. Chadbourne, 31 Maine, 9, 23, 25. An accidental or intentional obstruction, which was not in the stream in its natural condition, does not take away its character as a highway. Treat v. Lord, 42 Maine, 552; Brown v. Black, 43 Maine, 443.

commerce, it continues to be navigable and open to the public, although the natural barriers which render its navigation difficult are afterwards removed by artificial means, such as locks, canals and dams.<sup>1</sup> If the navigation of a river which was originally navigable in fact, to a greater or less extent, be improved by the act of the riparian owners in deepening the channel, the public have the right to use it for all purposes to which it is suited in its improved condition,<sup>2</sup> and when the riparian owners alter the channel and divert the water for manufacturing purposes, a bill in equity may be maintained by them or the attorney general to establish the boundary line between the public and private rights.<sup>3</sup> But if, being originally unnavigable, it is made navigable by the riparian proprietors, the public right does not attach.<sup>4</sup> A log-owner who, under a charter from the legislature, removes obstructions from a floatable stream, thereby increasing its capacity to float logs, cannot require a mill-owner below to increase the floating capacity of the sluice-way in his dam, which was sufficient for the passage of all logs in the natural condition of the stream.<sup>5</sup> The legislature cannot, by means of dams or otherwise, make an unnavigable stream public and navigable, or deprive the riparian owners of their right to use the water, without affording them compensation;<sup>6</sup> nor, if the legislature declares a stream

<sup>1</sup> Ibid.; *The Montello*, 20 Wall. 430. The Canadian statute, 12 Vict. ch. 87, § 5, includes the user, without compensation, of improved streams during freshets. *Caldwell v. McLaren*, 9 App. Cas. 392, overruling *Boale v. Dickson*, 13 U. C. C. P. 337. As to compensation for dredging the foreshore owned by a littoral proprietor, see *Blantyre v. Clyde Nav. Trustees*, 6 App. Cas. 273.

<sup>2</sup> *The Montello*, 20 Wall. 430; *Holden v. Robinson Co.*, 65 Maine, 215; *Toothaker v. Winslow*, 61 Maine, 123; *Wadsworth v. Smith*, 11 Maine, 278; *Volk v. Eldred*, 23 Wis. 410; *Cates v. Wadlington*, 1 McCord (S. C.), 580.

<sup>3</sup> *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290.

<sup>4</sup> *Hale*, *De Jure Maris*, ch. 3; *Wads-*

*worth v. Smith*, 11 Maine, 278; *Cro. Car.* 132; *Cowper*, 47; *Holden v. Robinson Co.*, 65 Maine, 215; *Nutter v. Gallagher*, 19 Oregon, 375.

<sup>5</sup> *Stratton v. Currier*, 81 Maine, 497; *Foster v. Block Co.*, 79 Maine, 508; *Pearson v. Rolfe*, 76 Maine, 380.

<sup>6</sup> Ibid.; *Walker v. Board of Public Works*, 16 Ohio, 540; *Clay v. Penoyer Creek Improvement Co.*, 34 Mich. 204; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; *Moore v. Veazie*, 32 Maine, 343; 31 Maine, 360; 14 How. 568; *State v. Cullum*, 2 Speers (S. C.), 581; *Binney's Case*, 2 Bland, 158; *State v. Pool*, 74 N. C. 402, 407; *Barclay R. Co. v. Ingham*, 36 Penn. St. 194; *Morgan v. King*, 35 N. Y. 454; 18 Barb. 277; 30 Barb. 9; *Cates v. Wadlington*, 1 Mo-

to be navigable, does it divest the property previously acquired in its bed under a patent from the State.<sup>1</sup> But such owners cannot recover for merely consequential injuries, such as the washing away of the banks of an improved stream.<sup>2</sup> They may dedicate to the public use highways by water as well as by land, and if, when dedicated, they are not passable, the public may make them so.<sup>3</sup> The mere user by the public of a private stream for floating logs at irregular intervals, neither interrupted nor acquiesced in, is not evidence of a dedication to the public;<sup>4</sup> nor can such user by a small number of persons give to the public a prescriptive right.<sup>5</sup> A navigable stream may be useful as a highway when covered with ice.

Cord (S. C.), 585; *Wilson v. Smith*, 10 Wend. 324; *Partridge v. Eaton*, 63 N. Y. 482; 3 Hun, 533; 5 S. C. 625; *White Deer Creek Co. v. Sassamen*, 67 Penn. St. 415; *State v. Glen*, 7 Jones, 321; *Clarke v. Hall Lumber Co.*, 41 Minn. 105. Legislative enactments relating to navigable streams extend to those afterwards declared by the legislature to be highways. *Walker v. Board of Public Works*, 16 Ohio, 540; *Brown v. Commonwealth*, 3 Serg. & R. 273; *State v. Cullum*, 2 Speers (S. C.), 581; *People v. Gutchess*, 48 Barb. 656. A statute which declares a stream to be a public highway for the passage of boats and rafts embraces logs not fastened together. *Deddrick v. Wood*, 15 Penn. St. 9.

<sup>1</sup> *Coovert v. O'Conner*, 8 Watts, 447; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *Barclay R. Co. v. Ingham*, 36 Penn. St. 194; *People v. Gutchess*, 48 Barb. 656.

<sup>2</sup> *Brooks v. Cedar Brook Imp. Co.*, 82 Maine, 17.

<sup>3</sup> *Yates v. Judd*, 18 Wis. 118, 128; *Arnold v. Elmore*, 16 Wis. 509; *Mariner v. Schulte*, 13 Wis. 692; *People v. Williams*, 64 Cal. 498. Making a private road usable by the public, subject to tolls, is not a dedication of

the road to the public as a highway; and, apparently, a dedication subject to tolls can only be made by authority of the Crown or Parliament. *Austerberry v. Oldham*, 29 Ch. D. 750.

<sup>4</sup> *Curtis v. Keesler*, 14 Barb. 511; *ante*, §§ 53, 55, 109; *Munson v. Hungerford*, 6 Barb. 265; *Shaw v. Crawford*, 10 Johns. 236; *Clements v. West Troy*, 10 How. Pr. 199; *post*, § 121; *Barker v. Deignan*, 25 S. C. 252.

<sup>5</sup> *Ibid.*; *Meyer v. Phillips*, 97 N. Y. 485. In this case a stream, five miles long, two of which were through the plaintiff's lands, had been used for thirty years for floating saw-logs by not more than twelve persons in all, usually by not more than three or four persons in any one year. Their user was only for about six days in any one year, and in some years not more than three. It was held that even if such a public right could be acquired by prescription, it was not established by these facts; that, as the defendants claimed a right in the public to use the stream, and threatened to exercise it whenever they chose, the plaintiff was entitled to equitable relief to quiet his title and prevent the threatened injury; and that all who asserted the common right could be joined as defendants.

In Maine it is held that the public right of passage is not suspended or changed in winter by the fact that it cannot be used with boats, and that those who cut holes in the ice upon or near a winter road along the shore of a navigable river which has been used for twenty years, are liable to those who, without being themselves at fault, suffer injury or loss thereby.<sup>1</sup> But this right of travel is not paramount to the right to cut ice when roads and ferries are available to the traveler.<sup>2</sup>

§ 112. **Navigability — Judicial notice.**— By the common-law rule, a river is *prima facie* navigable only so far as the tide ebbs and flows in it, and, in case of doubt, the burden of proof is upon those who allege navigability above that point.<sup>3</sup> But the courts take notice of those characteristics of streams which are matters of general history or common knowledge,<sup>4</sup> as that the tide ebbs and flows in such well-known rivers as the Thames and Mersey.<sup>5</sup> In Indiana judicial notice is taken of the course of the Ohio River,<sup>6</sup> of the position of the falls of the Ohio,<sup>7</sup> and of the navigability of streams.<sup>8</sup> In Wisconsin the court has taken notice of the fact that the capacity of many of the smaller streams in that State to float logs and lumber to market has been increased by dams.<sup>9</sup> And generally

<sup>1</sup> French v. Camp, 18 Maine, 433; State v. Wilson, 42 Maine, 9. See Roxbury v. Stoddard, 7 Allen, 158. Traveling over the ice in a public river is, like navigating it, the exercise of a public right, which cannot raise a prescriptive right against an individual. Ibid.; Dinn v. Queen, 1 Haszard & W. (Pr. Edw. Island), 361; Carvell v. Charlottetown, 2 id. 115, 123.

<sup>2</sup> Woodman v. Pitman, 79 Maine, 456.

<sup>3</sup> Rhodes v. Otis, 33 Ala. 578; Bowman v. Wathen, 2 McLean, 376; Adams v. Pease, 2 Conn. 483.

<sup>4</sup> Bittle v. Stuart, 34 Ark. 224; Thompson v. Androscoggin Co., 54 N. H. 545, 548; Lands v. A Cargo, 4 Fed. Rep. 478.

<sup>5</sup> Whitney v. Sauche, 11 La. Ann.

432; McIntosh v. Gastenhofer, 2 Rob. (La.) 403.

<sup>6</sup> Hays v. State, 8 Ind. 425.

<sup>7</sup> Cash v. Auditor, 7 Ind. 227.

<sup>8</sup> Neaderhouser v. State, 28 Ind. 257; Ross v. Faust, 54 Ind. 471; Mossman v. Forrest, 27 Ind. 233. So of the county in which a public ditch is located and the lands which it affects, if described by averment. Smith v. Clifford, 99 Ind. 113. So of State and Federal reports and correspondence as to swamp land titles. Kirby v. Lewis, 39 Fed. Rep. 66. So of an act of Congress authorizing a bridge over navigable waters. Penn. Ry. Co. v. Baltimore Ry. Co., 37 Fed. Rep. 129.

<sup>9</sup> Tewksbury v. Schulenberg, 41 Wis. 584, 593; Siegbert v. Stiles, 39 Wis. 533. See Hilliker v. Coleman, 73 Mich. 170.

a stream is presumably navigable, when it is subject to the commercial power of Congress and that power has been exerted over it,<sup>1</sup> or when the river remains public property and does not pass to the riparian proprietors.<sup>2</sup> So judicial notice has been taken of the fact that no part of a river lies within the corporate limits of a city;<sup>3</sup> that there are no tidal streams in a particular county;<sup>4</sup> and that the boundary between the States of Illinois and Michigan is in the middle of Lake Michigan.<sup>5</sup> If the character of the stream is not defined in any public statute, or in a private statute introduced in evidence, and it is not of such notoriety as to be generally understood, it cannot be known judicially that it is navigable.<sup>6</sup> So the court cannot take judicial notice that a vessel lying "near the mouth of" a certain harbor is in the county adjoining,<sup>7</sup> or that certain land lying under a navigable lake is not subject to location.<sup>8</sup> If streams flowing through the territory which was under the land system of the United States are not meandered, the presumption is that they are not navigable.<sup>9</sup>

§ 113. **Wharves — Repairs.**—The owner of a wharf is bound to exercise due diligence to keep it safe for the uses for which it was made. If he permits persons to come there and to have access to and from vessels over the wharf, he is liable for injuries which they, being in the exercise of due care, sustain by reason of his negligence.<sup>10</sup> His duty is the same as that which

<sup>1</sup> *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 556, 564; *Hodgman v. St. Paul Ry. Co.*, 23 Minn. 153, 160; *Commonwealth v. King*, 150 Mass. 221.

<sup>2</sup> *Wood v. Fowler*, 26 Kansas, 682.

<sup>3</sup> *Montgomery v. Montgomery Plankroad Co.*, 31 Ala. 76.

<sup>4</sup> *Walker v. Allen*, 72 Ala. 456.

<sup>5</sup> *Thorson v. Peterson*, 9 Fed. Rep. 517.

<sup>6</sup> *People v. Allen*, 42 N. Y. 378, 381; *New York Co. v. Brooklyn*, 71 N. Y. 580; *Leighy v. Ashland Lumbering Co.*, 49 Wis. 165; *Geise v. Green*, id. 334; *Oelrich v. Gilman*, 31 Wis. 495; *Siman v. Rhoades*, 24 Minn. 25; *Waller v. McConnell*, 19 Wis. 417.

The courts take judicial notice of early Mexican laws, upon which title to lands in California depended. *Bouldin v. Phelps*, 30 Fed. Rep. 547.

<sup>7</sup> *Des Brisay v. Commissioners*, 1 Hannay (N. B.), 48.

<sup>8</sup> *Wilcox v. Jackson*, 109 Ill. 261.

<sup>9</sup> *Clute v. Briggs*, 22 Wis. 607; *Jones v. Pettibone*, 22 Wis. 308; *Hubbard v. Bell*, 54 Ill. 110.

<sup>10</sup> *Wendell v. Baxter*, 12 Gray, 494; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *Nickerson v. Tirrell*, 127 Mass. 236; *Macaulay v. New York*, 67 N. Y. 602; *Swords v. Edgar*, 59 N. Y. 28; *Buckbee v. Brown*, 21 Wend. 110; *Moody v. New York*, 43 Barb. 282; 34 How. Pr. 288; *Newell*



is imposed upon the keeper of an inn or store to keep the access to his premises, and the passages, rooms, and floors therein, safe for those who enter under the express or implied invitation of the owner.<sup>1</sup> The true rule is, perhaps, even more stringent, the wharf-owner, upon whose vigilance often depends the personal safety of many, being, it has been said, bound to the utmost care.<sup>2</sup> He is not liable for latent defects,<sup>3</sup> or for those which are caused by inevitable accident, such as the exceptional violence of the sea,<sup>4</sup> or for an improper use of an unrepaired wharf, such as driving a large number of cattle upon it.<sup>5</sup> But in these cases he cannot escape liability if he does not make such examination and inspection as the construction, uses and exposure of the wharf reasonably require;<sup>6</sup> and if he has knowledge of a defect which is not apparent to all,<sup>7</sup> it is his duty, even before there is opportunity to repair, to close the wharf or to give proper notice of the danger.<sup>8</sup> So

*v. Bartlett*, 114 N. Y. 399; *Railroad Co. v. Hanning*, 15 Wall. 649; *Hall v. Tillson*, 81 Maine, 362.

<sup>1</sup> *Chapman v. Rothwell*, El. Bk. & El. 168; *Corby v. Hill*, 4 C. B. N. s. 556; *Collis v. Selden*, L. R. 3 C. P. 495; *Smith v. London Dock Co.*, L. R. 3 C. P. 326; *Sweeney v. Old Colony R. Co.*, 10 Allen, 368; *Elliott v. Pray*, id. 378; *Knight v. Portland Ry. Co.*, 56 Maine, 234; *Ackhert v. Lansing*, 59 N. Y. 646; *Swords v. Edgar*, id. 28; *Trim v. Vallejo St. Wharf Co.*, 7 Cal. 253; *Fennimore v. New Orleans*, 20 La. Ann. 124; *Philadelphia R. Co. v. Irwin*, 89 Penn. St. 71; *Buckingham v. Fisher*, 70 Ill. 121; *Grand Tower Co. v. Hawkins*, 72 Ill. 386; *Freer v. Cameron*, 4 Rich. (S. C.) 228; *Maenner v. Carroll*, 46 Md. 193; *Barrett v. Black*, 56 Maine, 498; *Pittsburg v. Grier*, 22 Penn. St. 54; *Campbell v. Portland Sugar Co.*, 62 Maine, 552; *Wendell v. Baxter*, 12 Gray, 494; *Cahill v. Layton*, 57 Wis. 600; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121; *Heissenbuttel v. New York*, 30 Fed. Rep. 456; *Baltimore Turnpike Co. v. Cassell*, 66 Md. 419.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*; *State v. Boyce* (Md.), 21 Atl. 322.

<sup>4</sup> *Wendell v. Baxter*, 12 Gray, 494; *Garrison v. New York*, 5 Bosw. (N. Y.) 497; *Wallace v. New York*, 2 Hilt. 440; 18 How. Pr. 169.

<sup>5</sup> *McDougall v. McDonald*, 3 Russell & Ch. N. s. 219.

<sup>6</sup> *Ibid.* In *Hill Manuf. Co. v. Providence Steamship Co.*, 125 Mass. 292, it was held that upon the issue whether piers in New York were properly constructed, evidence that piers are similarly constructed elsewhere was rightly excluded.

<sup>7</sup> See *Southcote v. Stanley*, 1 H. & N. 247; *Holmes v. North Eastern Ry. Co.*, L. R. 4 Ex. 254; 6 id. 123. It is contributory negligence to drive upon a pier, knowing that it is out of repair. *Clancy v. Byre*, 58 Barb. 449; 56 N. Y. 129; *Durkin v. Troy*, 61 Barb. 437.

<sup>8</sup> *Gibbs v. Liverpool Docks*, 3 H. & N. 164, 176; s. c. *nom. Mersey Docks v. Gibbs*, 11 H. L. Cas. 687; L. R. 1 H. L. 93; *Mersey Docks v. Penhallow*, 7 H. & N. 329; *Indemaur*



long as the wharf is kept open, it amounts to a representation that it is safe to enter, and that due diligence has been used both in its construction and repair.<sup>1</sup> This obligation rests upon the owner, not only in favor of those who compensate him for its use, or of those who contract with him therefor, but of all persons who enter rightfully upon the premises for the purposes of lawful business.<sup>2</sup> It is not limited to persons who come upon the wharf to transact the business for which it is adapted, but extends to all who come there for legitimate purposes, as a customs officer whose duty is to prevent smuggling;<sup>3</sup> the agents of the post-office;<sup>4</sup> an officer coming for the purpose of making a lawful arrest;<sup>5</sup> the vendors of goods to those upon a vessel lying at the dock;<sup>6</sup> hack-men who are awaiting passengers;<sup>7</sup> and those who come to make inquiries.<sup>8</sup> The occupant is primarily chargeable with the duty to repair, and is liable by reason of his occupancy, without proof of title.<sup>9</sup> The lessor of a wharf who reserves rent is also liable for injuries caused by defects which existed when the tenant entered, although the latter may have covenanted to repair.<sup>10</sup>

*v. Dames*, L. R. 2 C. P. 311; 1 *id.* 274; *Smith v. London Docks Co.*, L. R. 3 C. P. 326; *Thompson v. North Eastern Ry. Co.*, 2 B. & S. 106; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; 3 N. & P. 523; 3 P. & D. 162; *Lyme Regis v. Henley*, 3 B. & Ad. 92; *Railroad Co. v. Hanning*, 15 Wall. 649; *Pittsburgh v. Grier*, 22 Penn. St. 54; *Allegheny City v. Campbell*, 107 Penn. St. 530.

<sup>1</sup> *Ibid.*

<sup>2</sup> *Southcote v. Stanley*, 1 H. & N. 247; *White v. France*, 2 C. P. D. 308; *Holmes v. North Eastern Ry. Co.*, 38 L. J. Ex. 161; *Balch v. Smith*, 7 H. & N. 741; *Collett v. London & N. W. Ry. Co.*, 16 Q. B. 984; *Indemaur v. Dames*, L. R. 2 C. P. 311; 1 *id.* 274; *Wendell v. Baxter*, 12 Gray, 494; *Davis v. Central Congregational Society*, 129 Mass. 367, 371; *Gilbert v. Nagle*, 118 Mass. 278; *Severy v. Nickerson*, 120 Mass. 306; *Sweeny v. Old Colony R. Co.*, 10 Allen, 368; *Elliott*

*v. Pray*, 10 Allen, 378; *Zoebisch v. Tarbell*, 10 Allen, 385; *Baker v. Byrne*, 58 Barb. 438; *Campbell v. Portland Sugar Co.*, 62 Maine, 552.

<sup>3</sup> *Low v. Grand Trunk Ry. Co.*, 72 Maine, 313.

<sup>4</sup> *Collett v. London & N. W. Ry. Co.*, 16 Q. B. 984; *Wendell v. Baxter*, 12 Gray, 494.

<sup>5</sup> *Learoyd v. Godfrey*, 138 Mass. 315.

<sup>6</sup> *Smith v. London & St. Catherine Docks Co.*, L. R. 3 C. P. 326.

<sup>7</sup> *Tobin v. Portland R. Co.*, 59 Maine, 183.

<sup>8</sup> *Stratton v. Staples*, 59 Maine, 95.

<sup>9</sup> *Cannavan v. Conklin*, 1 Daly, 509; 1 Abb. Pr. N. S. 271; *Gluck v. Ridgewood Ice Co.*, 9 N. Y. S. 254.

<sup>10</sup> *Swords v. Edgar*, 59 N. Y. 28; 44 How. Pr. 139; 1 Sup. Ct. 23; *Clancy v. Byre*, 56 N. Y. 129; 65 Barb. 344; *Walsh v. Mead*, 8 Hun, 387; *Thompson v. Mayor*, 11 N. Y. 115; *Heaney v. Heeney*, 2 Denio, 625; *Irvine v. Wood*, 51 N. Y. 224; 4 Rob. 138; 5

But the lessor is not liable when the premises become defective after they have passed from his control,<sup>1</sup> or in consequence of obstructions placed there by third persons, of which he has no notice, express or implied,<sup>2</sup> or when, having himself created no nuisance, he is not guilty of wilful wrong, fraud or culpable negligence.<sup>3</sup> Where premises may cause injury to the public from want of repair, the owner's responsibility to keep them in proper condition is not lessened by the employment of a competent person to repair them, if they are not repaired, and injury is caused in consequence.<sup>4</sup>

**§ 114. Same — Same — Docks.**— These rules apply when the owner or occupant of a wharf, dock, or canal expressly or impliedly invites vessels to enter. In *Carleton v. Franconia*

Rob. 482; *Moody v. New York*, 43 Barb. 282; 34 How. Pr. 288; *Leary v. Woodruff*, 4 Hun, 99; *Bogart v. Haight*, 20 Barb. 251; *Vanderwater v. New York*, 2 Sandf. 258; *Murray v. Sharp*, 1 Bosw. 539; *Stevens v. Rhineland*, 5 Rob. 285; *Taylor v. New York*, 4 E. D. Smith, 559; *Ahern v. Steele*, 48 Hun, 517; *Moore v. Oceanic Steam Nav. Co.*, 24 Fed. Rep. 237; *Cleary v. Same*, 40 id. 908; *Joyce v. Martin*, 15 R. L. 588; *Shindelbeck v. Moon*, 32 Ohio St. 264, 273. See *Nash v. Minneapolis Mill Co.*, 24 Minn. 501; *House v. Metcalf*, 27 Conn. 640; *Owings v. Jones*, 9 Md. 108; *Leonard v. Storer*, 115 Mass. 86; *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Gwinnell v. Eamer*, L. R. 10 C. P. 658; *Rosewell v. Prior*, 12 Mod. 635; 2 Salk. 459; *Rex v. Pedly*, 1 Ad. & El. 822; *Todd v. Flight*, 9 C. B. N. S. 377; *White v. Phillips*, 15 C. B. N. S. 245; 33 L. J. C. P. 33; *Onderdonk v. Smith*, 21 Fed. Rep. 588; *O'Rourke v. Peck*, 29 id. 223; 40 id. 907; 24 Blatch. 473; *Leonard v. Decker*, 22 Fed. Rep. 741; *Penn. R. Co. v. Atha*, id. 920. If the lessee of a wharf covenants to make any repairs required by the proper municipal authorities for the safety or convenience of ves-

sels lying at the wharf, the covenant is not broken by neglect to make repairs ordered by such authorities for the purpose of preventing injury to the river. *Myers v. Myrrell*, 57 Ga. 516. Proof of a right to unload a vessel at a wharf does not establish title to the wharf, but the easement of unloading is consistent with title in another. *Kipp v. Den*, 24 N. J. L. 854. A covenant, beneficial to the covenantee, as to the use of a dock between wharves, is enforceable in equity by his grantee against the covenantor's lessor with notice. *Commercial Wharf Co. v. Winsor*, 146 Mass. 559.

<sup>1</sup> *Ibid.*; *Clancy v. Byre*, 56 N. Y. 129; 58 Barb. 449; *Albany v. Cunliff*, 2 Comst. 165; *Walsh v. Mead*, 8 Hun, 387; *Radway v. Briggs*, 37 N. Y. 256; 35 How. Pr. 422; *Cannavan v. Conklin*, 1 Daly, 509; *Owings v. Jones*, 9 Md. 108.

<sup>2</sup> *Seaman v. New York*, 8 Daly, 147; *Griffin v. Mayor*, 9 N. Y. 456; *Barton v. Syracuse*, 36 N. Y. 54; *Tarry v. Ashton*, 1 Q. B. D. 314.

<sup>3</sup> *Edwards v. New York R. Co.*, 98 N. Y. 245.

<sup>4</sup> *Ibid.* See *Behan v. New York*, 24 Fed. Rep. 239.

Iron & Steel Co.,<sup>1</sup> it appeared that the defendants procured the plaintiffs to bring their vessel to the defendants' wharf for the purpose of discharging a cargo of iron, and that, while lying at the wharf, the vessel settled with the ebb of the tide and was injured by a rock, of the existence and position of which the defendants had long known, but of which the plaintiffs and their employees had no notice. It did not appear that the defendants owned the soil of the dock in which the rock was imbedded, but they had excavated the dock for the purpose of accommodating vessels bringing cargoes to the wharf. The court said:<sup>2</sup> "It is immaterial in this case whether the danger had been created or increased by the excavation made by the defendants, or had always existed, if they, knowing of its existence, neglected to remove it or to warn those transacting business with them against it. Even if the wharf was not public, but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not created by them or by any human agency, they were still responsible for an injury occasioned by it to a vessel which they

<sup>1</sup> 99 Mass. 216; citing *Sweeny v. Manhattan Trans. Co. v. Mayor*, 37 id. 160; *The Calvin P. Harris*, 33 id. 295; *Allen v. Pray*, id. 378; *Wendell v. Onderdonk v. Smith*, 23 Blatch. 562; *Baxter*, 12 Gray, 494; *Parnaby v. Barber v. Abendroth*, 102 N. Y. 406; *Lancaster Canal Co.*, 11 Ad. & El. 223; 3 N. & P. 523; 3 P. & D. 162; *Gibbs v. Liverpool Docks*, 3 H. & N. 164; s. c. *nom. Mersey Docks v. Gibbs*, 11 H. L. Cas. 687, and L. R. 1 H. L. 93; *Indemaur v. Dames*, L. R. 1 C. P. 274; 2 id. 311; *Thompson v. North Eastern R'y Co.*, 2 B. & S. 106. See, also, *Curling v. Wood*, 16 M. & W. 628; *White v. Phillips*, 15 C. B. N. S. 245; *Smith v. London Docks Co.*, L. R. 3 C. P. 326; *The Apollo*, 61 L. T. N. S. 286; 60 id. 112; *The Calliope*, id. 359; 14 P. D. 138; [1891] A. C. 11; *The Moorcock*, 14 P. D. 64; 13 id. 157; *Barrett v. Black*, 56 Maine, 498; *Oliver v. Worcester*, 102 Mass. 489; *Sawyer v. Oakman*, 7 Blatch. 290; 1 Lowell, 134; *The John A. Berkman* (Mass. Dist. Ct.), 6 Fed. Rep. 535; *Smith v. Havemeyer*, 36 id. 927; 32 id. 844; *Manhattan Trans. Co. v. Mayor*, 37 id. 160; *The Calvin P. Harris*, 33 id. 295; *Onderdonk v. Smith*, 23 Blatch. 562; *Barber v. Abendroth*, 102 N. Y. 406; *Nelson v. Phoenix Chemical Works*, 7 Ben. 37; *Mason v. Rhinelanders*, 8 Ben. 163; *Philadelphia R. Co. v. Philadelphia Steamboat Co.*, 28 How. 209; *Smith v. Comptroller*, 18 Wend. 659; *Seaman v. New York*, 80 N. Y. 239; *Exchange Fire Ins. Co. v. Delaware Canal Co.*, 10 Bosw. 180; *Weitner v. Delaware Canal Co.*, 4 Rob. 234; *Johnson v. Belden*, 47 N. Y. 130; 2 Lans. 433; *Vroman v. Rogers*, 5 N. Y. S. 426; *Pittsburgh v. Grier*, 22 Penn. St. 54; *Borden Mining Co. v. Barry*, 17 Md. 419. The master of a canal boat, who attempts to pass a lock, and knows that the gates are out of repair, is not, because of such knowledge, guilty of contributory negligence. *Johnson v. Belden*, *supra*.  
<sup>2</sup> 99 Mass. 219.

had induced for their own benefit to come to the wharf, and which, without negligence on the part of its owners or their agents or servants, was put in a place apparently adapted to its reception, but known by the defendants to be unsafe." In *Nickerson v. Tirrell*,<sup>1</sup> the evidence was conflicting as to the condition of the dock, in which other vessels, both larger and smaller than the plaintiffs', had safely discharged, and as to the cause of injury to the plaintiffs' vessel, the bottom of which was broader than many vessels of its size and class. The case was submitted to the jury upon the issue whether the injury was attributable to want of care on the part of the defendant or of the master of the vessel. Morton, J., in delivering the opinion of the court, upon exceptions alleged by the defendant, thus states the rule applicable to this class of cases: "The owner or occupant of a dock is liable in damages to a person who, by his invitation express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready." So, in order that a draw-bridge may be safe for vessels, reasonable diligence must be used to prevent accumulations of drift-stuff there.<sup>2</sup> If a vessel is voluntarily placed by her officers partly at the wharf of the consignee, who is not informed of her presence there, and partly upon the adjoining flats of a third person, who has not improved such flats, and neither information as to the condition of the berth or request for a berth is made, the consignee is not responsible for failing to inform the master of a change in the condition of the bottom in that neighborhood since the vessel previously laid at the wharf.<sup>3</sup> And the same rule applies when the obstruction is recent and is equally well-known to both parties, the dock-

<sup>1</sup> 127 Mass. 286.

<sup>2</sup> *The Niantic*, 6 Fed. Rep. 632 (*q. v.*

<sup>3</sup> *St. Louis Ry. v. Meese*, 44 Ark. 414. See *Wilson v. Chicago*, 42 Fed. Rep. 506. p. 635) (as to keeping safe the access to wharf).

owner not being liable.<sup>1</sup> In *Byrne v. Chicago*<sup>2</sup> it was held reasonable to require the owners of a canal to draw off the water periodically for the purpose of inspecting the bed, and such owners were held not liable for injuries to a boat which struck upon a rock in the canal, if it was deposited there by a landslide, and the owners were not otherwise at fault. A contractor who has agreed to keep a canal free from obstruction to the navigation, is liable for negligently permitting obstructions to continue, and such cause of action is assignable.<sup>3</sup> A

<sup>1</sup> *The Stroma*, 42 Fed. Rep. 922; *Crossan v. Wood*, 44 id. 94; *Pennsylvania R. Co. v. Atha*, 22 id. 920; *Phillips v. Schlesinger*, 187 Mass. 338.

<sup>2</sup> 80 Ill. 195; *Lancaster Canal Co. v. Parnaby*, 11 Ad. & El. 223; *Pennsylvania Canal Co. v. Burd*, 90 Penn. St. 281; *Exchange Fire Ins. Co. v. Delaware Canal Co.*, 10 Bosworth, 180; *Townsend v. Susquehanna Turnpike Co.*, 6 Johns. 90; *Wilson v. Susquehanna Turnpike Co.*, 21 Barb. 68; *Hicks v. Dorn*, 42 N. Y. 47; 54 Barb. 172; 1 Lans. 81; *Mullen v. St. John*, 57 N. Y. 567; *Lane v. Salter*, 4 Robt. 239. In the above case of *Pennsylvania Canal Co. v. Burd*, in which a canal boat was injured by a sunken log, Sterrett, J., said: "An injury resulting from an unknown obstruction, which could not be guarded against, without the exercise of extraordinary or unreasonable care, must be considered an accident for which no one is specially to blame, and for which the company is not liable. It would be unreasonable to require a canal company to sound and drag the whole length of its canal continually, to ascertain what obstructions might lie at the bottom, or to keep guards along the banks, to prevent the commission of injuries by careless or designing persons. But it is bound, annually at least, when the water is out of the canal, to inspect the bed and remove obstruc-

tions." When a canal company receiving tolls induces a boat to enter the canal, a promise is implied to let it through in a reasonable time. *Muir v. Louisville Canal Co.*, 8 Dana, 161. See *Hagan v. Brockie*, 11 Fed. Rep. (Pa.) 745 (case of a dock newly dredged). Actions for injury to a barge in a defective dock (*Dempsey v. Delaware Co.*, 12 Phila. 314), or caused by the overflow of canal (*Moyer v. Chesapeake Canal Co.*, id. 400), are local in Pennsylvania.

<sup>3</sup> *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Robinson v. Chamberlain*, 34 N. Y. 389. If one conveys a mill, dam, and slip, reserving the right to slip his own logs, free of toll, it is a personal right and not assignable. *Wadsworth v. Smith*, 11 Maine, 278. By a written agreement, the defendants were to repair and occupy the plaintiff's canal, to collect and account for the tolls on all merchandise, including their own, and, "after deducting all costs, expenses, and charges for repairing and running said canal," were to pay the net profits to the owner. The agreement provided in a subsequent clause that the defendants should account for and pay over "the whole of said receipts, after deducting the expenditures in making said repairs." The defendants were held entitled to retain from the tolls received suitable

canal corporation is not liable in a private action for failure to construct its canal according to its charter, except upon the ground of special peculiar damage;<sup>1</sup> but if such corporation neglects to keep the canal free and clear from obstructions as required by its charter, it is liable to the owner of a raft or boat which is thereby grounded or injured.<sup>2</sup> Common carriers by water are liable for the negligence of third persons in leaving hidden artificial obstructions in the way, such negligence not being an act of God.<sup>3</sup> But a tug or steamboat, in rendering towage service, is not a common carrier; and is liable only for her own negligence in approaching a place of landing not known to be dangerous.<sup>4</sup>

**§ 115. Improving navigation — Public bodies — Tolls.—** The owner of land adjoining a navigable stream is not bound to cleanse the river, unless he has some special benefit from it, as a toll, fishing or other profit.<sup>5</sup> But when corporations and public trustees are empowered to improve the navigation of streams, or to construct canals, docks, wharves, water-works, or bridges, they may be liable, independently of statute, for a neglect of duty which causes injury to individuals from whom toll is demandable.<sup>6</sup> In *Mersey Docks v. Gibbs*, it appeared

compensation for their supervision of the canal and its repair, though not expressly stipulated in the contract. *Dyer v. Fitch*, 63 Maine, 170. The defendant, when sued for dockage and wharfage, may recoup his damages by reason of the wharf being out of repair. *Buckbee v. Brown*, 21 Wend. 110; *Albany v. Trowbridge*, 7 Hill, 429; 5 Hill, 71. Injury from a sewer to a wharf lot, which is bulk-headed, or occupied by a wharf, can be shown upon an estimate of its value when so occupied. *Harris v. Philadelphia* (Penn. St.), 16 Atl. 740.

<sup>1</sup> *Quincy Canal v. Newcomb*, 7 Met. 276, 284.

<sup>2</sup> *Riddle v. Locks & Canals*, 7 Mass. 169; *Pajewski v. Carondelet Canal Co.*, 11 Fed. Rep. 313; *Christian v. Van Tassel*, 12 id. 884.

<sup>3</sup> *Trent Navigation Co. v. Wood*, 3

*Esp.* 131; *Oakley v. Packet Co.*, 11 Exch. 618; *New Brunswick S. Co. v. Tiers*, 4 Zab. 697.

<sup>4</sup> *The Angelina Corning*, 1 Ben. 109; *The America*, 6 Ben. 122; *Powell v. Steam-Tug Willie*, 2 Fed. Rep. 95; *The James Jackson*, 9 Fed. Rep. 614 (see cases cited); *The Fannie Tuthill*, 12 Fed. Rep. 446; *The D. Newcomb*, 16 Fed. Rep. 274; *Molenbrock v. St. Louis Packet Co.*, id. 878; *The Webb*, 14 Wall. 406; *The Fox*, 4 Woods, 199.

<sup>5</sup> *Repair of Bridges*, 13 Co. 33.

<sup>6</sup> *Harrison v. Great Northern R. Co.*, 3 H. & C. 231; *Manley v. St. Helen's Canal Co.*, 2 H. & C. 840; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; *John v. Bacon*, L. R. 5 C. P. 437; *Bayley v. Wolverhampton Water Works Co.*, 6 H. & N. 241; *Smith v. London Docks Co.*, L. R. 8 C. P. 326; *Dunn v. Birmingham Canal*



that the trustees of the docks in Liverpool were incorporated by act of Parliament for the construction and maintenance of docks and warehouses for the public use, with authority to collect tolls therefor, and that these tolls were to be applied exclusively to the maintenance of the docks and warehouses, and to the payment of the indebtedness incurred in their construction; and it was held by the House of Lords that the trustees were liable to the owner of a vessel, which was injured in entering one of the docks, by striking upon a bank of mud which their servants and agents had negligently permitted to accumulate at the entrance.<sup>1</sup> So authority to take tolls for buoying a harbor imposes, at common law, an obligation to buoy the approaches to the harbor, and renders the party authorized liable for the loss of a vessel striking on a sunken wreck which is insufficiently buoyed in the approaches to the

Co., L. R. 8 Q. B. 42; *Rex v. Kent*, 13 East, 220; *Newark Plank Road Co. v. Elmer*, 1 Stock. 755; 4 Hal. Ch. 586; *Gifford v. New Jersey R. Co.*, 2 id. 177; *Attorney General v. New Jersey R. Co.*, 2 Green Ch. 136; *Allen v. Monmouth Co.*, 2 Beas. 68; *Pittsburgh v. Grier*, 22 Penn. St. 54; *Prescott v. Duquesne*, 48 Penn. St. 118; *Pennsylvania R. Co. v. Patterson*, 73 Penn. St. 491; *Pennsylvania Canal Co. v. Graham*, 63 Penn. St. 290; *Hill v. Boston*, 122 Mass.; *Yale v. Hampden Turnpike Co.*, 18 Pick. 357; *Heacock v. Sherman*, 14 Wend. 58; *Albany v. Cunliff*, 2 N. Y. 165; *Radway v. Briggs*, 37 N. Y. 256; *Stack v. Bangs*, 6 Lans. 262; *Humphreys v. Armstrong*, 56 Penn. St. 204, 209; *Steele v. Western Navigation Co.*, 2 Johns. 283; *Schuylkill Navigation Co. v. McDonough*, 33 Penn. St. 73; *Frankfort Bridge Co. v. Williams*, 9 Dana, 403; *Adsit v. Brady*, 4 Hill (N. Y.), 630; *Shepherd v. Lincoln*, 17 Wend. 250.

<sup>1</sup> 11 H. L. Cas. 687; L. R. 1 H. L. 93; 7 H. & N. 329; 3 id. 164; 1 id. 439; *Gilbert v. Trinity House*, 17 Q. B. D. 795; *Dormont v. Furness*

*Ry. Co.*, 11 id. 496; *Reg. v. Williams*, 9 App. Cas. 418; *Sanitary Commissioners v. Orfila*, 15 id. 400; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; *Mersey Docks v. Cameron*, 11 H. L. Cas. 443; *Coe v. Wise*, L. R. 1 Q. B. 711; 5 B. & S. 440; 7 id. 831; *Joliffe v. Wallasey Local Board*, L. R. 9 C. P. 62; *Foreman v. Canterbury*, 40 L. J. (Q. B.) 138; *Shoebottom v. Egerton*, 18 L. T. N. S. 889; *Walker v. Goe*, 4 H. & N. 350; *Witherly v. Regents' Canal Co.*, 3 F. & F. 61; 12 C. B. N. S. 2; *Thompson v. N. E. Ry. Co.*, 2 B. & S. 106; *Grant v. Sligo Harbour Com'rs*, Ir. R. 11 C. L. 190; *Southampton Bridge Co. v. Southampton*, 8 E. & B. 301; *Ward v. Lee*, 7 E. & B. 426; *Clothier v. Webster*, 12 C. B. N. S. 790; *Ruck v. Williams*, 3 H. & N. 308; *Whitehouse v. Fellows*, 10 C. B. N. S. 765; *Brownlow v. Metropolitan Board*, 13 C. B. N. S. 768; 16 id. 546. See *Reg. v. Berwick As. Committee*, 16 Q. B. D. 473; *Mersey Docks v. Llaneilian Overseers*, 14 Q. B. D. 770; *New River Harbour Board v. McLeod*, 2 N. Zeal. L. R. (S. Ct.) 290; *Freeman v. Reg.*, 3 id. 109.



harbor.<sup>1</sup> In *Winch v. Conservators of the Thames*,<sup>2</sup> the defendants were held liable for the non-repair of a towing path adjoining the river Thames, the doctrine sustained by the majority of the court of Exchequer Chamber being that the defendants, so long as they kept the towing path open and took toll for its use, were under an obligation to those whom they invited to use it, to take reasonable care that the towing path was in such condition as not to expose those using it to undue danger, and that there was no distinction in this respect between the natural and artificial parts of the towing path. But where the trustees or conservators of a river, who were not owners of the river or of the navigation therein, but were an unpaid body of trustees, appointed for public purposes in aid of the common-law right of navigating an ancient highway, were authorized to remove all obstructions and impediments to the navigation *at their discretion*, they were held not liable for injuries sustained by a vessel which struck upon submerged piles in the bed of the river.<sup>3</sup> So, in the absence of negligence, a corporation empowered by a special act to improve the navigation of a river, and to collect tolls for the purpose of defraying the expense, is not liable at law for injury to the adjoining lands caused by an overflow of the water in consequence of staunches which it has erected in the river in aid of the navigation, combined with the natural growth of weeds and the accumulation of silt against the staunches,<sup>4</sup> since the duties of a navigation company which does not own the soil are confined, in the absence of an express enactment upon the subject, to matters relating to the navigation.<sup>5</sup> The liability, when it exists, depends upon the neglect of duty towards persons who,

<sup>1</sup> *Dormont v. Furness Ry. Co.*, 11 Q. B. D. 496.

<sup>2</sup> L. R. 9 C. B. 378; L. R. 7 Q. B. 458.

<sup>3</sup> *Forbes v. Lee Conservancy Board*, 4 Ex. D. 116; *York Ry. Co. v. Reg.*, 1 El. & Bl. 858; *Great Western Ry. Co. v. Reg.*, 1 El. & Bl. 874. See *Grote v. Chester Ry. Co.*, 2 Exch. 251; *Hammond v. Vestry of St. Pancras*, L. R. 9 C. P. 316. Cf. *Hood v. Com'rs of Toronto Harbor*, 37 Q. B. (Can.) 72; 34 id. 87. Bonds of harbor trustees,

secured by an assignment of "rates, tolls, rents," etc., are an interest in land within the St. 9 Geo. 2, ch. 36. *Re David*, 41 Ch. D. 168; 43 id. 27.

<sup>4</sup> *Cracknell v. Thetford*, L. R. 4 C. P. 629. It is a matter for *compensation*, and not for damages at law. See *post*, § 250.

<sup>5</sup> *Ibid.*; *Parrett Navigation Co. v. Robins*, 10 M. & W. 593. Cf. *Burwell v. Port Burwell Harbor Co.*, 20 Q. B. (Can.) 841.

being within the scope of the benefit intended by the statute, are damaged by such neglect.<sup>1</sup> In general, the receipt of tolls

<sup>1</sup> *Ibid.*; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 213; *Manley v. St. Helen's Canal*, 2 H. & N. 840; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686; *Forbes v. Lee Conservancy Board*, 4 Ex. 116; *The Moorcock*, 14 P. C. 64; 18 *id.* 157; *Lowther v. Curwen*, 58 L. T. N. S. 168; *Riddle v. Locks and Canals*, 7 Mass. 169. Corporate bodies, or individuals, when authorized to perform an act for others which will benefit themselves, such as the construction of a toll-bridge, are bound to repair, though the public use the structure. *Rex v. West Riding*, 2 East, 842; *Rex v. Kent*, 18 East, 220; *Rex v. Lindsay*, 14 East, 87; *Rex v. Somerset*, 16 East, 305; *Rex v. Oxfordshire*, 16 East, 223; *Reg. v. Kerrison*, 3 M. & S. 526; *Manley v. St. Helen's Canal Co.*, 2 H. & N. 804; *Reg. v. Brecon*, 15 Q. B. 813; *Nicholl v. Allen*, 1 B. & S. 934; *Wiggins v. Boddington*, 3 C. & P. 544; *Reg. v. Ely*, 4 New Sess. Cas. 222. See *Cutler v. Howard*, 9 Wis. 309; *County Commissioners v. Duckett*, 20 Md. 468; *Hill v. Boston*, 122 Mass. 844; *Freedom v. Weed*, 40 Maine, 383; *Tift v. Jones*, 52 Ga. 538. But if they act solely for the benefit of the public, or if the particular liability is, by statute, prescription or otherwise, shifted upon the public, they are not liable if they fail to repair. *Reg. v. Southampton*, 18 Q. B. 841; *Rex v. Oxfordshire*, 16 East, 223; *Rex v. Derbyshire*, 2 Q. B. 745; *Rex v. Whitney*, 3 Ad. & El. 69; *Rex v. Trafford*, 1 B. & Ad. 874; *Rex v. Devonshire*, 5 B. & Ad. 883; *Reg. v. Gloucestershire*, 2 C. & M. 506; *Sampson v. Goochland Justices*, 5 Gratt. 241; *Rex v. Hendon*, 4 B. & Ad. 628; *Rex v. Oswestry*, 6 M. & S. 861; *Rex v. Ecclesfield*, 1 B. & A. 848; *Rex v. Stratford-on-Avon*, 14

East, 848; *Rex v. Lincoln*, 8 Ad. & El. 65; *Rex v. Surrey*, 2 C. & M. 455; *Beaver v. Manchester*, 8 E. & B. 44; *Rex v. Oxfordshire*, 4 B. & S. 194; *Nicholl v. Allen*, 1 B. & S. 934; *Reg. v. Commissioners*, 10 L. T. N. S. 375; *Rex v. Yorkshire*, 5 Burr. 2594; 2 Wm. Bk. 685; *Flynn v. Canton Co.*, 40 Md. 312; *Sayre v. Northwestern Turnpike Road*, 10 Leigh, 454; *Swineford v. Franklin Co.*, 6 Mo. App. 39; *Maximilian v. Mayor*, 62 N. Y. 160; *Coulson & Forbes on Waters*, 519; *Orcutt v. Kittery Point Bridge Co.*, 53 Maine, 500. The owner of a toll-bridge is not liable as a common carrier, but is only bound to proper diligence in keeping the bridge in repair. *Grigsby v. Chappel*, 5 Rich. (S. C.) 444. As to statutory liability to repair bridges between counties or towns, see *Re Spier*, 3 N. Y. S. 438; *Huggins v. Riley*, 51 Hun, 501; *Re Commissioners*, 3 N. Y. S. 461; *State v. Commissioners*, 119 Ind. 444 (freshet); *Hord v. Montgomery*, 26 Ill. App. 41; *State v. Wood Co.*, 72 Wis. 629; *Ecorse v. Supervisors*, 75 Mich. 264; *Haverhill v. Groveland*, 152 Mass. 510. Liability to repair a bridge may arise by prescription. *Rex v. Wilts*, 6 Mod. 307; *Rex v. Bucknall*, 7 Mod. 55; 2 Ld. Raym. 792, 804. If a person who opens a private way for his own convenience, builds a bridge over a creek which runs across it, and the public use the same with his permission, he is liable to a person injured by the breaking in of the bridge which the owner knew to be unsafe, but which was apparently in good condition. *Campbell v. Boyd*, 88 N. C. 129. See *Rex v. Wilts*, 6 Mod. 307. So a raceway cut across a highway. *West Bend v. Mann*, 59 Wis. 69.

by a company, incorporated for the improvement of a harbor, dock, etc., amounts to an assertion that such harbor or dock is adapted to receive and shelter vessels of such size as it is fitted for.<sup>1</sup>

§ 116. Same — Municipal corporations.— *Quasi* corporations, such as counties and municipal corporations, created by the legislature for public purposes, are subject to indictment at common law for neglect of a public duty imposed upon them, but are not liable to a private action for such neglect, unless such action is given by statute, or the liability arises by prescription, or unless they hold and deal with property for their own emolument, and receive rents or tolls therefrom like a private owner.<sup>2</sup> Under the last exception, a city which has possession and exclusive control of a public wharf or dock, and receives toll for its use, is liable to an individual who is injured upon the wharf, or whose vessel is damaged, in consequence of non-repair.<sup>3</sup> Upon the ground of prescription, a

<sup>1</sup> Webb v. Port Bruce Harbor Co., 19 Q. B. (Can.) 615, 623; Berryman v. Port Burwell Harbor, 24 id. 34; *post*, § 144; Willey v. Allegheny City, 118 Penn. St. 490.

<sup>2</sup> Russell v. Men of Devon, 2 T. R. 667; Hill v. Boston, 122 Mass. 344; Barnes v. District of Columbia, 91 U. S. 540, 551; Dillon, Mun. Corp. ch. 23; Gordon v. Taunton, 126 Mass. 349; Riddle v. Locks & Canals, 7 Mass. 169; Mower v. Leicester, 9 Mass. 247; Welsh v. Rutland, 56 Vt. 228, 234; Finch v. Board of Education, 30 Ohio St. 37; Pray v. Jersey City, 32 N. J. L. 394; Rowe v. Portsmouth, 56 N. H. 291; Eastman v. Meredith, 36 N. H. 284; Detroit v. Blackeby, 21 Mich. 84; Rapho v. Moore, 68 Penn. St. 404; Baltimore v. Marriott, 9 Md. 160, 175; Cooper v. Athens, 53 Ga. 638; Aldrich v. Tripp, 11 R. I. 145. See Waltham v. Kemper, 55 Ill. 346; Chicago v. Joney, 60 Ill. 383; Chicago v. Dermody, 61 Ill. 431; Richmond v. Long, 17 Gratt. 375; Transportation Co. v.

Chicago, 99 U. S. 635; 7 Biss. 45; Nugent v. Levee Commissioners, 58 Miss. 197.

<sup>3</sup> Pittsburgh v. Grier, 22 Penn. St. 54; Pittsburg Ry. v. Gilleland, 56 Penn. St. 445, 451; Winpenny v. Philadelphia, 65 Penn. St. 135, 140; Philadelphia v. Gilmartin, 71 Penn. St. 140, 159; Snyder v. Philadelphia, 78 Penn. St. 23; Hey v. Philadelphia, 81 Penn. St. 44, 51; Maxwell v. The City, 7 Phila. 137; Hill v. Boston, 122 Mass. 344, 376; Oliver v. Worcester, 102 Mass. 489; Aldrich v. Tripp, 11 R. I. 141; Radway v. Briggs, 37 N. Y. 256; Kennedy v. New York, 73 N. Y. 365; Shinkle v. Covington, 1 Bush, 617; Memphis v. Kimbrough, 12 Heisk. 133; Petersburg v. Applegarth, 28 Gratt. 321; Jeffersonville v. Louisville Ferry Co., 27 Ind. 100; Jeffersonville v. The John Shallcross, 35 Ind. 19; Macauley v. New York, 67 N. Y. 602; Moody v. New York, 43 Barb. 282; Taylor v. New York, 4 E. D. Smith, 559; McGuinness v. New York, 52 How. Pr. 450; Seaman v.

municipal corporation has been held liable to a person who lost his navigation because of its neglect to repair and cleanse a tide-water creek,<sup>1</sup> and for the same reason it may be liable to a private action for damages caused by its neglect to repair sea-walls.<sup>2</sup> A city which, being under no legal obligation to remove obstructions in a navigable river, attempts so to do, but abandons the work without changing the position of an obstruction which afterwards causes injury to a vessel, is not liable therefor.<sup>3</sup>

§ 117. *Same — Same.*—Municipal corporations cannot engage in works of internal improvement, such as the construction of harbors, canals, etc., and loan their credit in aid thereof, without special authority from the legislature.<sup>4</sup> They have been thought not liable for the consequences of acts which are *ultra vires*, as by erecting an embankment in excess of their powers which turns a stream upon the plaintiff's lands.<sup>5</sup> They may be empowered by the legislature to pass ordinances for the preservation of their harbors and water channels and the regulation of vessels, bridges, and wharves;<sup>6</sup> to deepen and

New York, 3 Daly, 147; *Jackson v. Allegheny City*, 41 Fed. Rep. 886. An agreement by a municipal corporation to let a repairing dock, which it owns, but of which it retains the control and possession, is not an agreement as to an interest in land, and if the admission of ships into the dock is a matter of frequent ordinary occurrence, the agreement need not be under the corporate seal. *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

<sup>1</sup> *Lynn v. Turner*, Cowper, 86.

<sup>2</sup> *Henly v. Lyme*, 5 Bing. 91; 3 Moo. & P. 278; 3 B. & Ad. 77; 2 Cl. & Fin. 331; 8 Bligh, N. R. 690; 1 Bing. N. C. 222; 1 Scott, 29; *Hill v. Boston*, 122 Mass. 344, 348, 360. But the mere grant by the sovereign of a charter to a municipal corporation situated upon navigable waters does not raise an *implied* duty, on the part of the grantee, to build or keep in repair

wharves or sea-walls for the protection of the city lands from the sea. *Coram v. St. John*, 1 Hannay (N. B.), 441.

<sup>3</sup> *Goodrich v. Chicago*, 4 Biss. 18.

<sup>4</sup> *Hasbrouck v. Milwaukee*, 13 Wis. 87; *Miller v. Milwaukee*, 14 Wis. 642; *Oebricke v. Pittsburg*, 5 Penn. L. J. Rep. 485; *Anthony v. Adams*, 1 Met. 284.

<sup>5</sup> *Anthony v. Adams*, 1 Met. 284; *Wheeler v. Essex Public Road Board*, 39 N. J. L. 291. But cf. *post*, § 260.

<sup>6</sup> *Ibid.*; *Escabana Co. v. Chicago*, 107 U. S. 678; *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa, 185; *Keokuk v. Keokuk Northern Line Packet Co.*, *id.* 196; *Culbertson v. The Southern Belle*, Newb. 461; *Soens v. Racine*, 10 Wis. 271; *Hasbrouck v. Milwaukee*, 13 Wis. 87; 17 Wis. 266; 21 Wis. 217; *New York v. Ryan*, 2 E. D. Smith, 368; *People v. Bryan*, 46 Barb. 355; *Ogdensburg*

improve rivers, or to remove and prevent obstructions therein,<sup>1</sup> or to subscribe for stock in a company organized for the purpose of improving the navigation of a river contiguous to the city or town, even when the improvements extend through several towns or counties.<sup>2</sup> Special laws granting such powers and the right to levy taxes therefor are sustained by the courts, it is said, only when it is apparent that the works will be generally beneficial to the members of the corporation.<sup>3</sup> But the power must be conferred in express terms. A provision of a city charter giving power "to erect, repair, and regulate public wharves and docks, and fix the rates of wharfage thereat," does not enable the city to create a harbor or to improve one by obtaining an increased supply of water.<sup>4</sup> With respect to counties, it has been held that the state legislature may require them, against their will, to levy and collect a tax for the improvement of rivers or harbors within their respective limits, in which the county is vitally interested, although the improvement may also be for the benefit of other counties and the state.<sup>5</sup>

*v. Lyon*, 7 Lans. 215; *Ogdensburg v. Lovejoy*, 2 S. C. 83; 10 Alb. L. J. 207; *Brown v. Catlettsburg*, 11 Bush, 435; *Grant v. Davenport*, 18 Iowa, 179; *Philadelphia v. Field*, 58 Penn. St. 320; *New Orleans v. New Orleans R. Co.*, 27 La. Ann. 414; *Ellerman v. McMains*, 30 La. Ann. 190; *Municipality No. 1 v. Kirk*, 5 La. Ann. 34; *Shepherd v. Third Municipality*, 6 Rob. (La.) 349; *Tourne v. Lee*, 20 Martin, 549; *Gregory v. Bridgeport*, 41 Conn. 76; *Horn v. People*, 26 Mich. 221; *Marshall v. Vicksburg*, 15 Wall. 146; *Bacon v. Mulford*, 41 N. J. L. 59; *Geiger v. Filor*, 8 Fla. 325; *Evansville v. Martin*, 41 Ind. 145; *Jeffersonville v. Louisville Ferry Co.*, 27 Ind. 100; *Stevens v. Walker*, 15 La. Ann. 577; *Waddingham v. St. Louis*, 14 Mo. 190; *Murphy v. Montgomery*, 11 Ala. 586.

<sup>1</sup> *Rochester v. Osborn*, 5 Lans. 37; *Winpenny v. Philadelphia*, 65 Penn. St. 135; *Compton v. Waco Bridge Co.*, 62 Texas, 715 (access to ford).

<sup>2</sup> *Taylor v. Newbern*, 2 Jones Eq. 141. As to the prohibiting the removal of sand by city ordinances, see *Clason v. Milwaukee*, 30 Wis. 316.

<sup>3</sup> *Alexander v. Milwaukee*, 16 Wis. 247; *Miller v. Milwaukee*, 14 Wis. 642; *Hasbrouck v. Milwaukee*, 13 Wis. 37; 17 Wis. 266; 21 Wis. 217; *State v. Hasbrouck*, 25 Wis. 122; *Reed v. Erie*, 79 Penn. St. 346. In the absence of statutory authority, a city cannot lease a public wharf to private persons. *Bateman v. Covington*, 88 Ky.; 14 S. W. 361; *Belcher S. R. Co. v. St. Louis G. R. Co.*, 82 Mo. 121. As to ferries, see *Macdonnell v. International Ry. Co.*, 60 Texas, 590; *Waterbury v. Laredo*, id. 519.

<sup>4</sup> *Spengler v. Trowbridge*, 62 Miss. 46.

<sup>5</sup> *Kimball v. Mobile*, 3 Woods, 555. See *State v. Keith County*, 16 Neb. 508.

§ 118. **Same — Same.**— The principle under which special assessments are made by municipal corporations upon city lots, for improvements in adjoining streets or highways by land, applies also to improvements in highways by water;<sup>1</sup> and such assessments may be authorized upon riparian proprietors whose estates are benefited thereby.<sup>2</sup> A municipal corporation is under no obligation at common law to keep adjacent waters safe for navigation.<sup>3</sup> A city which is invested by its charter with “the general powers possessed by municipal corporations at common law,” may build a breakwater for the purpose of protecting its streets and the buildings thereon from inundation, and a contract entered into for that purpose is binding on the city at large.<sup>4</sup> When such a corporation is authorized by statute to maintain, repair and regulate docks and wharves for the free use of the public, or of those who pay toll, it is in general a power which cannot be delegated.<sup>5</sup> A wharf erected by a city is presumably open to

<sup>1</sup> *Johnson v. Milwaukee*, 40 Wis. 815.

<sup>2</sup> *Hale v. Kenosha*, 29 Wis. 599; *Bond v. Kenosha*, 17 Wis. 284; *Buffalo Union Iron Works v. Buffalo*, 13 Abb. Pr. N. S. 141; *Wright v. Chicago*, 20 Ill. 252; *Elston v. Chicago*, 40 Ill. 514; *Goddin v. Crump*, 8 Leigh, 120; *Harrison Justices v. Holland*, 3 Gratt. 236; *Frederick v. Augusta*, 5 Ga. 561.

<sup>3</sup> *Seaman v. New York*, 80 N. Y. 239; *ante*, § 98, n.

<sup>4</sup> *Miller v. Milwaukee*, 14 Wis. 642; *Soens v. Racine*, 10 Wis. 271; *Roundtree v. Galveston*, 42 Texas, 613. The legislature may authorize a city to acquire the fee of land necessary for the construction of a breakwater. *Sweet v. Buffalo Ry. Co.*, 79 N. Y. 203.

<sup>5</sup> *Oakland v. Carpentier*, 18 Cal. 510; 21 Cal. 642; *People v. Broadway Wharf Co.*, 31 Cal. 33; *Lord v. Oconto*, 47 Wis. 386; *Matthews v. Alexandria*, 68 Mo. 115; *Mobile v. Moog*, 53 Ala. 561; *Illinois Canal Co. v. St. Louis*, 2 Dillon, 70; *Morris Co.*

*v. Central R. Co.*, 16 N. J. Eq. 419.

But village boards may be authorized by the legislature to grant franchises for the collection of wharfage. *Farnum v. Johnson*, 62 Wis. 620. A city possessing the above authority may by ordinance prohibit the use of other wharves than those which it establishes. *Dubuque v. Stout*, 32 Iowa, 40, 47. “Dock” defined, in *Snow v. Morton*, 2 Nova Scotia, 237, 246. The term “wharfage” includes a charge for landing goods at a natural landing as well as at an artificial wharf (*Sacramento v. New World*, 4 Cal. 41; *Sacramento v. Confidence*, *id.* 45), but not the side of a street along a river (*Shreveport v. Red River Line*, 37 La. Ann. 562); or for landing goods beyond the city’s wharf, on land which it does not own, in times of high water. *St. Louis v. Schulenberg Lumber Co.*, 13 Mo. App. 56. The city’s right is one of property, not sovereignty. *Ibid.* As to what constitutes a wharf, see *Ibid.*; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa,



the public free of toll.<sup>1</sup> If the corporation is expressly authorized by statute or by its charter to maintain a public wharf, or a free bridge or ferry, it cannot exact toll without an express legislative grant of such franchise;<sup>2</sup> nor being authorized by law to maintain a toll ferry, can it order the ferry to run without toll.<sup>3</sup> When the privilege is granted of erecting a wharf or dock in a highway, it does not include the right to erect a warehouse,<sup>4</sup> but a city which is invested with power to regulate and control its public wharves may authorize the erection of elevators thereon to facilitate the transshipment of grain.<sup>5</sup>

**§ 119. Wharves — Public and private.**— Piers, landing places, docks and wharves may be private, or they may be in their nature public, although the property may be in an individual owner.<sup>6</sup> If a vessel is wrongfully moored to a private wharf, and the wharf-owner, having occasion to use the wharf, sets it adrift, he incurs no liability if, in consequence of his act, the vessel is stranded and lost.<sup>7</sup> When wharves belonging

196; *Fitchburg R. Co. v. Boston R. Co.*, 3 Cush. 58; *Stevens v. Rhinelanders*, 5 Rob. (N. Y.) 285; *Decker v. Jaques*, 1 E. D. Smith, 80; *People v. Kelsey*, 38 Barb. 269; 14 Abb. Pr. 372. Authority conferred upon a city to build a free bridge, to be paid for by taxation, does not give it the right to establish a toll bridge. *Williams v. Davidson*, 43 Texas, 2. But if a city has authority under general laws to erect and maintain toll-bridges, it may change a toll-bridge into a free bridge, and *vice versa*. *Scott v. Des Moines*, 34 Iowa, 552.

<sup>1</sup> *Muscantine v. Keokuk Northern Line Packet Co.*, 45 Iowa, 185; *Russell v. The Empire State*, Newb. 541; *Taylor v. Atlantic Ins. Co.*, 37 N. Y. 275.

<sup>2</sup> *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Clark v. Des Moines*, 19 Iowa, 199; *Dively v. Cedar Falls*, 27 Iowa, 227; *Attorney General v. Boston*, 123 Mass. 460; *The Geneva*, 16 Fed. Rep.

874. Without special authority a municipal corporation has no power to lease a ferry. *Millsaps v. Monroe*, 37 La. Ann. 641. But if such a corporation has power to bridge a river it may empower a railroad corporation to do so. *McCartney v. Chicago R. Co.*, 112 Ill. 611.

<sup>3</sup> *Attorney General v. Boston*, 123 Mass. 460.

<sup>4</sup> *Bingham v. Doane*, 9 Ohio, 165. So as to the erection of a toll-house within the limits of a turnpike company's land. *Strattan v. Elliott*, 83 Ind. 425; *Danville Gravel Road Co. v. Campbell*, 87 Ind. 57,

<sup>5</sup> *Illinois Canal Co. v. St. Louis*, 2 Dillon, 70.

<sup>6</sup> *Hale, De Portibus Maris*, ch. 6; *Hargrave's Law Tracts*, 77, 78; *Munn v. Illinois*, 94 U. S. 113, 150; *Bolt v. Stennett*, 8 T. R. 606; *District of Columbia v. Johnson*, 1 Mackey, 51; *Degan v. Dunlap*, 15 Phila. 69.

<sup>7</sup> *Dutton v. Strong*, 1 Black, 23, 32;



to individuals are legally thrown open to the use of the public, they become affected with a public interest, and the wharfage must be reasonable.<sup>1</sup> The keeping of such wharf is likened to the keeping of an inn, and all navigators have an implied license to moor their vessels to these wharves, an application to the owner for permission to do so not being necessary.<sup>2</sup> If the owner of a public wharf sets adrift a vessel which is fastened thereto, and of which he has not requested the removal, he is liable for injury to the vessel occasioned thereby.<sup>3</sup> The question whether a wharf is public or private depends upon the purpose for which it was built, the uses to which it has been applied, the place where located, and the nature and character of the structure.<sup>4</sup> When a public highway is laid out to navigable waters, its termination is presumed to be a public landing as incident to the highway, but this presumption does not apply to any part of a highway which is laid out along the shore of such waters and follows the line of the shore, although it may come in contact with the water for a greater or less distance.<sup>5</sup> The legislature, in the exercise of the power of eminent domain, may make a private wharf public in whole or in part.<sup>6</sup>

*Harrington v. Edwards*, 17 Wis. 586. The master of a vessel who wrongfully places the vessel behind a seawall, the exclusive right to use which, as a place of shelter, has been given to another, is liable for the loss of the latter vessel in a storm, if, upon request, he fails to remove his vessel. *Derry v. Flitner*, 118 Mass. 131.

<sup>1</sup> *Hale*, *De Portibus Maris*, ch. 6; *Allnut v. Inglis*, 12 East, 527; *The Wharf Case*, 3 Bland Ch. 361, 374; *Munn v. Illinois*, 94 U. S. 113, 151; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 699; *The Minnie L. Gerow*, 5 Hughes, 169; *The Whitburn*, 14 Phila. 600; *Aiken v. Eager*, 35 La. Ann. 567; *Robertson v. Wilder*, 69 Ga. 340. The contract, express or implied, to pay wharfage is maritime, and a maritime lien may be founded thereon. *The Dora Mathews*, 31 Fed. Rep. 619; *The Mary K.*

*Campbell*, id. 840; *Woodruff v. One Covered Scow*, 80 id. 269.

<sup>2</sup> *Heaney v. Heeney*, 2 Denio, 625; *Swords v. Edgar*, 59 N. Y. 28; *Lincoln v. Penn. W. Co.*, 8 Penn. Co. Ct. 195.

<sup>3</sup> *Heaney v. Heeney*, 2 Denio, 625.

<sup>4</sup> *Per Clifford J.*, *Dutton v. Strong*, 1 Black, 23, 33; *Railroad Co. v. Hanning*, 15 Wall. 649; *Backus v. Detroit*, 49 Mich. 110; *The Wharf Case*, 3 Bland, 361; *Dugan v. Baltimore*, 5 Gill & J. 357; *Brown v. Ellicott*, 2 Md. 75; *Swords v. Edgar*, 59 N. Y. 28; *Degan v. Dunlap*, 25 Alb. L. Jour. 103; *Columbus v. Grey*, 2 Bush, 476; *Galveston v. Menard*, 23 Texas, 349; *O'Neill v. Annett*, 25 N. J. L. 290.

<sup>5</sup> *Ibid.*; *Burrows v. Gallup*, 32 Conn. 493.

<sup>6</sup> *Page v. Baltimore*, 34 Md. 558; *Hazlehurst v. Baltimore*, 37 Md. 199. See *Waddingham v. St. Louis*, 14 Mo. 190; *Murray v. Sharp*, 1 Bosw. 539.

or dedicate a public wharf to such exclusive uses as in its judgment is proper.<sup>1</sup> Where the legislature authorized a public wharf, landing, and road to be made on a plantation, the owner of which maintained a private wharf thereon, and directed payment to be made "for the value of the premises taken for public use, as well as for the damages generally to the same," it was held that the owner was not entitled to compensation for the loss of profits accruing from his private wharf.<sup>2</sup>

§ 120. **Wharfage — Who liable for.**— Those who avail themselves of the use of a wharf are liable for wharfage, though the wharf is out of repair,<sup>3</sup> and even though the necessity of using it is compelled by stress of weather;<sup>4</sup> and the right to collect these charges at public or private wharves carries with it the correlative duty to repair.<sup>5</sup> The right of wharf-owners

<sup>1</sup> *Broadway Ferry Co. v. Hankey*, 31 Md. 346.

<sup>2</sup> *Fuller v. Edings*, 11 Rich. (S. C.) 239; *Eddings v. Seabrook*, 12 id. 504. Cf. *Moses v. Sanford*, 11 Lea (Tenn.), 731.

<sup>3</sup> *Jeffersonville v. Louisville Ferry Co.*, 27 Ind. 100; *Prescott v. Duquesne*, 48 Penn. St. 118; *The George E. Berry*, 25 Fed. Rep. 780 (burned vessel held liable). The damages caused by a failure to repair the wharf may be recouped by the defendant when sued for wharfage. *Buckbee v. Brown*, 21 Wend. 110.

<sup>4</sup> *Heron v. The Marchioness*, 40 Fed. Rep. 330.

<sup>5</sup> *Radway v. Briggs*, 35 N. Y. 256; 35 How. Pr. 422; *ante*, § 113; *The Wharf Case*, 3 Bland, 361; *Yarmouth v. Eaton*, 3 Burr. 1404; *James v. Johnson*, 2 Mod. 143; *Warrington v. Morley*, 4 Mod. 320; *Colton v. Smith*, Cowper, 47; *Freeman v. Walghan*, 2 Wils. 296. The mooring of rafts to an unimproved bank of a river does not create the relation of landlord and tenant between the riparian owner and the owner of the rafts. *Hall v. Jacobs*, 7 Bush, 595; *The Lizzie E.*, 30 Fed. Rep. 876. As to

the action of use and occupation in relation to docks, see *Hathaway v. Ryan*, 35 Cal. 188; *Camden R. R. v. Finch*, 5 Sand. (N. Y.) 48; *Mangum v. Farrington*, 1 Daly (N. Y.) 236; *Moore v. Jackson*, 2 Abb. N. C. 211. Wharfage, warehouse use, moorage of ships, and the like, may be recovered under counts of *indebitatus assumpsit*. *De Wolf v. Punchard*, 3 Nova Scotia, 224, 226; *Stewart v. Baker*, 7 Mod. 12, n.; *Cock v. Vivian*, id. 203. A sheriff's attachment and bringing of a vessel to a wharf do not bind the owner for wharfage. *The Mary K. Campbell*, 24 Blatch. 475. The use of a pier projecting from a bulkhead in such manner as to prevent the owner from using his wharf, is a tort, and does not give rise to an implied contract to pay wharfage. *Camden R. Co. v. Finch*, 5 Sand. 48. See *Pelham v. Woolsey*, 16 Fed. Rep. 418. And, if the grantor of a wharf, together with the right to collect wharfage thereat, builds another wharf so as to obstruct that which is granted, it is not a continuing trespass under the statute of limitations. *Van Zandt v. New York*, 8 Bosw. 375.

to exact compensation from ships and vessels<sup>1</sup> using a berth at their wharves, may be claimed upon an express or an implied contract. If upon an express contract, the agreed price is not affected by a statute which authorizes a certain *per diem* charge for goods remaining upon the wharf.<sup>2</sup> When the wharf is used without a definite agreement as to price, the proprietor is entitled to a just and reasonable remuneration for the use of his property and the benefit conferred;<sup>3</sup> and if the time of occupancy is extended by such public authority as the quarantine officers, this is not an unexpected intervention of sovereignty which suspends the operation of the contract of wharfage.<sup>4</sup> A vessel which is compelled by stress of weather to moor to a private wharf for safety, is not liable for wharfage if no fixed rates of wharfage are there in use.<sup>5</sup> Any individual owner of a wharf may use it for the purpose of landing his own goods, which are not dutiable, or he may permit others to do so upon such terms as he thinks proper to impose,<sup>6</sup> and of which he gives notice.<sup>7</sup> But no goods which are chargeable with a duty can be landed in any other place than a public port.<sup>8</sup> Either the assent of the legislature or

<sup>1</sup> As to what is a "vessel," see *Rudiman v. A Scow Platform*, 38 Fed. Rep. 158; *Cope v. Valette Dry-dock Co.*, 16 id. 924; *The Pioneer*, 30 id. 206; *Hedges v. London Docks Co.*, 16 Q. B. D. 597.

<sup>2</sup> *Woodruff v. Havemeyer*, 106 N. Y. 129.

<sup>3</sup> *Ex parte Easton*, 95 U. S. 68, 73. The remedy is not by injunction, but by resisting excessive charges, if demanded. *Silver v. Tobin*, 28 Fed. Rep. 545.

<sup>4</sup> *Elwell v. Fabre*, 52 Hun, 70. See *A Cargo of Lumber*, 23 Fed. Rep. 301.

<sup>5</sup> *Heron v. The Marchioness*, 42 Fed. Rep. 173.

<sup>6</sup> *Hale, De Portibus Maris*, ch. 6; *Hargrave's Law Tracts*, 76; *Brune v. Thompson*, 4 Q. B. 543; *Woolrych on Waters*, 301; *Gunning on Tolls*, 123, 126; *Sargent v. Reed*, 2 Stra. 1228; 1 Wils. 91; *Stephens v. Coster*, 3 Burr. 1409; 1 W. BL 413; *Colton v.*

*Smith*, 1 Cowper, 47; *Wyatt v. Thompson*, 2 Esp. 252; *Dutton v. Strong*, 1 Black, 32; *Ensminger v. People*, 47 Ill. 384; *Chicago v. Laflin*, 49 Ill. 172; *The Wharf Case*, 3 Bland, 383; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384; *Jeffersonville v. Louisville Ferry Co.*, 27 Ind. 100; *O'Neill v. Annett*, 27 N. J. L. 290; *The Volusia*, 3 Wall. Jr. 375. See *Allnutt v. Inglis*, 12 East, 527; *Hargrave's Law Tracts*, 77, 78.

<sup>7</sup> *Southern Steamship Co. v. Sparks*, 22 Texas, 657; *The Magnolia v. Marshall*, 39 Miss. 109; *The Buckeye State*, Newb. Adm. 69; *Croucher v. Wilder*, 98 Mass. 322.

<sup>8</sup> *Ante*, § 4; *The Wharf Case*, 3 Bland, 361; *Hale, De Portibus Maris*, ch. 6; *Hargrave*, 78. As to double wharfage allowed by New York statute, see *The Shady Side*, 23 Fed. Rep. 731.

prescription is undoubtedly required to authorize the collection of fixed rates of wharfage;<sup>1</sup> and, as Congress has abstained from action on the subject of wharfage, it is entirely within the operation of State laws, by which the reasonableness of the charge is to be determined.<sup>2</sup> The State alone can prevent such wharfage charges as are exorbitant.<sup>3</sup> If a wharf is unlawfully extended into navigable waters upon the soil of the State, no compensation can be demanded by an individual for use of that part of the wharf which is beyond the line of his rightful ownership.<sup>4</sup>

§ 121. **Public nuisances — Remedies.**— An unlawful obstruction to navigation, being a common nuisance, is remedi-

<sup>1</sup> *Wiswall v. Hall*, 8 Paige, 313; *People v. Broadway Wharf Co.*, 31 Cal. 34; *People v. San Francisco R. Co.*, 35 Cal. 606; *Taylor v. Beebe*, 1 Rob. 268; *O'Conley v. Natchez*, 1 S. & M. 31.

<sup>2</sup> *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; 16 Fed. Rep. 890 and note; s. c. 4 Woods, 208; *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Silver v. Tobin*, 28 Fed. Rep. 545.

<sup>3</sup> *De Bary Baya Merchants' Line v. Jacksonville Ry. Co.*, 40 Fed. Rep. 392.

<sup>4</sup> *Gunter v. Geary*, 1 Cal. 462; *Coburn v. Ames*, 52 Cal. 385; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384. Possession of such a structure, though it may support trespass against a mere wrongdoer for an actual entry upon it, would not draw to it possession of the submerged soil between the structure and the shore. *Dixon v. Snetsinger*, 23 C. P. (Can.) 235. Cases relating to wharf privileges and wharfage, upon special facts, are: *McNairy v. Paine*, 9 Humph. 533; *Columbus v. Grey*, 2 Bush, 477; *Child v. Chappell*, 9 N. Y. 246; *Albany v. Trowbridge*, 5 Hill, 71; 7 Hill, 429; *Memphis Packet Co. v. Grey*, 9 Bush, 148; *Long Wharf v. Palmer*, 37 Maine, 379;

*Stockwell v. Brewer*, 59 Maine, 286; *Union Wharf Co. v. Hemingway*, 12 Conn. 293; *Gregory v. Brooks*, 35 Conn. 437; *Union Wharf Co. v. The J. H. Starin*, 45 Conn. 585; 15 Blatch. 473; *Deweese v. Adger*, 2 McCord (S. C.), 105; *Fitzsimons v. Milner*, 2 Rich. (S. C.) 371; *People v. San Francisco Gaslight Co.*, 54 Cal. 248; *Bersie v. The Shenandoah*, 21 Mo. 18; *Keokuk Co. v. Quincy*, 81 Ill. 422; *Whitney v. New York*, 6 Abb. N. C. 330, n.; *Langdon v. New York*, id. 314; 93 N. Y. 129; *Russell v. The Empire State*, Newb. Adm. 542; *Thompson v. New York*, 11 N. Y. 115; 3 Sand. 487; *Kelsey v. Murray*, 28 How. Pr. 243; 18 Abb. Pr. 294; *Linthicum v. Ray*, 9 Wall. 241; *Russell v. The Asa R. Swift*, 1 Newb. Adm. 553; *The Whitburn*, 7 Fed. Rep. 925; *Lawton v. Reed*, 1 Pugsley (N. B.), 329; *Collins v. Hall*, 2 Hannay (N. B.), 90; *Currer v. Crosby*, 1 Puga. & B. (N. B.) 464. A mere right to collect wharfage for a term of years is neither real estate nor personal property, but a franchise or incorporeal hereditament. *De Witt v. Hays*, 2 Cal. 463; *Commissioners v. Clark*, 35 N. Y. 251; *Langdon v. New York*, 6 Abb. N. C. 314; *Whitney v. New York*, id. 330, note; *Kelsey v. Murray*, 18 Abb. Pr. 294; 28 How. Pr. 243.

able by indictment,<sup>1</sup> or by abatement;<sup>2</sup> or a court of equity may take jurisdiction upon an information filed by an attorney general.<sup>3</sup> Equity will not interfere, even upon an information in the name of the State, when the injury to the public is doubtful or prospective, but will leave the question of nuisance or not nuisance to be tried before a jury.<sup>4</sup> When the nuisance causes both a public and a private injury, a suit in equity may be brought by information and bill.<sup>5</sup> An individual may maintain a bill, without the attorney general, in

<sup>1</sup> Hale, *De Jure Maris*, ch. 3, and *De Portibus Maris*, ch. 7; Hargrave's *Law Tracts*, 9, 88; *Rex v. Russell*, 6 B. & C. 566; *Rex v. Ward*, 4 Ad. & El. 384; *Rex v. Grosvenor*, 2 Stark. 511; *Rex v. Morris*, 1 B. & Ad. 441; *Rex v. Tindall*, 6 Ad. & El. 143; *Reg. v. Betts*, 16 Q. B. 1022; *Reg. v. Randall*, 1 Car. & M. 496; *Commonwealth v. Wright*, 3 Am. Jur. 185; *Commonwealth v. Alger*, 7 Cush. 53; *People v. Vanderbilt*, 26 N. Y. 287; *People v. Horton*, 64 N. Y. 610; 5 Hun, 516; *Gates v. Blencoe*, 2 Dana, 158; *Walker v. Shepardson*, 2 Wis. 384; *Allegheny v. Zimmerman*, 95 Penn. St. 287.

<sup>2</sup> *Post*, § 128.

<sup>3</sup> *Attorney General v. Burrige*, 10 Price, 350; *Attorney General v. Parmenter*, id. 378, 412; *Attorney General v. Johnson*, 2 Wils. Ch. 87; *Attorney General v. Richards*, 1 Anst. 603; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *Attorney General v. Tomline*, 12 Ch. D. 214; *Attorney General v. Cleaver*, 18 Ves. 211; *Georgetown v. Alexandria Canal Co.*, 12 Peters, 91; *Attorney General v. Utica Ins. Co.*, 2 Johns. 371, 382; *Attorney General v. Cohoes Co.*, 6 Paige, 133; *Yolo Co. v. Sacramento*, 36 Cal. 193; *Eden on Injunctions*, ch. 11; 2 Story Eq. Jur. § 921 *et seq.*; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Attorney General v. Jamaica Pond Aqueduct Co.*, 133 Mass. 361; *Needham*

*v. N. Y. & N. E. R.*, 152 Mass. 61; *Attorney General v. Salem*, 103 Mass. 138; *Haskell v. New Bedford*, 108 Mass. 208, 216; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Attorney General v. New Jersey R. Co.*, 2 Green Ch. 136; *Newark Plank Road Co. v. Elmer*, 9 N. J. Eq. 755; *Attorney General v. Hudson River R. Co.*, id. 526; *Gifford v. New Jersey R. Co.*, 10 N. J. Eq. 177; *Attorney General v. Delaware R. Co.*, 27 N. J. Eq. 1, 631; *Allen v. Monmouth Co.*, 2 Beas. 68.

<sup>4</sup> 2 Story Eq. Jur. §§ 923, 925 *a*; *Crowder v. Tinkler*, 19 Ves. 617; *Ripon v. Hobart*, 3 Myl. & K. 169, 179; *Baines v. Baker*, 1 Ambl. 158; *Irwin v. Dixon*, 9 How. 10; *Attorney General v. Heishon*, 3 C. E. Green, 410; *Attorney General v. New Jersey R. Co.*, 2 Green Ch. 136; *Attorney General v. Stewart*, 5 C. E. Green, 415; *Harlan v. Paschall*, 5 Del. Ch. 435; *Hartshorn v. South Reading*, 3 Allen. 501; *Mohawk Bridge Co. v. Utica R. Co.*, 6 Paige, 554; *Rochester v. Curtiss*, Clarke Ch. 336; *Fisk v. Wilbur*, 7 Barb. 395; *Rochester v. Erickson*, 46 Barb. 92; *Gervais v. Charleston*, 11 Rich. Eq. (S. C.) 432; *Attorney General v. Lea*, 3 Ired. Eq. 301; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 582; *Ramsey v. Riddle*, 1 Cranch, C. C. 399.

<sup>5</sup> *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *Attorney General v. Forbes*, 2 Myl. & Cr. 123.

respect to a public nuisance which causes him special damage.<sup>1</sup> If a public nuisance, such as a bridge which obstructs the navigation, will also affect the private rights of each of several private owners injuriously and in the same way, they may join as complainants in a bill to restrain the erection of the structure, or each may sue alone.<sup>2</sup> Jurisdiction will not be taken upon a bill thus filed by an individual which discloses only detriment to the community at large, and does not set forth facts showing peculiar and irreparable injury to the plaintiff.<sup>3</sup> A court of equity will act with caution upon such

<sup>1</sup> *Ibid.*; *Spencer v. London Ry. Co.*, 8 Sim. 193; *Sampson v. Smith*, 8 Sim. 272; *Cook v. Bath*, L. R. 6 Eq. 177; *Hickok v. Hine*, 23 Ohio St. 523, and authorities in next note; *Mississippi R. Co. v. Ward*, 2 Black, 485; *Irwin v. Dixon*, 9 How. 10; *Parker v. Winnipiseogee Lake Co.*, 2 Black, 545; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 561; *Ewell v. Greenwood*, 26 Iowa, 377; *Musser v. Hershey*, 42 Iowa, 356; *Park v. The C. & S. W. R. Co.*, 43 Iowa, 636; *Works v. Junction Railroad*, 5 McLean, 425; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Spooner v. McConnell*, 1 McLean, 337; *Treat v. Bates*, 27 Mich. 390; *Walker v. Shepardson*, 2 Wis. 384; 4 Wis. 496; *Hamilton v. Whitridge*, 11 Md. 128; *Columbus v. Jaques*, 30 Ga. 506; *Savannah R. Co. v. Shields*, 33 Ga. 601; *Potter v. Menasha*, 30 Wis. 492; *Draper v. Mackey*, 35 Ark. 497; *Adams v. Popham*, 76 N. Y. 410; *Sparhawk v. Union Passenger Car Co.*, 54 Penn. St. 401; *Prince v. McCoy*, 40 Iowa, 533; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233; *Penniman v. New York Balance Co.*, 13 id. 40; *Parrish v. Stephens*, 1 Or. 73; *Shed v. Hawthorne*, 3 Neb. 186; *Kittle v. Tremont*, 1 Neb. 329. In such a suit, the plaintiff acts on behalf of all who are similarly injured, as a public prosecutor rather than on his own ac-

count. *Woodruff v. North Bloomfield Gravel Mining Co.*, 8 Sawyer, 628; 9 id. 441.

<sup>2</sup> *Barnes v. Racine*, 4 Wis. 454; *Pettibone v. Hamilton*, 40 Wis. 402; *Cadigan v. Brown*, 120 Mass. 498; *Murray v. Hay*, 4 Sand. Ch. 362; 1 Barb. Ch. 59; *Reid v. Gifford*, Hopk. Ch. 416; *Emery v. Erskine*, 66 Barb. 9; *Peck v. Elder*, 3 Sand. 126; *Brady v. Weeks*, 3 Barb. 157; *Foot v. Bronson*, 4 Lans. 47; *Robinson v. Baugh*, 81 Mich. 290; *Middleton v. Flat River Co.*, 27 Mich. 538; *Grant v. Schmidt*, 22 Minn. 1; *Schultz v. Winter*, 7 Nev. 180; *Fogg v. Nevada C. O. Ry. Co.*, 20 Nev. 429. *Contra*, *Hudson v. Madison*, 12 Sim. 416; *Hinchman v. Paterson R. Co.*, 17 N. J. Eq. 75; *Morris R. Co. v. Prudden*, 20 id. 530. This rule does not apply when the plaintiffs own in severalty distinct parcels of land to which water is carried by various ditches. *Barham v. Hostetter*, 67 Cal. 272; *Jones v. Cardwell*, 98 Ind. 331. Even where this rule does not prevail, the objection of misjoinder of plaintiffs must be raised by the pleadings, and cannot be taken at the hearing, if the real point in controversy can be determined in the suit. See *Hamilton v. Whitridge*, 11 Md. 128.

<sup>3</sup> 2 Story Eq. Jur. §§ 924-926; *Crowder v. Tinker*, 19 Ves. 616; *Georgetown v. Alexandria Canal Co.*,



a bill where the work, such as a bridge, ferry, or public mill, tends to promote the public convenience.<sup>1</sup> If improvements of great magnitude, which are thus complained of as obstructions to navigation, have been constructed under color of legislative authority and used in facilitating an important branch of commerce, and have long been acquiesced in, a perpetual injunction will not be granted unless it appears that the right of the plaintiff has been established at law and that no adequate compensation can be afforded in damages.<sup>2</sup> The remedy by abatement is, according to numerous authorities, coextensive and concurrent with that by indictment.<sup>3</sup> Upon

12 Peters, 91; *Attorney General v. Birmingham*, 4 K. & J. 528; *Works v. Junction Railroad*, 5 McLean, 425; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Haskell v. New Bedford*, 108 Mass. 208, 216; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Hartshorn v. South Reading*, 3 Allen, 501; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Fall Village Co. v. Tibbetts*, 31 Conn. 169; *Frink v. Lawrence*, 20 Conn. 120; *Norwich Gas Light Co. v. Norwich Gas Co.*, 25 Conn. 35; *O'Brien v. Norwich R. Co.*, 17 Conn. 372; *Seeley v. Bishop*, 19 Conn. 128; *Thornton v. Grant*, 10 R. L. 477; *New York v. Baumberger*, 7 Rob. 219; *Hudson River R. Co. v. Loab*, id. 418; *Knox v. New York*, 55 Barb. 404; *Mohawk Bridge Co. v. Utica R. Co.*, 6 Paige, 554; *Corning v. Lowerre*, 2 Johns. Ch. 439; *Smith v. Lockwood*, 13 Barb. 209; *Davis v. New York*, 14 N. Y. 506; 3 Duer, 119; *Harrison v. Newton*, 9 N. Y. Leg. Obs. 311, 347; *Watertown v. Cowen*, 4 Paige, 510; *Savannah Railroad v. Shields*, 33 Ga. 601; *Mechling v. Kittanning Bridge Co.*, 1 Grant, 416; *Ewell v. Greenwood*, 26 Iowa, 377; *Delaware R. Co. v. Stump*, 8 Gill & J. 479; *Jarvis v. Santa Clara Valley R. Co.*, 52 Cal. 438; *Stevens v. Paterson R. Co.*, 5 C. E. Green, 126; *Scudder v. Trenton*

*Falls Co., Sax.* 694; *Southard v. Morris Canal Co.*, id. 518; *Denver Ry. Co. v. Denver City Ry. Co.*, 2 Col. 673; *Ingram v. The C. D. & M. R. Co.*, 38 Iowa, 669; *Prince v. McCoy*, 40 Iowa, 533; *Prosser v. Ottumwa*, 42 Iowa, 509; *Roman v. Strauss*, 10 Md. 89; *Hamilton v. Whitridge*, 11 Md. 128; *Fort v. Groves*, 29 Md. 188; *Baltimore v. Gill*, 31 Md. 375; *Dawson v. St. Paul Ins. Co.*, 15 Minn. 136; *Walker v. Shepardson*, 4 Wis. 486; *Shed v. Hawthorne*, 3 Neb. 179; *Middleton v. Franklin*, 3 Cal. 238; *Beveridge v. Lacey*, 3 Rand. 63; *Arnold v. Klepper*, 24 Mo. 273; *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Frizzle v. Patrick*, 6 Jones Eq. 354.

<sup>1</sup> *Barnes v. Calhoun*, 2 Ired. Eq. 199; *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90; *Rosser v. Randolph*, 7 Porter, 238.

<sup>2</sup> *Weller v. Smeaton*, 1 Cox, 102; *Irwin v. Dixon*, 9 How. 10; *Heerman v. Beef Slough Manuf. Co.*, 8 Biss. 334; 1 Fed. Rep. 145; *Remington v. Foster*, 42 Wis. 608; *Attorney General v. International Bridge Co.*, 28 Grant's Ch. (Can.) 65.

<sup>3</sup> *Post*, § 128; *Knox v. Chaloner*, 42 Maine, 150; *Arundell v. McCulloch*, 10 Mass. 70; *Coates v. New York*, 7 Cowen, 585; *Miles v. Hall*, 9 Wend. 315; *Hart v. Albany*, id. 571; *Renwick v. Morris*, 3 Hill (N. Y.), 621; 7



an indictment against a person who has obstructed the navigation, and who relies upon a license from the government to justify the act, he is required to prove compliance with every requirement of the statute, as an exception.<sup>1</sup> In such a case, the indictment must aver that the limits of the statute are exceeded, and that the erection is not in pursuance of the authority given by the statute.<sup>2</sup> An indictment against a bridge corporation for neglect of a provision of its charter that "said bridge shall be so constructed as not to prevent the navigating said waters," must directly allege that the bridge prevents navigation.<sup>3</sup> By an uninterrupted user for twenty years the public may, it seems, acquire a prescriptive right of navigation in inland waters which are private property;<sup>4</sup> but lapse of time will not legalize a public nuisance.<sup>5</sup> The continuance

id. 575; *Wetmore v. Tracy*, 14 Wend. 250.

<sup>1</sup> *Commonwealth v. Church*, 1 Penn. St. 105; *Renwick v. Morris*, 8 Hill (N. Y.), 621; 7 id. 575; *Knox v. Chaloner*, 42 Maine, 150; *State v. Freeport*, 43 Maine, 198; *State v. Dibble*, 4 Jones (N. C.), 107, 115; *State v. Parrott*, 71 N. C. 311; *Healy v. Joliet R. Co.*, 2 Brad. (Ill.), 435; *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410.

<sup>2</sup> *State v. Godfrey*, 24 Maine, 232; *Rex v. Liverpool*, 3 East, 86.

<sup>3</sup> *State v. Portland R. Co.*, 57 Maine, 402; *Pine City v. Munch*, 42 Minn. 342. As to the distance of the bridge changed by filling up the river bed, see *State v. South Carolina Ry. Co.*, 28 S. C. 23.

<sup>4</sup> *Ante*, § 111; *Wheeler v. Spinola*, 54 N. Y. 377; *Meyer v. Phillips*, 97 N. Y. 485; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Burbaker v. Paul*, 7 Dana, 429; *Coolidge v. Learned*, 8 Pick. 504; *Shaw v. Crawford*, 10 Johns. 236, 240; *Ingram v. Police Jury*, 20 La. Ann. 226. Individuals acquire by user no prescriptive right to navigate a public river, transversely or otherwise. *Bird v. Smith*, 8 Watts, 434. See *Pearsall v. Post*, 20

Wend. 111; 22 Wend. 425; *Curtis v. Keesler*, 14 Barb. 511.

<sup>5</sup> *Folkes v. Chad*, 3 Dougl. 340; *King v. Montague*, 4 B. & C. 598; *Weld v. Hornby*, 7 East, 195, 199; *Rex v. Cross*, 3 Camp. 224, 227; *Carter v. Murcot*, 4 Burr. 2162; *Vooght v. Winch*, 2 B. & Ald. 662; *People v. Cunningham*, 1 Denio, 524; *Pierson v. Elgar*, 4 Cranch, C. C. 454; *Coates v. New York*, 7 Cowen, 558; *Crill v. Rome*, 47 How. Pr. 398; *Rochester v. Erickson*, 46 Barb. 921; *Ogdensburg v. Lovejoy*, 58 N. Y. 662; 2 Sup. Ct. 83; *Campbell v. Seaman*, 2 Sup. Ct. 231; *Mills v. Hall*, 9 Wend. 815; *Renwick v. Morris*, 7 Hill (N. Y.), 575; 3 id. 621; *Kellogg v. Thompson*, 66 N. Y. 88; *St. Vincent's Orphan Asylum v. Troy*, 76 N. Y. 109, 114; 12 Hun, 817; *Simmons v. Cornell*, 1 R. L. 519; *Knox v. Chaloner*, 42 Maine, 150; *Davis v. Winslow*, 51 Maine, 298; *Gerrish v. Brown*, id. 256; *Dyer v. Curtis*, 72 Maine, 181; *Commonwealth v. Howes*, 15 Pick. 231, 233; *Veazie v. Dwinel*, 50 Maine, 479; *Stoughton v. Baker*, 4 Mass. 522; *Arundel v. McCullough*, 10 Mass. 70; *Commonwealth v. Upton*, 6 Gray, 473; *Lewis v. Stein*, 16 Ala. 214;

of a nuisance for twenty years will not defeat either a prosecution for obstructing navigation,<sup>1</sup> or the remedy by abatement;<sup>2</sup> nor is it a bar to an action by an individual for special damage thereby caused.<sup>3</sup> This rule applies to streams which are merely floatable, as well as to those which are navigable in the larger sense.<sup>4</sup> If specific penalties are imposed by statute, they are merely cumulative and not exclusive of the ordinary remedies, unless the intent to exclude them clearly appears in the act.<sup>5</sup> But when an appropriate method of redress is provided by statute for a failure to observe its requirements, it is exclusive of the common-law remedies, as by abatement.<sup>6</sup> If a bridge or road, constructed in a town across navigable

Philadelphia's Appeal, 78 Penn. St. 33; Pettis v. Johnson, 56 Ind. 139; De Laney v. Blizzard, 7 Hun, 7; House v. Metcalf, 27 Conn. 639; Philadelphia R. Co. v. State, 20 Md. 157; North Central Ry. Co. v. Baltimore, 21 Md. 93; Cottrill v. Myrick, 12 Maine, 222; State v. Franklin Falls Co., 49 N. H. 240; Bird v. Smith, 8 Watts, 434; Commonwealth v. McDonald, 16 S. & R. 390; Commonwealth v. Alburger, 1 Wharton, 469; Penny Pot Landing, 16 Penn. St. 79, 94; Philadelphia v. Philadelphia R. Co., 58 Penn. St. 253; Johnson v. Irwin, 8 S. & R. 292; Douglass v. State, 4 Wis. 387; Hoboken Land Co. v. Hoboken, 36 N. J. L. 540; Ingram v. Police Jury, 20 La. Ann. 226; Olive v. State, 86 Ala. 88; State v. Holman, 104 N. C. 861; People v. Pope, 53 Cal. 437; Nimmo v. Commonwealth, 4 H. & M. (Va.) 57; Woolrych on Waters, 270.

<sup>1</sup> Ibid. The obstruction and its continuance are distinct offenses which cannot be joined in one count of an indictment. Burke v. People, 23 Ill. App. 36; Hoadley v. People, id. 39.

<sup>2</sup> Ibid.; Knox v. Chaloner, 42 Maine, 150; Renwick v. Morris, 3 Hill (N. Y.), 621; 7 id. 575; Miles v. Hall, 9 Wend. 315; Stafford v. Ingersoll, 3 Hill, 38, 41.

<sup>3</sup> Miles v. Hall, 9 Wend. 315; Mor-

ton v. Moore, 15 Gray, 573, 576; Woodruff v. North Bloomfield G. M. Co., 8 Sawyer, 628; 9 id. 441; 1 West Coast Rep. 183.

<sup>4</sup> Knox v. Chaloner, 42 Maine, 150; Amoskeag Manuf. Co. v. Goodale, 46 N. H. 53. Whether the obstruction is accidental or intentional, it will not deprive the stream of its natural character as a highway. Treat v. Lord, 42 Maine, 552.

<sup>5</sup> 6 Bacon's Abr. tit. Statute G.; 2 Inst. 200; 2 Hawk. P. C. 301, 302; Rex v. Robinson, 2 Burr. 799, 803; Dwarris on Statutes, 678; Commonwealth v. Ruggles, 10 Mass. 391; Waterford Turnpike Co. v. People, 9 Barb. 161; Renwick v. Morris, 3 Hill (N. Y.), 621; 7 id. 575; Wetmore v. Tracy, 14 Wend. 250, 255; Jackson v. Bradt, 2 Caines, 169; Pennington v. Townsend, 7 Wend. 276, 280; Crittenden v. Wilson, 5 Cowen, 165; Stafford v. Ingersoll, 3 Hill, 38. A statute, declaring the obstruction of a private water-course to be a public nuisance and indictable as such, is merely cumulative and does not deprive the riparian proprietors of the common-law remedy of an action on the case or the right to abate the nuisance. Welton v. Martin, 7 Mo. 307; State v. Moffett, 1 G. Greene, 247.

<sup>6</sup> Criswell v. Clugh, 3 Watts, 330;

waters, is built or laid out under an authority which is adjudged void, the town is under no obligation to keep it in repair,<sup>1</sup> unless it has so far treated the place as a public street, that it is estopped from denying that it is a public highway.<sup>2</sup> A tenant cannot controvert his landlord's title, and, if no action is taken on behalf of the public for the removal of a mill erected upon the bed of a navigable stream, the lessee thereof cannot set up in defense to an action by the landlord for the possession, that the possession, if restored, would be an unlawful obstruction of the navigation.<sup>3</sup> So, in an action on the case for diverting water from the plaintiff's mill, it is no defense that the mill is built in the public domain of tide waters;<sup>4</sup> and the fact that a dam prevents the public passage of lumber does not justify a lower proprietor in causing the water to flow back upon the dam.<sup>5</sup>

§ 122. Same — Private suits.— The general rule is that individuals are not entitled to redress against a public nuisance. The private injury is merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private persons.<sup>6</sup> If,

*Spigelmoyer v. Walter*, 3 Watts & S. 540; *Brown v. Commonwealth*, 3 Serg. & R. 273; *post*, § 250.

<sup>1</sup> *Commonwealth v. Charlestown*, 1 Pick. 180; *Jones v. Andover*, 9 Pick. 146.

<sup>2</sup> *Mayor v. Sheffield*, 4 Wall. 189; *Houfe v. Fulton*, 34 Wis. 608; *Codner v. Bradford*, 3 Chand. (Wis.) 291; *Williams v. Cummington*, 18 Pick. 312; *Leavenworth v. Laing*, 6 Kansas, 274; *McDonough v. Virginia City*, 6 Nev. 90; *Bissell v. Railroad Co.*, 22 N. Y. 258; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.

<sup>3</sup> *St. Anthony Falls Co. v. Morrison*, 12 Minn. 249. It is no defense to an undertaking given on suing out an injunction that the business which the defendant enjoined was a public nuisance. *Cunningham v. Breed*, 4 Cal. 384.

<sup>4</sup> *Simpson v. Seavey*, 8 Maine, 138; *Houston R. Co. v. Parker*, 50 Texas, 330.

<sup>5</sup> *Odiorne v. Lyford*, 9 N. H. 502; *Lincoln v. Chadbourne*, 56 Maine, 200; *Stiles v. Hooker*, 7 Cowen, 266.

<sup>6</sup> *Bigelow, C. J.*, in *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 101; *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, *id.* 511, 514; *Borden v. Vincent*, 24 Pick. 301; *Quincy Canal v. Newcomb*, 7 Met. 276, 283; *Holman v. Townsend*, 13 Met. 297; 299; *Smith v. Boston*, 7 Cush. 254; *Brainard v. Connecticut River R. Co.*, 7 Cush. 506, 511; *Blood v. Nashua & Lowell Railroad*, 2 Gray, 140; *Brightman v. Fairhaven*, 7 Gray, 271; *Harvard College v. Stearns*, 15 Gray, 1; *Willard v. Cambridge*, 3 Allen, 574; *Hartshorn v. South Reading*, *id.* 501; *Fall River Iron Works Co.*

however, a public nuisance, such as an unlawful obstruction to a common passage, causes peculiar damage to an individual, he may maintain an action therefor. In such case, the declaration or complaint need not negative the lawfulness of the obstruction, or its continuance for a reasonable length of time, or that it was unavoidable because of inevitable accident, these being matters of defense to be set up by answer.<sup>1</sup> But the particular damage is the gist of the action, and must be specifically set forth in the declaration or complaint.<sup>2</sup> It

*v. Old Colony Railroad*, 5 Allen, 224; *Shaubut v. St. Paul R. Co.*, 21 Minn. 502; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Gordon v. Baxter*, 74 N. C. 470; *In re Eldred*, 46 Wis. 580, 541; *Abbott v. Mills*, 8 Vt. 521; *Hatch v. Vermont Central R. Co.*, 28 Vt. 142; *Low v. Knowlton*, 26 Maine, 128; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *Lansing v. Wiswall*, 5 Denio, 213; 5 How. Pr. 77; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Anderson v. Rochester R. Co.*, 9 How. Pr. 553; *Dougherty v. Bunting*, 1 Sand. 1; *Purcell v. Potter*, Anth. (N. Y.) 310; *Osborn v. Union Ferry Co.*, 53 Barb. 629; *State v. Thompson*, 2 Strob. (S. C.) 12; *Carey v. Brooks*, 1 Hill (S. C.), 365; *Commissioners v. Taylor*, 2 Bailey (S. C.), 282; *McLaughlin v. Charlotte R. Co.*, 5 Rich. (S. C.) 593; *Harrison v. Sterrett*, 4 H. & McH. 540; *Wroe v. State*, 8 Md. 416; *Baltimore v. Marriott*, 9 Md. 160; *Flynn v. Canton Co.*, 40 Md. 312; *Walter v. County Commissioners*, 35 Md. 385; *South Carolina R. Co. v. Moore*, 28 Ga. 398; *Dunn v. Stone*, 2 Car. L. Rep. 261; *Morgan v. Graham*, 1 Woods, 124; *L. T. Co. v. S. & W. R. Co.*, 41 Cal. 562.

<sup>1</sup> *Enos v. Hamilton*, 27 Wis. 256. Erections in navigable waters, which are near the shore, and are not prohibited by any positive law or regulation, are presumed not to be obstructions to navigation, and he who alleges that they are obstructions

must prove it. *Dutton v. Strong*, 1 Black, 23; *Yates v. Milwaukee*, 10 Wall. 497.

<sup>2</sup> *Baker v. Boston*, 12 Pick. 184, 196; *Atkins v. Boardman*, 2 Met. 457; *Houck v. Wachter*, 34 Md. 265; *Swanson v. Miss. Boom. Co.*, 42 Minn. 532; *Baxter v. Winoski Turnpike Co.*, 22 Vt. 114; *Hall v. Kitson*, 4 Chand. (Wis.) 20; *Greene v. Nunne-macher*, 36 Wis. 50; *Carpenter v. Mann*, 17 Wis. 155; *Powers v. Irish*, 23 Mich. 429; *Dwinel v. Veazie*, 44 Maine, 167, 175; *Roseburg v. Abraham*, 8 Oregon, 509; *Farrelly v. Cincinnati*, 2 Disney (Ohio), 516; *Bristol Manuf. Co. v. Gridley*, 28 Conn. 201; *Taylor v. Monroe*, 43 Conn. 36; *Tomlinson v. Derby*, id. 562. See *South Carolina v. Georgia*, 93 U. S. 4, 14; *Smith v. McConathy*, 11 Mo. 517; *Welton v. Martin*, 7 Mo. 307; *Payne v. McKinley*, 54 Cal. 532; *Tibbetts v. Blade*, 60 Cal. 428. But it is not indispensable to a recovery that the injury shall be proved precisely as alleged. *Memphis R. Co. v. Hicks*, 5 Sneed, 427. And if a declaration in case defectively sets out the special damage sustained by the plaintiff in consequence of the obstruction preventing his passage with boats, the defect is cured by a verdict in his favor, if the issue joined compels him to prove the special injury. *Hall v. Kitson*, 4 Chand. (Wis.) 20; 3 Pin. 296. Damages sustained by an individual after action brought are re-

is not enough that injury is shown, but it must be different in kind from that sustained by the community at large.<sup>1</sup> If a bridge is unlawfully constructed across a navigable stream and arm of the sea, the direct injury is to the navigation of the stream, which is a public interest, and the fact that the plaintiff alone navigates the river, and is the owner of the only wharf thereon above the bridge, being merely proof that the consequential damage to him is greater in degree than to others, does not establish his right to maintain an action, as other riparian owners and the rest of the public may suffer in the same way whenever they use the stream.<sup>2</sup> "The case," says Gray, C. J.,<sup>3</sup> "has no analogy to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land,<sup>4</sup> or, being against the front of his land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate, or in which the carrying on of an offensive trade creates a nuisance to the plaintiff." Where the plaintiff's predecessor in title dredged out a channel exceeding one thousand feet in length, about one-fourth of which was within his own dock, and the rest extended seaward through flats owned by other persons, it was held that the action of a city, in filling up by its sewers the portion of the channel which was beyond the limits of the plaintiff's ownership, did not create an injury which differed in kind from that suffered by other persons owning lands upon the harbor or

coverable in such action. *Duncan v. 253; Breed v. Lynn, 126 Mass. 367; Markley, Harper (S. C.), 276. Small v. Grand Trunk R. Co., 15 Q. B. (Can.) 283.*

<sup>1</sup> *Ibid.*; *Houck v. Wachter, 34 Md. 265; Schall v. Nusbaum, 56 Md. 512; Gilbert v. Morris Canal Co., 8 N. J. Eq. 495.* <sup>3</sup> 122 Mass. 3.

<sup>2</sup> *Blackwell v. Old Colony R. Co., 122 Mass. 1; Blood v. Nashua R. Co., 2 Gray, 137; Lawrence v. Fairhaven, 5 Gray, 110; Brightman v. Fairhaven, 7 Gray, 271; Willard v. Cambridge, 3 Allen, 574; Hartshorn v. South Reading, 3 Allen, 501; Wesson v. Washburn Iron Co., 13 Allen, 95; Brayton v. Fall River, 113 Mass. 218; Borden v. Vincent, 24 Pick. 301; Smith v. Boston, 7 Cush. 257; Thayer v. New Bedford Railroad, 125 Mass. 253; Cogswell v. Essex Mill Co., 6 Pick. 94; Grigsby v. Clear Lake Water Co., 40 Cal. 396; Sinnickson v. Johnson, 17 N. J. L. 129; Rowan v. Johnson, id. 154; Delaware Canal Co. v. Lee, 22 N. J. L. 243; Glover v. Powell, 10 N. J. Eq. 211; Carson v. Coleman, 11 N. J. Eq. 106; Crittenden v. Wilson, 5 Cowen, 165; Steele v. Western Inland Lock Navigation Co., 2 Johns. 283.*

<sup>4</sup> The defendant would be liable for such injury. *Turner v. Blodgett, 5 Met. 240; Cogswell v. Essex Mill Co., 6 Pick. 94; Grigsby v. Clear Lake Water Co., 40 Cal. 396; Sinnickson v. Johnson, 17 N. J. L. 129; Rowan v. Johnson, id. 154; Delaware Canal Co. v. Lee, 22 N. J. L. 243; Glover v. Powell, 10 N. J. Eq. 211; Carson v. Coleman, 11 N. J. Eq. 106; Crittenden v. Wilson, 5 Cowen, 165; Steele v. Western Inland Lock Navigation Co., 2 Johns. 283.*

navigating over the flats, and was not remediable by private action, although access to the plaintiff's wharf was thereby rendered more difficult and expensive, and the wharf itself less valuable.<sup>1</sup> If a portion of a lot of flats is taken by a railroad corporation under the right of eminent domain, and the access from navigable water to the remaining portion is thereby cut off, the value of such access may be considered by the jury in estimating the land-owner's injury; but the possibility that the corporation may construct side-tracks on the flats not taken for the purpose of filling the same more easily, or for business purposes, is not an element to be taken into consideration.<sup>2</sup>

§ 123. **Same — Same.**—If the wrong is actionable, it is none the less so because it is committed in such a way that the defendant may be liable to a public prosecution.<sup>3</sup> Where sewers constructed by a city caused a creek to be filled up directly in front of and adjoining the plaintiff's wharf, so that his vessels could not lie at the wharf on account of the diminished depth of the water, the injury to the plaintiff was held to be different in kind and not merely in degree from that sustained by the general public, and the plaintiff recovered damages in a private suit for this injury.<sup>4</sup> The court distin-

<sup>1</sup> *Breed v. Lynn*, 126 Mass. 367. The defendant in this case did not except to the damages assessed for the filling of that part of the channel which was within the limit of the plaintiff's ownership. See, also, *Baron v. Baltimore*, 2 Am. Jur. 203.

<sup>2</sup> *Drury v. Midland Railroad*, 127 Mass. 571; *Commonwealth v. Boston & Maine Railroad*, 3 Cush. 25; *Boston & Worcester Railroad v. Old Colony Railroad*, 12 Cush. 605.

<sup>3</sup> *Brewer v. Boston R. Co.*, 113 Mass. 52, 58; *Commonwealth v. Vermont R. Co.*, 4 Gray, 22; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Brayton v. Fall River*, 113 Mass. 218; *Haskell v. New Bedford*, 108 Mass. 208; *Willard v. Cambridge*, 3 Allen, 574; *Harvard College v.*

*Stearns*, 15 Gray, 1; *Clement v. Burns*, 43 N. H. 609.

<sup>4</sup> *Brayton v. Fall River*, 113 Mass. 218. In *Haskell v. New Bedford*, 108 Mass. 208, which was a similar case, the court say that neither the special injury to the plaintiff by the filling up of his dock, nor that occasioned by making his premises offensive and unhealthy, was merged in the common nuisance. *Locks and Canals v. Lowell*, 7 Gray, 223; *Emery v. Lowell*, 104 Mass. 13; *Nichols v. Boston*, 98 Mass. 39; *Eames v. New England Worsted Co.*, 11 Met. 570; *Child v. Boston*, 4 Allen, 41; *Sherman v. Tobey*, 3 Allen, 7; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Boston v. Richardson*, 19 How. 263; 24 How. 188; *Gerrish v. Brown*, 51



guished the case from that of *Harvard College v. Stearns*,<sup>1</sup> in which it was held that a private action would not lie upon proof merely that the defendant had filled up a navigable creek and thereby rendered the plaintiff's land more difficult of access and less valuable. Whenever the obstruction immediately adjoins or is against the front of the plaintiff's premises, it is as to him a private nuisance for which an action will lie, or which may be restrained by injunction.<sup>2</sup> But when it is at a distance from the plaintiff's land, and the only injury which he sustains consists of inconvenience or loss of access thereto, without direct and clearly defined damage other than

Maine, 256; *Franklin Wharf v. Portland*, 67 Maine, 46; *Frink v. Lawrence*, 20 Conn. 117; *Clark v. Peckham*, 9 R. L. 455; 10 R. L. 35; *Gorton v. Tiffany*, 14 R. L. 95; *Attorney General v. Birmingham*, 4 Kay & Johns. 528.

<sup>1</sup> 15 Gray, 1.

<sup>2</sup> *Brayton v. Fall River*, 113 Mass. 218; *Haskell v. New Bedford*, 108 Mass. 208; *Blackwell v. Old Colony R. Co.*, 122 Mass. 1; *Breed v. Lynn*, 126 Mass. 367; *Barron v. Baltimore*, 2 Am. Jur. 203; *Boston v. Richardson*, 24 How. (U. S.) 188; *Simmons v. Lillystone*, 8 Exch. 431; *Blundell v. Catterall*, 5 B. & Ald. 287, 294, 304, 309; *Somerset v. Fogwell*, 5 B. & C. 883; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. R. 281; *Rose v. Groves*, 5 M. & G. 613; 6 Scott, N. R. 645; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Green v. Kleinhans*, 2 Green (N. J.), 473; *Williams v. Tripp*, 11 R. L. 453; *Abbott v. Mills*, 3 Vt. 521; *Cotton v. Mississippi Boom Co.*, 19 Minn. 497; *Wilder v. De Cou*, 26 Minn. 10; *Walker v. Shepardson*, 2 Wis. 384; 4 Wis. 486; *Potter v. Menasha*, 30 Wis. 492; *Williams v. Smith*, 22 Wis. 594; *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194; *C. B. R. Co. v. Twine*, 23 Kansas, 585; *Frith v. Dubuque R. Co.*, 45 Iowa, 406; *Park v. C. & S. W.*

*R. Co.*, 43 Iowa, 636; *Cowell v. Martin*, 43 Cal. 605; *Meyers v. St. Louis*, 8 Mo. App. 266; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; 34 Mo. 259; *Price v. Knott*, 8 Oregon, 438; *Clark v. Peckham*, 10 R. L. 35; 9 R. L. 455; *Folsom v. Freeborn*, 13 R. L. 200, 210; *Clark v. Providence*, 16 R. L. 337; *Sullivan v. Webster*, id. 33; *Venard v. Cross*, 8 Kansas, 248; *Schulte v. North Pacific Transportation Co.*, 50 Cal. 52; *Yolo County v. Sacramento*, 36 Cal. 193; *Blanc v. Klumpke*, 29 Cal. 156; *Courtwright v. B. R. Co.*, 30 Cal. 585; *Aram v. Shallenberger*, 41 Cal. 449; *Clement v. Burns*, 43 N. H. 609, 617, 619; *Bowman v. Wathen*, 2 McLean, 376; *Blanchard v. Porter*, 11 Ohio, 138; *Crawford v. Delaware*, 7 Ohio St. 459; *Russell v. Burlington*, 30 Iowa, 262; *McMahon v. Council Bluffs*, 12 Iowa, 268; *Ewell v. Greenwood*, 26 Iowa, 377; *Cole v. Sprowl*, 35 Maine, 161; *Frink v. Lawrence*, 20 Conn. 117; *Reynolds v. Clarke*, 1 Pitts. (Pa.) 9; *Harrison v. Sterrett*, 4 Har. & McH. 540; *Strauss's Case*, 37 Md. 237; *Garitee v. Baltimore*, 53 Md. 422; *Enos v. Hamilton*, 27 Wis. 256. One who has only a leasehold interest in the premises may maintain the action. *Knox v. New York*, 55 Barb. 404; 38 How. Pr. 67; *De Laney v. Blizzard*, 7 Hun, 7.



the general depreciation of property common in a greater or less degree to all the riparian owners similarly situated, and preventable by an abatement of the nuisance, the plaintiff cannot maintain an action.<sup>1</sup> A person suffering a peculiar and special damage from a public nuisance may maintain an action against the person who continues it, although a recovery for the injury done by its creation is barred by the statute of limitations.<sup>2</sup>

§ 124. *Same—Same.*—The English decisions distinguish between injuries to the riparian right of access and those which accrue to persons exercising the public right of navigation. In *Rose v. Groves*,<sup>3</sup> in which an innkeeper recovered damages against the defendant for wrongfully preventing the access of guests to his house upon the river Thames, by placing timbers in the river opposite the inn, Tindall, C. J., said:<sup>4</sup> “This is not an action for obstructing the river, but for obstructing the access to the plaintiff’s house on the river.” In

<sup>1</sup> *Harvard College v. Stearns*, 15 Gray, 1; *Transportation Co. v. Chicago*, 99 U. S. 635; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233; *Bailey v. Philadelphia R. Co.*, 4 Harr. (Del.) 389; *McLaughlin v. Charlotte R. Co.*, 5 Rich. (S. C.) 583; *Kearns v. Cordwainers’ Co.*, 6 C. B. N. s. 388; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *O’Brien v. Norwich R. Co.*, 17 Conn. 372; *Clark v. Saybrook*, 21 Conn. 222; *Seeley v. Bishop*, 19 Conn. 135; *Burrows v. Pixley*, 1 Root, 363; *Aram v. Shallenberger*, 41 Cal. 449; *Cowell v. Martin*, 43 Cal. 605; *Hopkins v. Western Pacific R. Co.*, 50 Cal. 190; *Schulte v. North Pacific Transportation Co.*, 50 Cal. 592; *George v. Northern Pacific R. Co.*, 50 Cal. 589; *Bigley v. Nunan*, 53 Cal. 403; *Severy v. Central Pacific R. Co.*, 51 Cal. 194; *Jarvis v. Santa Clara Valley R. Co.*, 52 Cal. 438; *Folsom v. Freeborn*, 23 Alb. L. Jour. 497; *Kinealy v. St. Louis R. Co.*, 28 Am. Law Reg. 124; *Harrison v. Sterrett*,

4 H. & McH. 540; *White v. Flannigan*, 1 Md. 539.

<sup>2</sup> *New Salem v. Eagle Mill Co.*, 138 Mass. 8.

<sup>3</sup> 5 M. & G. 613; 6 Scott, N. R. 645; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. R. 281; *Pentley v. Lynn Paving Commissioners*, 13 W. R. 983; *Stephen v. Costor*, 3 Burr. 1408; *Wyatt v. Thompson*, 1 Esp. 252; *Anon.*, 1 Camp. 517, note; *Rex v. Russell*, 6 B. & C. 566; *Attorney General v. Conservators*, 1 H. & M. 1; *Kearns v. Cordwainers’ Co.*, 6 C. B. N. s. 388; *Lyon v. Fishmongers’ Co.*, 1 App. Cas. 662, and L. R. 10 Ch. 679; *Attorney General v. Wemyss*, 13 App. Cas. 192; *Moore v. Great Southern Ry. Co.*, Ir. R. 10 C. L. 46; *Richardson v. Boston*, 24 How. 188; *Yates v. Milwaukee*, 10 Wall. 497; *Haskell v. New Bedford*, 108 Mass. 208, 216; *French v. Conn. River Lumber Co.*, 145 Mass. 261.

<sup>4</sup> 5 Man. & G. 613; 6 Scott, N. R. 645.

Attorney General *v.* Conservators of the Thames,<sup>1</sup> Lord Hath-erley said: "I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway on the river." And in *Lyon v. Fishmongers' Company*,<sup>2</sup> Lord Cairns, L. C., said, referring to *Rose v. Groves*: "As I understand the judgment in that case, it went, not on the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with." "Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties, when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." According to these decisions, which do not differ in principle from *Brayton v. Fall River* and *Haskell v. New Bedford*, it is the right of access to and from the highway, and not the right of access by means of the highway, which is regarded as a private right.<sup>3</sup> An obstruction in front of one's own premises may prevent his entering upon the highway and thus interfere with a peculiar right. But when he is once upon the highway, he is a traveler like the rest of the public, and though an obstruction at a distance may as effectually prevent ingress and egress as when

<sup>1</sup> 1 H. & M. 1.

*Byron v. Stimpson*, 1 Pugs. & B. (N. B.) 697.

<sup>2</sup> 1 App. Cas. 662; L. R. 10 Ch. 679; *Bell v. Quebec*, 5 App. Cas. 84; *Brown v. Gugsy*, 2 Moo. P. C. N. S. 341; *Buccleugh v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Becket v. Midland Ry. Co.*, L. R. 3 C. P. 82; *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473; *Miner v. Gilmour*, id. 131; *Benjamin v. Storr*, L. R. 9 C. P. 400; *Fitz v. Hobson*, 28 W. R. 459, 722;

<sup>3</sup> In other words, the distinction is between rights of immediate access from a man's property to a highway, and the power to complain of a mere obstruction in the highway. See cases above cited; also *Caledonian Ry. Co. v. Ogilvy*, 2 Macq. Sc. App. 229; *Montreal v. Drummond*, 1 App. Cas. 384; *Bell v. Quebec*, 5 App. Cas. 84, 97; 2 *Quebec L. R.* 305; 7 id. 103.

it is opposite his door, yet the right to pass along the way is one which he shares in common with the general public.<sup>1</sup> Injuries to riparian owners arising from obstructions to the navigation may thus differ from those sustained by members of the public who are simply prevented from exercising the common right of passage upon the water.

§ 125. **Same — Same.**— A private action also lies, according to numerous decisions, in favor of the owners of vessels which have been wrecked or injured, without negligence on the part of those in charge, in consequence of unlawful obstructions in navigable waters; and such an action has frequently been maintained by those whose vessels have been thus delayed, or lost their voyage,<sup>2</sup> although such special damage has also been regarded as resting only in contemplation.<sup>3</sup> One who suffers no pecuniary damage from an obstruction in a highway, or the stopping of a common ferry,<sup>4</sup> but is merely put to the inconvenience, common to all who use the way, of removing the obstruction or of taking a more circuitous route, cannot maintain an action.<sup>5</sup> In New York any expense or

<sup>1</sup> His lands are not "injuriously affected," under eminent domain statutes, by such general interference with access. Cases cited above, note 1; *Rochett v. Chicago Ry. Co.*, 32 Minn. 201; *post*, § 252; *Birkenhead v. L. & N. W. Ry. Co.*, 15 Q. B. D. 572; *Wadham v. N. E. Ry. Co.*, 16 Q. B. D. 227; *Caledonian Ry. v. Walker's Trustees*, 7 App. Cas. 259; *Reg. v. Essex*, 14 Q. B. D. 753, affirmed in *H. L. sub nom. Essex v. Acton Local Board*, 14 App. Cas. 153; *Furness Ry. v. Cumberland Society*, 52 L. T. 144; *Essex v. Acton Local Board*, 14 App. Cas. 153; *North Shore Ry. v. Pyon*, *id.* 612; *Blantyre v. Babbie*, 13 App. Cas. 631; *Ford v. Metropolitan District Railways*, 17 Q. B. D. 12; *Chicago v. Taylor*, 125 U. S. 161.

<sup>2</sup> *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410; *Guthrie v. McConnel*, 1 West. L. M. 593; *Porter v. Allen*, 8 Ind. 11; *Columbus Ins. Co. v. Peoria*

*Bridge Co.*, 6 McLean, 70; *Irwin v. Sprigg*, 6 Gill, 203; *Owings v. Jones*, 9 Ind. 108; *Baltimore v. Marriott*, *id.* 160; *Flower v. Adam*, 2 Taunt. 314; *Butterfield v. Forrester*, 11 East, 60; *Marriott v. Stanley*, 1 M. & G. 568; *Smith v. Smith*, 2 Pick. 621; *President v. Dusouchett*, 2 Cart. (Ind.) 586; *Kennard v. Burton*, 25 Maine, 39; *Harlow v. Humiston*, 6 Cowen, 189; *Plumer v. Alexander*, 12 Penn. St. 81; *Irwin v. Sprigg*, 2 Bland, 2; *Little Rock Ry. Co. v. Brooks*, 39 Ark. 403.

<sup>3</sup> *Clark v. Chicago Ry. Co.*, 70 Wis. 593.

<sup>4</sup> *Pain v. Patrick*, 3 Mod. 289.

<sup>5</sup> *Winterbottom v. Derby*, L. R. 2 Ex. 316; *Wiggin v. Boddington*, 3 C. & P. 544; *Fineaux v. Hovenden*, Cro. Eliz. 664; *Hubert v. Groves*, 1 Esp. 148; *Carpenter v. Mann*, 17 Wis. 155; *Greene v. Nunnemacher*, 36 Wis. 50; *Houck v. Wachter*, 84 Md. 265; *Ship-*

delay, however trifling, incurred by one member of the public in removing an unlawful obstruction in a highway has been held to be ground for an action,<sup>1</sup> and damages may be recovered for a peculiar private injury caused thereby, though a like injury is sustained by numerous other persons.<sup>2</sup> There is no right of private action if the plaintiff, hearing of the obstruction, does not go upon the highway obstructed, but voluntarily takes another more expensive route.<sup>3</sup>

§ 126. *Same — Same.*— It has been held that one who is prevented from abating the nuisance can recover the damages which he sustains by the consequent delay or loss of his voyage.<sup>4</sup> And, by the apparent weight of authority, at least of the older decisions, one who (being, as it is said, in actual occupation of the navigation, and not merely having it in contemplation<sup>5</sup>) is forced by the obstruction, not merely to go a longer way, but to carry his cargo overland in order to reach a particular point, or to abandon his voyage, suffers peculiar damage, distinguishable from that inflicted upon the general public and entitling him to recover the additional expenses to which he is unlawfully subjected.<sup>6</sup> But the evidence of dam-

ley v. Caples, 17 Md. 179; Garitee v. Baltimore, 53 Md. 422, 437; Farrelly v. Cincinnati, 2 Disney (Ohio), 516; McCowan v. Whitesides, 31 Ind. 235; Shed v. Hawthorne, 3 Neb. 179; Barr v. Stevens, 1 Bibb, 292; South Carolina Steamboat Co. v. South Carolina Ry. Co., 30 S. C. 539; Alabama S. R. Nav. Co. v. Georgia Pac. Ry. Co., 87 Ala. 154. See Pittsburgh v. Scott, 1 Penn. St. 309.

<sup>1</sup> Pierce v. Dart, 7 Cowen, 609; Lansing v. Wiswall, 5 Denio, 213; Lansing v. Smith, 4 Wend. 9; 8 Cowen, 146; Hudson River R. Co. v. Loeb, 7 Rob. 418.

<sup>2</sup> Francis v. Schoellkopf, 53 N. Y. 152; Soltau v. De Held, 2 Sim. N. S. 133.

<sup>3</sup> Burton v. Dougherty, 3 Pugsley & B. (N. B.) 51.

<sup>4</sup> Chichester v. Lethbridge, Willes, 71; Hart v. Bassett, T. Jones, 156;

Winterbottom v. Derby, L. R. 2 Ex. 316; Hughes v. Heiser, 1 Binney, 463.

<sup>5</sup> Rose v. Miles, 4 M. & S. 101.

<sup>6</sup> Cases above, notes 1, 2; Rose v. Miles, 4 M. & S. 101; Blagrove v. Bristol Water Works Co., 1 H. & N. 367; Bacon v. Arthur, 4 Watts, 437; Williams v. Tripp, 11 R. I. 447; Hart v. Bassett, T. Jones, 156; Maynell v. Saltmarsh, 1 Keb. 847; Wiggins v. Boddington, 3 Car. & P. 156; Iveson v. Moore, Carth. 451; 1 Ld. Raym. 486; Salk. 15; Greasley v. Codling, 2 Bing. 263; 9 Moore, 489; Lyme Regis v. Henley, 1 Bing. N. R. 222; 3 B. & Ad. 77; 2 Cl. & Fin. 331; Wilkes v. Hungerford Market Co., 2 Bing. N. C. 281; Dudley v. Kennedy, 63 Maine, 465; Brown v. Watson, 47 Maine, 161; Veazie v. Dwinel, 50 Maine, 490; Gerrish v. Brown, 51 Maine, 256; Cole v. Sprowl, 35 Maine,

age must be direct and positive;<sup>1</sup> and if the plaintiff is himself responsible for the obstruction in whole or in part, or if his own want of ordinary caution is the cause of the injury,<sup>2</sup> he cannot recover.<sup>3</sup> A company, incorporated for the purpose of improving a navigable river which suffers a loss of its tolls in consequence of an unauthorized bridge across the river, may maintain a suit to prevent its completion.<sup>4</sup> So, the obstruction of a canal, though amounting to a public nuisance, is actionable when it involves the breach of a private warranty.<sup>5</sup> The owner of a ferry beyond the limits of a city from which public travel is diverted by the failure of the city to keep a certain street in repair, suffers no injury other than that shared by the general public in being deprived of the right of passage, and is not entitled to maintain an action for such injury.<sup>6</sup>

§ 127. **Same—Same.**—In *Enos v. Hamilton*,<sup>7</sup> in Wisconsin, the plaintiff had a tannery in the village of New London on the Wolf River, and procured the bark necessary for carrying

161; *Low v. Knowlton*, 26 Maine, 128; *Stetson v. Faxon*, 19 Pick. 147; *Atkins v. Bordman*, 2 Met. 457, 469; *Harvard College v. Stearns*, 15 Gray, 1, 6; *Blackwell v. Old Colony R. Co.*, 122 Mass. 1; *French v. Connecticut River Lumber Co.*, 145 Mass. 261; *Jolly v. Terre Haute Drawbridge Co.*, 6 McLean, 237; *United States v. New Bedford Bridge*, 1 Wood. & M. 401; *Clark v. Peckham*, 10 R. I. 35; *Enos v. Hamilton*, 27 Wis. 256; *Hall v. Kitson*, 4 Chand. (Wis.) 20; *Pittsburgh v. Scott*, 1 Penn. St. 309; *Rhines v. Clark*, 51 Penn. St. 96; *Philadelphia v. Collins*, 68 Penn. St. 106; *Philadelphia v. Gilmartin*, 71 Penn. St. 140; *Newbold v. Mead*, 57 Penn. St. 487; *Powers v. Irish*, 23 Mich. 429; *Martin v. Bliss*, 5 Blackf. 35; *Memphis R. Co. v. Hicks*, 5 Sneed, 427; *South Carolina R. Co. v. Moore*, 28 Ga. 398; *Tyrrell v. Lockhart*, 3 Blackf. 136; *Browne v. Scofield*, 8 Barb. 239. *Contra*, *Carey v. Brooks*, 1 Hill (S. C.), 365; *McLaughlin v. Charlotte R. Co.*, 5 Rich. (S. C.)

592; *South Carolina S. Co. v. South Carolina Ry. Co.*, 30 S. C. 546; *Houston v. Police Jury*, 3 La. Ann. 566; *Baird v. Wilson*, 23 C. P. (Can.) 491; *Crandell v. Mooney*, 23 id. 212.

<sup>1</sup> *Powers v. Irish*, 23 Mich. 429; *Baxter v. Winooski Turnpike Co.*, 23 Vt. 114; *Brown v. Watson*, 47 Maine, 161; *Milarkey v. Foster*, 6 Oregon, 378.

<sup>2</sup> *Ante*, § 92; *post*, § 128.

<sup>3</sup> *McGinnis v. Blackman*, 39 Mich. 111; *Flynn v. Canton Co.*, 40 Md. 312.

<sup>4</sup> *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61. See *Green Nav. Co. v. Chesapeake R. Co.* (Ky.), 10 S. W. 6.

<sup>5</sup> *Bruning v. New Orleans Canal Co.*, 12 La. Ann. 541. Obstructions to the navigation do not excuse the breach of a contract to deliver merchandise by a certain day. *Dodge v. Van Lear*, 5 Cranch, C. C. 278.

<sup>6</sup> *Prosser v. Ottumwa*, 42 Iowa, 509.

<sup>7</sup> 27 Wis. 256; 24 Wis. 658; *Barnes v. Racine*, 4 Wis. 454; *Walker v.*

on his business at a point upon the Wolf River about sixty miles above New London, which was the only place where the bark required could be obtained. The Wolf River between these points is a navigable stream, and the defendants obstructed that part of the river so that the plaintiff could not obtain the bark, and his business was injured. It was held that peculiar damage to the plaintiff was established, and that the action could be maintained. The opinion refers to earlier decisions in Massachusetts,<sup>1</sup> but is not reconcilable with the later decisions in that State.<sup>2</sup> It has, however, more or less support in the decisions of other States.<sup>3</sup> The general rule clearly is that, the right of navigation being a public and not a private right, a riparian owner cannot maintain an action for an unlawful obstruction which prevents his use of this public right.<sup>4</sup>

§ 128. **Same — Abatement.**— A common nuisance may be abated without compensation<sup>5</sup> and without notice.<sup>6</sup> When a public highway is unlawfully obstructed, any individual who has occasion to use it, and is thereby stopped in his journey, may remove the obstruction in order to effect a passage;<sup>7</sup>

Shepardson, 2 Wis. 384; *The A. C. Conn Co. v. Little Suamico Lumber Co.*, 55 Wis. 580.

<sup>1</sup> Citing *Stetson v. Faxon*, 19 Pick. 147; *Blood v. Nashua R. Co.*, 2 Gray, 137; *Smith v. Boston*, 7 Cush. 254; *Brainard v. Boston*, id. 506; *Holmes v. Townsend*, 13 Met. 297; *Carpenter v. Mann*, 17 Wis. 155.

<sup>2</sup> *Ante*, § 122.

<sup>3</sup> *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. L. 148; 25 N. J. L. 255; *Shephard v. Barnett*, 52 Texas, 638; *Hickok v. Hine*, 23 Ohio St. 523. See *Maxwell v. Bay City Bridge Co.*, 46 Mich. 278; *New York v. Baumberger*, 7 Rob. (N. Y.) 219; *Hudson River R. Co. v. Loeb*, 7 Rob. 418; *Manhattan Gaslight Co. v. Barker*, 7 Rob. 523; 36 How. Pr. 233; *Walker v. Allen*, 72 Ala. 456; *Luhrs v. Sturtevant*, 10 Oregon, 170. That a town and village may be liable, jointly and sev-

erally, for negligently managing the draw of a bridge, controlled by both, to a navigator's injury, see *Weisenberg v. Winneconne*, 56 Wis. 667.

<sup>4</sup> *Swanson v. Miss River Boom Co.*, 42 Minn. 532.

<sup>5</sup> *Coe v. Schultz*, 47 Barb. 64; *Manhattan Manufacturing Co. v. Van Keuren*, 23 N. J. Eq. 251; *Commonwealth v. Tolman*, 149 Mass. 229.

<sup>6</sup> *Missouri River Packet Co. v. Hannibal R. Co.*, 1 McCrary, 281.

<sup>7</sup> *Arundel v. McCulloch*, 10 Mass. 70; *Wales v. Stetson*, 2 Mass. 143; *Garey v. Ellis*, 1 Cush. 307; *Brown v. Perkins*, 12 Gray, 89; *Willis v. Sproule*, 13 Kansas, 257; *Beach v. Schoff*, 28 Penn. St. 195; *Owens v. State*, 52 Ala. 400; *Hopkins v. Crombie*, 4 N. H. 520; *State v. Anthoine*, 40 Maine, 435; *Lincoln v. Chadbourne*, 56 id. 197; *Earp v. Lee*, 71 Ill. 193; *Rung v. Shoneberger*, 2



and he may enter upon the land of the person erecting or continuing the obstruction, if necessary to remove it.<sup>1</sup> It has been held that the remedies by abatement and by indictment are in all respects concurrent and co-extensive, and that any person representing the public may abate a common nuisance.<sup>2</sup> An individual cannot, however, abate a common nuisance, if it would cause a breach of the peace;<sup>3</sup> and, although the public remedy may be pursued whenever the passage is partially obstructed, the master of a vessel would not be justified in running his vessel upon the obstruction unnecessarily or wantonly, thereby injuring property which is so placed as to constitute a common nuisance, but which does not interfere with the reasonable prosecution of his voyage.<sup>4</sup> So a private individual cannot abate the nuisance to a greater extent than is

Watts, 23; *Selman v. Wolfe*, 27 Texas, 68; *James v. Hayward*, Cro. Car. 184; *Harrington v. Edwards*, 17 Wis. 586; *Williams v. Fink*, 18 Wis. 265; *King v. Sanders*, 2 Brev. (S. C.) 111; *Dimmett v. Eskridge*, 6 Munf. 308.

<sup>1</sup> *Arundel v. McCulloch*, 10 Mass. 70.

<sup>2</sup> *Renwick v. Morris*, 8 Hill, 621; 7 Hill, 575; *Coates v. New York*, 7 Cowen, 558, 600; *Mills v. Hall*, 9 Wend. 315; *Burnham v. Hotchkiss*, 14 Conn. 310, 317; *Gunter v. Geary*, 1 Cal. 462; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 566; *Knox v. Chaloner*, 42 Maine, 150; *McLean v. Mathews*, 7 Brad. (Ill.) 599; *State v. Parrott*, 71 N. C. 311; *Gates v. Blincoe*, 2 Dana, 158; *Gray v. Ayres*, 7 Dana, 375; *Brubaker v. Paul*, id. 428; *Manhattan Manuf. Co. v. Van Keuren*, 23 N. J. Eq. 251; *Hale, De Portibus Maris*, ch. 7; *Hargrave's Law Tracts*, 87, 88; *Harvey v. Dewoody*, 18 Ark. 252; 4 Black. Com. 167; *Bac. Abr. tit. Nuisance*, 6; *Com. Dig. tit. Action on the Case for Nuisance*, D. 4. See *Williams v. Blackwell*, 32 L. J. Ex. 174; *Tarrar v. Nunamaker*, 5 Rich. (S. C.) 484. In Virginia, a court of equity may restrain the

threatened abatement of a mill dam, on the ground of obstructing the navigation, until the right to maintain the dam is decided. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

<sup>3</sup> *Earp v. Lee*, 71 Ill. 193; *Day v. Day*, 4 Md. 262; *Turner v. Holtzman*, 54 Md. 148; *Mohr v. Gault*, 10 Wis. 513; *Smart v. Commonwealth*, 27 Gratt. 950, 953. *Contra*, that all necessary force may be used to effect a passage when resistance is made, see *Brubaker v. Paul*, 7 Dana, 428.

<sup>4</sup> *Ante*, § 92; *Colchester v. Brooke*, 7 Q. B. 339; *Dimes v. Petley*, 15 id. 276; *Bateman v. Bluck*, 18 id. 870; *Davies v. Mann*, 10 M. & W. 545; *Bridge v. Grand Junction Ry. Co.*, 8 M. & W. 244; *Eastern Ry. Co. v. Dorling*, 5 C. B. N. S. 821; *Rady v. London Ry. Co.*, 1 App. Cas. 754; *L. R.* 10 Ex. 100; 9 id. 71; *Roberts v. Rose*, L. R. 1 Ex. 82; 3 H. & C. 162; *Cobb v. Bennett*, 75 Penn. St. 326; *The C. D. Jr.*, 1 Newb. Adm. 501; *Norris v. Litchfield*, 35 N. H. 271; *Kerwacker v. Cleveland R. Co.*, 8 Ohio St. 172; *Lovett v. Salem R. Co.*, 9 Allen, 557; *Pilcher v. Hart*, 1 Humph. 524; *Smart v. Commonwealth*, 27 Gratt. 950, 953.



necessary to effect a passage,<sup>1</sup> is liable for doing an unnecessary injury, and cannot convert to his own use the materials of which the structure is composed.<sup>2</sup> "This right and power," says Shaw, C. J.,<sup>3</sup> "is never entrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance." The rule supported by the weight of authority appears to be that an individual cannot abate a

<sup>1</sup> Ibid.; *Bird v. Holbrook*, 4 Bing. 828; *Hicks v. Dorn*, 42 N. Y. 47, 52; *Ely v. Supervisors*, 36 N. Y. 297; *Blodgett v. Syracuse*, 36 Barb. 529; *Harrower v. Ritson*, 37 Barb. 301; *Griffith v. McCullum*, 46 Barb. 561; *Dyer v. Dupri*, 5 Whart. 587; *Goldsmith v. Jones*, 43 How. Pr. 415; *Northrop v. Burrows*, 10 Abb. Pr. 365; *Owens v. State*, 52 Ala. 400; *State v. Moffet*, 1 G. Greene, 247; *Moffett v. Brewer*, id. 348; *Morrison v. Marquardt*, 24 Iowa, 85; *Brown v. Chadbourne*, 31 Maine, 9; *Dwinel v. Veazie*, 44 id. 167; *Veazie v. Dwinel*, 50 id. 479, 496; *Prescott v. Williams*, 21 Pick. 241; *Gates v. Blincoe*, 2 Dana, 158; *Graves v. Shattuck*, 35 N. H. 257; *Hopkins v. Crombie*, 4 id. 520; *Philiber v. Matson*, 14 Penn. St. 806; *Beach v. Schoff*, 28 id. 195. See *Criswell v. Clugh*, 3 Watts, 830; *Dimmett v. Eskridge*, 6 Munf. (Va.) 308.

<sup>2</sup> *Larson v. Furlong*, 50 Wis. 681; *Godsell v. Fleming*, 59 Wis. 52; *State v. Taylor*, 27 N. J. L. 117. Such conversion may make the defendants trespassers *ab initio*. *Little v. Ince*, 3 C. P. (Can.) 528.

<sup>3</sup> *Brown v. Perkins*, 12 Gray, 89, 101. A city, charged with the duty of preventing obstructions to navigation, may abate them as nuisances. *Hart v. Albany*, 9 Wend. 571. But the city must be prepared to show that a nuisance actually exists. *Yates v. Milwaukee*, 10 Wall. 497; *Evansville v. Martin*, 41 Ind. 145.

A person is not precluded, by abating a nuisance, from bringing an action for the damages which he has previously sustained thereby. *Gleason v. Gary*, 4 Conn. 420; *Pierce v. Dart*, 7 Cowen, 609; *Lansing v. Smith*, 4 Wend. 9; *Hudson River R. Co. v. Loeb*, 7 Rob. 418; *Call v. Buttrick*, 4 Cush. 345. Nor, after an action has once accrued for obstructing a right of way, does an offer by the defendant to remove the obstruction deprive the plaintiff of his right to damages occurring prior to the offer. *Green v. Caulk*, 16 Md. 556. But the defendant is only liable for damages prior to the suit. *Hopkins v. Western Pacific R. Co.*, 50 Cal. 191. In *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245, a corporation claimed the right to abate a mill-dam as a nuisance to the navigation of a stream; and, it appearing that such abatement would cause great loss to the mill-owner and inconvenience to the public, it was held that a court of equity had jurisdiction to prevent the intended abatement until the right to maintain the dam was decided. Judicial determination is necessary before an object can be abated as a nuisance, except as to nuisances *per se*, which may be abated summarily, *e. g.*, such as affect health, or the safety of person or property, or are tangible obstructions to highways. *Denver v. Mullen*, 7 Col. 345.

public nuisance unless he suffers some special damage, not common to the rest of the public, entitling him to maintain an action.<sup>1</sup> If the abatement is lawful, the intent in making it is immaterial. Thus a person who has a right to pass from a highway to navigable waters may remove, with as little injury as possible, a fence which obstructs his right of passage, although his purpose may be to commit a nuisance by filling up the creek.<sup>2</sup> Where a building was unlawfully erected in tide water in front of certain villa lots, it was held that the owner of the lots had no right to abate it, either upon the ground that the building was unsightly and diminished the salable value of the lots by interfering with the prospect therefrom, or because the access to the lots by water was thereby made less convenient, it not appearing that their owner or any other person had approached or had occasion to approach them from the water, or that the building wholly prevented such access.<sup>3</sup> And the legislature cannot declare the building of a private residence to be a nuisance because it cuts off the sea breeze and obstructs the view of the sea from other estates.<sup>4</sup> A right of prospect cannot be gained even where the obstruction of light is illegal;<sup>5</sup> but such right may be secured by express agreement and injunction.<sup>6</sup> Where a camp-meeting association mapped out its land into lots, reserving a campground between the ocean and the lot sold by it to the plaintiff, on which he built a cottage, his outlook was protected by injunction.<sup>7</sup>

§ 129. **Obstructions — Congress — State legislation.**— In *Gibbons v. Ogden*,<sup>8</sup> the Supreme Court of the United States

<sup>1</sup> Authorities cited, *Barnes v. Racine*, 4 Wis. 454; *Greene v. Nunne-macher*, 86 Wis. 50; *Brown v. Perkins*, 12 Gray, 89; *State v. Paul*, 5 R. L. 185; *State v. Keeran*, 5 R. L. 497; *Great Falls Co. v. Worster*, 15 N. H. 438; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Clark v. St. Clair Ice Co.*, 24 Mich. 508; *Finley v. Hershey*, 41 Iowa, 389; *McGregor v. Boyle*, 34 Iowa, 268; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Rogers v. Rogers*, 14 Wend. 131; *Wetmore v. Tracey*, 14 Wend. 250; *Griffith v. McCullum*, 46

*Barb.* 561; *Harrower v. Ritson*, 37 *Barb.* 301; *Goldsmith v. Jones*, 43 *How. Pr.* 415.

<sup>2</sup> *Harvard College v. Stearns*, 15 *Gray*, 1.

<sup>3</sup> *Bowden v. Lewis*, 13 R. L. 189.

<sup>4</sup> *Quintini v. Bay St. Louis*, 64 *Miss.* 483.

<sup>5</sup> See *Innes on Easements* (2d ed.), 5.

<sup>6</sup> *Buck v. Adams*, 45 N. J. Eq. 552.

<sup>7</sup> *Lennig v. Ocean City Association*, 41 N. J. Eq. 24, 606.

<sup>8</sup> 9 *Wheat.* 1; *Veazie v. Moore*, 14 *How.* 568, 573; *Brown v. Maryland*,

decided in 1824 that the word "commerce," as employed in the Constitution, is not limited to trade or traffic, but includes the navigation of rivers, bays, and harbors of the several States, and the intercourse between nations or citizens connected with such navigation; that this constitutional power is not limited by the external bounds of a State, but extends to the interior thereof in favor of citizens of other States, but not in cases between citizens of the particular State, or between different parts of the same State which are not accessible from other States; and that the exclusive power to regulate commerce between the States is vested in Congress. In the important case of *Pennsylvania v. Wheeling Bridge Co.*,<sup>1</sup> decided in 1851 by the same court, it appeared that under a statute of the State of Virginia a bridge had been erected across the Ohio River, having but a single span, about 980 feet in length, without draws or openings, and that steamboats or sail vessels could not pass under it at all states of the water. Congress had previously regulated navigation upon this river by licensing vessels, establishing ports of entry, and imposing duties on masters of vessels, and had approved the compact between the States of Virginia and Kentucky, which provided that the navigation of the river should be free and common to all citizens of the United States. It was held that the Ohio was a navigable stream, subject to the commercial power of Congress, and that the action of Congress respecting the river excluded State legislation; and the bridge was ordered to be removed unless the defendants should open an unobstructed passage for vessels by a day named. It was held that this might be done by erecting a bridge which, for the space of 300 feet over the channel of the river, should have an elevation of 111 feet above low-water mark.<sup>2</sup> It being subsequently agreed by the parties that a draw which was deemed of sufficient width by the court might be constructed over the western channel of the river, the bridge, as constructed over the main or eastern channel, was permitted to stand,<sup>3</sup> and a subse-

12 Wheat. 419; *Lord v. Steamship of Wardens*, 12 How. 299; 1 Kent Co., 102 U. S. 541; *Railroad Co. v. Com.* 439.

*Richmond*, 19 Wall. 584; *New York* <sup>1</sup> 13 How. 518; 18 How. 421.

*v. Miln*, 11 Peters, 102; *The License* <sup>2</sup> 13 How. p. 578.

*Cases*, 5 How. 504; *Cooley v. Board* <sup>3</sup> 13 How. pp. 577, 619, 627; *Ibid.*

quent act of Congress, declaring the bridge a lawful structure, was held to be valid.<sup>1</sup> In *Newport & Cincinnati Bridge Co. v. United States*,<sup>2</sup> the States of Kentucky and Ohio authorized the plaintiff to construct a bridge across the Ohio River. Congress then passed a resolution sanctioning the bridge, but reserving the right to withdraw its assent in case the navigation of the river should at any time be substantially and materially obstructed thereby, or to direct the necessary modifications and alterations of such bridge; but afterwards, and while the bridge was building, declared it unlawful to proceed with its construction unless certain changes were made. The majority of the court held (Miller, Field and Bradley, JJ., dissenting, and Matthews, J., not sitting) that such reservation by Congress of the right to withdraw its assent was valid, and that such a withdrawal of the assent of Congress amounted to an enactment that the further construction of the bridge, as intended, should be unlawful, irrespective of the State legislation. In *People v. Kelly*,<sup>3</sup> the Court of Appeals of New York held that Congress could authorize the construction of the suspension bridge across the East River, between the cities of New York and Brooklyn, although it would, to some extent, interfere with the navigation; that the determination of Congress, as to the extent of the interference which would be permitted, was conclusive; that Congress might devolve upon the Secretary of War the power to approve or prescribe the plan for the bridge;<sup>4</sup> that the Secretary of War could convey the

In equity an obstruction erected in navigable waters, especially if it is uncompleted, will not necessarily be enjoined as a nuisance, but it may be left to injured persons to institute proper proceedings in the event that the structure, when completed, proves to be a nuisance. *St. Louis v. Knapp Co.*, 2 McCrary, 516; 104 U. S. 658.

<sup>1</sup> 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; 1 Woolw. 150; *South Carolina v. Georgia*, 93 U. S. 4; *Baird v. Shore Line R. Co.*, 6 Blatch. 276, 461; *Northern Pacific R. Co. v. Barnesville R. Co.*, 2 McCrary, 224; *St. Louis*

*v. Knapp Co.*, id. 516; s. c. 104 U. S. 658.

<sup>2</sup> 105 U. S. 470; 13 Fed. Rep. 190.

<sup>3</sup> 76 N. Y. 475; 5 Abb. N. C. 383; *Miller v. New York*, 18 Blatch. 212; 10 Fed. Rep. 513; 109 U. S. 385; *United States v. Oregon Ry. Co.*, 16 Fed. Rep. 524; *Penn. Ry. Co. v. Baltimore Ry. Co.*, 37 id. 129.

<sup>4</sup> *Covington Harbor Co. v. Phoenix Bridge Co.*, 23 Wkly. L. Bul. 34; *Commissioners v. Detroit (Mich.)*, 45 N. W. 508; 18 A. G. Op. 512; 19 id. 295, 375. The authority conferred by the act of Congress of 1888 (25 Stat. 424) upon the Secretary of War to make the

notification in any way that would be effectual, and that notice of approval, given through one of his subordinates, was sufficient. In *United States v. Duluth*,<sup>1</sup> it was held that the action of Congress, in making appropriations for the improvement of the navigation between Lake Superior and Superior Bay, was sufficient to preclude State legislation authorizing a canal for the improvement of Duluth harbor, which would seriously interfere with the work of the general government, the engineers of the war department, who had the control of the appropriations, being of the opinion that the work authorized by them at the mouth of the St. Louis River was the true mode of improving the entrance to Superior Bay, in which was the harbor of Duluth. The United States may restrain by injunction those who act under State authority from so floating logs, or doing other acts, as to seriously injure its improvements of navigation.<sup>2</sup> But the courts will not interfere in cases where it does not appear that acts done under such authority will prevent the carrying into effect of legislation by Congress for the survey and improvement of a navigable river.<sup>3</sup>

§ 130. Same — Same.— State legislation is also upheld which authorizes bridges and similar obstructions upon navigable streams; and the commercial power vested in Congress extends over the commercial waters of a State only as regards

necessary rules and regulations to protect improvements on the Mississippi, which makes their violation a misdemeanor, is not invalid as conferring legislative authority upon that officer. *United States v. Breen*, 40 Fed. Rep. 402; 19 A. G. Op. 317. See *United States v. Keokuk Bridge Co.*, 45 Fed. Rep. 178. But this officer can only thus act under some express or implied authority of statute. *United States v. Pittsburgh R. Co.*, 26 Fed. Rep. 113.

<sup>1</sup> 1 Dillon, 469; *Wisconsin v. Duluth*, 96 U. S. 379; 2 Dillon, 406.

<sup>2</sup> *United States v. Rum River Boom Co.*, 1 McCrary, 397; *United States v. Mississippi River Boom Co.*, id. 601.

<sup>3</sup> *United States v. Beef Slough Manuf. Co.*, 8 Biss. 421. The power of Congress to enact statutes totally or partially destroying the navigability of streams within a State is limited to such purposes as are connected with the operations of commerce or the carrying of the mails. *Woodruff v. North Bloomfield Gravel Mining Co.*, 8 Sawyer, 628; 9 id. 441. An action is maintainable in the Federal courts, without regard to citizenship, by a steamboat company against a railroad corporation for obstructing navigable waters of the United States by building a bridge. *Sunflower River P. Co. v. Georgia P. R. Co.*, 39 Fed. Rep. 229.

intercourse with foreign nations, or with other States of the Union.<sup>1</sup> In *Willson v. Blackbird Creek Marsh Co.*,<sup>2</sup> decided in 1829, it appeared that the State of Delaware had authorized the building of a dam across the Blackbird Creek, a small stream, in which the tide ebbed and flowed, and that the defendants, being the owners of a sloop regularly enrolled and licensed according to the navigation laws of the United States, tore down the dam for the purpose of effecting a passage. It was held that the State had power to authorize the dam in the absence of any action by Congress in execution of the power to regulate commerce, and that the defendants were trespassers. The opinion was delivered by Marshall, C. J., who said: "The act of assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." This decision was declared by the court in the *Wheeling Bridge Case*<sup>3</sup> not to be in conflict with the conclusions there reached. Its authority has been maintained upon the ground that it did not appear that the defendants' vessel was bound to a port of entry above the dam, or that there was such a port above the dam;<sup>4</sup> but it is more frequently regarded as supporting the

<sup>1</sup> *The Passenger Cases*, 7 How. 283; St. 286; 1 Pearson (Pa.), 879; *Com. v. The Bright Star*, Woolw. 266, 275; *Erie Ry.*, id. 345.

*Sears v. Warren Co.*, 36 Ind. 367, <sup>2</sup> 2 Peters, 245.

p. 237, n. 1; *Case of State Freight Tax*, 15 Wall. 232; s. c. *nom. Com.* <sup>3</sup> 13 How. 518, 566.

*v. Phila. & Reading R. Co.*, 62 Penn. <sup>4</sup> *Per* Hunt, J., in *Silliman v. Troy and West Troy Bridge Co.*, 11 Blatch.



doctrine that the States are free to legislate with respect to their internal waters so long as the superior power of Congress remains dormant.<sup>1</sup> In *Gilman v. Philadelphia*,<sup>2</sup> a bridge thirty feet above the waters of the Schuylkill River, a tidal stream entirely within the State of Pennsylvania, was about to be erected, with no draw or opening, under the authority of the State. There was already a bridge over the stream, about five hundred feet lower down, which had stood for many years, and by which all commerce, except that of low coal barges, had been long excluded from the river, but the legality of which was not drawn in question. The plaintiff, who was a citizen of another State, was the owner of valuable dock property on the river above the proposed bridge and not the owner or navigator of a vessel having a coasting license. The majority of the court<sup>3</sup> maintained the legality of the proposed structure, holding, upon the authority of *The Blackbird Creek Case*, that, as Congress had not acted on the precise subject, the State had concurrent jurisdiction over it, but expressly denying<sup>4</sup> that the fact that the Schuylkill River lay within a single State affected the power of Congress over it. In the case of *The Passaic Bridges*,<sup>5</sup> also, it was said that the police power of a State extends to the closing of navigation upon a tidal

274, 287; *People v. Rensselaer R. Co.*, 13 Wend. 113, 135.

<sup>1</sup> *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 566; *The Passenger Cases*, 7 How. 397; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *County of Mobile v. Kimball*, 102 U. S. 691, 700; *Hall v. De Cuir*, 95 U. S. 485, 488, 516; *People v. Rensselaer R. Co.*, 15 Wend. 113, 135; *Miller v. New York*, 13 Blatch. 469, 475; *Baird v. Shore Line Ry. Co.*, 6 Blatch. 276; *Ormerod v. New York Ry. Co.*, 21 Blatch. 106; *Gray v. Clinton Bridge*, 16 Am. Law Reg. 149; *United States v. New Bedford Bridge*, 1 Wood. & M. 407; *Flanagan v. Philadelphia*, 42 Penn. St. 219, 231; *Craig v. Kline*, 65 Penn. St. 399; *Stevens v. Paterson R. Co.*, 34 N. J. L. 532, 552; *Norris v. Boston*, 4

*Met.* 282, 296; *Dunham v. Lamphere*, 8 Gray, 268, 273; *Bailey v. Philadelphia R. Co.*, 4 Harr. (Del.) 389, 395; *Cox v. State*, 3 Blackf. (Ind.) 193, 197; *Savannah v. Georgia*, 4 Ga. 26, 41; *Kellogg v. Union Co.*, 12 Conn. 7; *Ex parte Crandall*, 1 Nev. 294, 310; *Dover v. Portsmouth Bridge*, 17 N. H. 200, 226; *State v. Dibble*, 4 Jones (N. C.), 107, 112.

<sup>2</sup> 3 Wall. 713.

<sup>3</sup> In the dissenting opinion of Mr. Justice Clifford, which was concurred in by Justices Wayne and Davis, it was maintained that Congress had regulated navigation on the waters in question.

<sup>4</sup> 3 Wall. 724, 725; *The Daniel Ball*, 10 Wall. 557, 564; *The Montello*, 20 Wall. 430.

<sup>5</sup> 3 Wall. 782, 793.



river lying wholly within its own territory, by means of a bridge or dam. The acts of Congress which authorize vessels to engage in the coasting trade within a State are construed as not indicating an intention by Congress to interfere with the power of the State to obstruct its navigable waters, but only to authorize navigation upon them by coasting vessels while they are navigable.<sup>1</sup>

§ 131. **Same — Same.**—In *Pound v. Turck*,<sup>2</sup> the question presented was as to the validity of a statute of Wisconsin which authorized the construction of dams at a given point across the Chippewa River, a navigable stream, and also the building of booms with sufficient piers to stop and hold all logs and other things which might float in said river. The statute provided that the dams and booms should be so constructed as not to obstruct the running of lumber rafts in the river. In delivering the opinion of the court, Mr. Justice Miller said: The principle established is “that, in regard to the powers conferred by the commerce clause of the constitution, there are some which by their essential nature are exclusive in Congress, and which the States can exercise under no circumstances; while there are others which from their nature may be exercised by the State until Congress shall see proper to cover the same ground by such legislation as that body may deem appropriate to the subject.”<sup>3</sup> Of this class are pilotage and other regulations;<sup>4</sup> bridges across navigable streams;<sup>5</sup> and as especially applicable to the case before us to erect dams

<sup>1</sup> *Hatch v. Wallamet Iron Bridge Co.*, 7 Sawyer, 127; 6 Fed. Rep. 326, 53, 65.

<sup>2</sup> 95 U. S. 459. See also *County of Mobile v. Kimball*, 102 U. S. 691, 700; *Sweeney v. Chicago Ry. Co.*, 60 Wis. 60. The State may authorize dams in navigable rivers for other purposes than the improvement of the navigation. *State v. Eau Claire*, 40 Wis. 533.

<sup>3</sup> *Railroad Co. v. Fuller*, 17 Wall. 560, 569.

<sup>4</sup> *Cooley v. Board of Wardens*, 12 How. 299.

<sup>5</sup> *Gilman v. Philadelphia*, 3 Wall. 713.

<sup>1</sup> *Hatch v. Wallamet Iron Bridge Co.*, 7 Sawyer, 127; 6 Fed. Rep. 326, 53, 65. <sup>2</sup> 95 U. S. 459. See also *County of Mobile v. Kimball*, 102 U. S. 691, 700; *Sweeney v. Chicago Ry. Co.*, 60 Wis. 60. The State may authorize dams in navigable rivers for other purposes than the improvement of the navigation. *State v. Eau Claire*, 40 Wis. 533. <sup>3</sup> *Railroad Co. v. Fuller*, 17 Wall. 560, 569. <sup>4</sup> *Cooley v. Board of Wardens*, 12 How. 299. <sup>5</sup> *Gilman v. Philadelphia*, 3 Wall. 713.

across navigable streams.”<sup>1</sup> . . . “The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom.” No decision appears in which State laws, or regulations under State authority, on subjects of a local nature, have been set aside on the ground of repugnance to the power of regulating commerce given to Congress, unless it has appeared that they were contrary to some express provision of the constitution, or to some act of Congress, or that they amounted to an assumption of power exclusively conferred upon Congress.<sup>2</sup>

§ 132. Same — Same.— There are three cases in which authority from the legislature is necessary to erect a bridge across a stream: First, where the stream is navigable; second, where the State owns the bed of the stream; and third, where the right to take toll is desired.<sup>3</sup> Impassable obstructions may be authorized by a State upon either tidal or fresh-water streams within its limits and navigable to coasting vessels, while the power conferred upon Congress to regulate commerce remains dormant and unexercised by legislation upon the subject;<sup>4</sup> and the mere grant of commercial power, anterior to any action of Congress under it, is not, in this respect,

<sup>1</sup> Willson v. Blackbird Creek Co., 2 Peters, 245; Gilman v. Philadelphia, 3 Wall. 713; Crandall v. Nevada, 6 id. 35.

<sup>2</sup> Transportation Co. v. Parkersburg, 107 U. S. 691, 705, *per* Bradley, J.; Cardwell v. American Bridge Co., 113 U. S. 205; Scheurer v. Columbia Street Bridge Co., 27 Fed. Rep. 172.

<sup>3</sup> Fort Plain Bridge Co. v. Smith, 30 N. Y. 44. “Bridge” held not to include a causeway built from the end thereof. Swanzey v. Somerset, 132 Mass. 312.

<sup>4</sup> Willson v. Black Bird Creek Co., 2 Peters, 245; Withers v. Buckley, 20 How. 84; Pound v. Turck, 95 U. S. 459; Hall v. De Cuir, 95 U. S. 485, 488, 516; Wisconsin v. Duluth, 96 U. S. 379; 18 A. G. Op. 425; Wisconsin v. Eau Claire, 40 Wis. 533. A

grant by the State of the right to erect a dam in a navigable river is subject to the rights of a prior grantee. Union Canal Co. v. Landis, 9 Watts, 228. But the right of the State to widen the draw of a bridge which it owns is not impaired by a previous grant to a street railway corporation to run its cars over the bridge, and the fact that the cars will be temporarily interrupted. Middlesex Railroad v. Wakefield, 103 Mass. 261. In Pennsylvania a statutory license to the owners of lands adjoining such a stream to erect dams or water-works is subordinate to the right of the State to grant the water to a navigation company. Monongahela Navigation Company v. Coons, 6 Watts, & S. 101; Susquehanna Canal Co. v. Wright, 9 Watts & S. 9.

exclusive of State authority.<sup>1</sup> Even when an impassable structure like a dam might be removable as obstructing interstate commerce, a bridge, erected under authority from a State, which, having draws or openings, affords opportunity for vessels to pass, but which limits the navigation, at a point below where the coasting trade is carried on by licensed vessels, to the space occupied by the draw or opening, would not be condemned,<sup>2</sup> although additional precautions in passing it may be

<sup>1</sup> Ibid.; *County of Mobile v. Kimball*, 102 U. S. 691, 699, 700; *Silliman v. Hudson River Bridge Co.*, 4 Blatch. 74, 395, 409; 1 Black, 582; 2 Wall. 403; *Henderson v. New York*, 92 U. S. 259, 272; *Minot v. Philadelphia R. Co.*, 2 Abb. (U. S.) 323, 338; *Woodman v. Kilbourn Manuf. Co.*, 1 Biss. 546; *United States v. New Bedford Bridge*, 1 Wood. & M. 401; 18 A. G. Op. 133, 164, 200, 425, 512; 19 id. 395, 599, 676; *Lister v. Newark Plank Road Co.*, 36 N. J. Eq. 477; *Ingraham v. Chicago R. Co.*, 34 Iowa, 249; *Ex parte Crandall*, 1 Nev. 294, 310; *Western Union Telegraph Co. v. Atlantic Telegraph Co.*, 5 Nev. 102, 106; *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Parker v. Cutler Mill-dam Co.*, 20 Maine, 353; *State v. Portland R. Co.*, 57 id. 402; *Lee v. Pembroke Iron Co.*, 57 id. 481; *Moore v. Veazie*, 32 id. 843; *Brown v. Chadbourne*, 31 id. 9; *Rogers v. Kennebec R. Co.*, 35 id. 319; *Knox v. Chaloner*, 42 id. 150; *Treat v. Lord*, id. 552; *State v. Freeport*, 43 id. 198; *Veazie v. Dwinel*, 50 id. 479; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Plecker v. Rhodes*, 30 Gratt. 795.

<sup>2</sup> *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 577, 619, 627; 18 How. 421; *The Passaic Bridges*, 3 Wall. 782; *Gilman v. Philadelphia*, 3 Wall. 713; *Mississippi R. Co. v. Ward*, 2 Black, 485; *Atlee v. Packet Co.*, 21 Wall. 389, 335; *Crandall v. Nevada*, 6 id. 35; *Silliman v. Hudson River Bridge Co.*, 4 Blatch. 74, 395; 1 Black,

582; 2 Wall. 403; *Silliman v. Troy & West Troy Bridge Co.*, 11 Blatch. 274; *Jolly v. Terre Haute Drawbridge Co.*, 6 McLean, 237; *Works v. Junction Railroad*, 5 McLean, 425; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Columbus Ins. Co. v. Curtinius*, id. 209; *Columbus Ins. Co. v. Peoria Bridge Co.*, id. 70; *Hood v. Dighton Bridge*, 3 Mass. 263; *People v. Rensselaer R. Co.*, 15 Wend. 113, 134; *Commonwealth v. Breed*, 4 Pick. 460; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *Commonwealth v. Essex Co.*, 13 Gray, 239; *Middlesex R. Co. v. Wakefield*, 103 Mass. 265; *Commonwealth v. Taunton*, 7 Allen, 309, 312; *Talbot County v. Queen Anne's County*, 50 Md. 245; *Easton v. New York R. Co.*, 30 Leg. Int. 124; *People v. St. Louis*, 5 Gilman, 351, 550; *Illinois River Packet Co. v. Peoria Bridge Co.*, 36 Ill. 467; *Chicago v. McGinn*, 51 Ill. 266; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508, 516; *Joliet R. Co. v. Healy*, 94 Ill. 416; *Hodgman v. St. Paul R. Co.*, 23 Minn. 153; 20 Minn. 48; *Flanagan v. Philadelphia*, 42 Penn. St. 219, 232; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Attorney General v. Hudson River R. Co.*, 1 Stock. 526; *Attorney General v. New York R. Co.*, 24 N. J. Eq. 49; *Attorney General v. Stevens*, Sax. (N. J.) 370; *Tucker v. Burlington Co.*, id. 282; *Allen v. Monmouth Co.*, 2 Beas. 68; *Stevens v. Erie Ry. Co.*, 6 C. E. Green, 259; *Attorney General v. Paterson*

required on the part of vessels, or temporary delays may be thereby caused to navigators. A bridge so authorized, having a sufficient opening, or being of sufficient height, at the usual state of the water or of ordinary freshets,<sup>1</sup> to permit the passage of any vessel capable of navigating the stream, will not be condemned as interfering with the powers of Congress, even in cases where Congress has regulated navigation upon the river;<sup>2</sup> and the legislature of a State may empower per-

R. Co., 9 N. J. Eq. 526; Trenton Water Power Co. v. Raff, 36 N. J. 335; Stephens Co. v. Central R. Co., 34 N. J. L. 280; Rogers v. Kennebec R. Co., 35 Maine, 319; State v. Freeport, 43 Maine, 198; State v. Portland R. Co., 57 Maine, 402; Moor v. Veazie, 32 Maine, 343; 31 Maine, 360; 14 How. 568; County Commissioners v. County Commissioners, 50 Md. 245; Wisconsin Improvement Co. v. Manson, 43 Wis. 255; New Haven Toll Bridge Co. v. Bunnell, 4 Conn. 54; Jones v. Pettibone, 2 Wis. 308; Depew v. Wabash & Erie Canal, 5 Ind. 8; Neaderhauser v. State, 28 Ind. 257; Williams v. Beardsley, 2 Ind. 591; Terre Haute Bridge Co. v. Halliday, 4 Ind. 36; Cobb v. Smith, 16 Wis. 661; 3 Am. Law Reg. 1; Hoeft v. Seaman, 38 N. Y. S. C. 62; *Ex parte* Water Commissioners, 3 Edw. Ch. 290; Selman v. Wolfe, 27 Texas, 68; Hudson v. Cuero Land Co., 47 Texas, 56; Bailey v. Philadelphia R. Co., 4 Harr. (Del.) 389; Heerman v. Beef Slough Co., 1 Fed. Rep. 145; 8 Biss. 334; Commissioners v. Withers, 29 Miss. 21; Eldridge v. Cowell, 4 Cal. 80; Dyer v. Tuscaloosa Bridge, 2 Porter, 296; Avery v. Fox, 1 Abb. (U. S.) 246. In Parker v. Cutler Mill-dam Co., 20 Maine, 355, a statute authorizing the defendants to maintain and rebuild a mill-dam on their own land across the head of a harbor, with flood-gates so as to admit the passage of boats at high water, was held to be constitutional. In Wisconsin a

town or village can maintain a bridge over a navigable river only upon condition of constructing a suitable draw. Weisenberg v. Winneconne, 56 Wis. 667.

<sup>1</sup> See Pennsylvania v. Wheeling Bridge Co., 13 How. 518.

<sup>2</sup> Georgetown v. Alexandria Canal Co., 12 Peters, 91; Mississippi R. Co. v. Ward, 2 Black, 485; Middle Bridge Co. v. Marks, 26 Maine, 326; President v. Trenton City Bridge Co., 13 N. J. Eq. 46; State Bridge Co. v. Metz, 5 Dutcher, 122; 2 Vroom, 378; 3 id. 199; Dover v. Portsmouth Bridge, 17 N. H. 200; Crosby v. Hanover, 36 N. H. 404; Cornish Bridge v. Richardson, 8 N. H. 207; Attorney General v. Delaware R. Co., 27 N. J. Eq. 1, 631; State v. Mutchler, 42 N. J. L. 461; Culbertson v. Wabash Navigation Co., 4 McLean, 544; State v. Boston R. Co., 25 Vt. 433; Ohio R. Co. v. Wheeler, 1 Black, 286, 297. A corporation may be legally organized in one State for the purpose of building a bridge across a river which forms the boundary between that State and another State. Hunt v. Kansas Bridge Co., 11 Kansas, 412. Towns are under no duty, and have no power to bridge streams flowing between the State in which they are situated and an adjoining State. Abendroth v. Greenwich, 29 Conn. 363. As to the carrying of telegraph lines across draw-bridges, see Pacific M. Tel. Co. v. Chicago Bridge Co., 36 Kansas, 113, 118.

sons or corporations to erect and maintain bridges without draws over its navigable waters, as well as dams, if the statute giving such power does not interfere with the regulations of Congress on the same subject.<sup>1</sup> Such authority will be a protection from indictment brought upon the ground that the structure is a public nuisance,<sup>2</sup> and is valid, although no indemnity is provided for those who have been accustomed to navigate in the waters which are thereby enclosed.<sup>3</sup> And, apart from State legislation, an act of Congress, passed either before or after the erection of the structure, authorizing an obstruction, or even a termination, of the navigation, renders it not obnoxious to the commerce clause of the Constitution, since the power thereby vested in Congress includes both the right to declare what is and what is not an illegal obstruction in a navigable stream, and the power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction from one channel or part of a river to another.<sup>4</sup> The combined action of Congress and of the State or States interested would legalize

<sup>1</sup> *Commonwealth v. Taunton*, 7 Allen, 309; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339, 347; *Davidson v. Boston Railroad*, 3 Cush. 91, 106; *Thayer v. New Bedford Railroad*, 125 Mass. 255; *State v. Freeport*, 43 Maine, 198; *Pennsylvania R. Co. v. New York R. Co.*, 23 N. J. Eq. 157; *Ecorse v. Supervisors*, 75 Mich. 264. See *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Brown v. Commonwealth*, 3 Serg. & R. 273; *Wisconsin v. Eau Claire*, 40 Wis. 533; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255; *Attorney General v. Eau Claire*, 37 Wis. 400. If, in an action for obstructing a navigable river, a legislative grant, authorizing the erection of a dam, is introduced in defense, this does not raise a question of title. *Browne v. Scofield*, 8 Barb. 239. A toll-bridge over a navigable river is properly assessed and taxed as real estate. *Hudson River*

*Bridge Co. v. Patterson*, 74 N. Y. 365; 11 Hun, 525.

<sup>2</sup> *Ibid.*; *Stoughton v. State*, 5 Wis. 291; *Harris v. Thompson*, 9 Barb. 350; *People v. New York Gaslight Co.*, 64 Barb. 55; 6 Lans. 467; *Phoenix v. Commissioners*, 12 How. Pr. 1; 1 Abb. Pr. 466. It is the province of the legislature to determine whether the benefit to logging interests and to commerce, arising from the erection of dams, piers, and booms, will counterbalance the inconvenience they will necessarily cause to navigation by vessels. *Heerman v. Beef Slough Co.*, 8 Biss. 334, 421.

<sup>3</sup> *Ibid.*; *Commonwealth v. Breed*, 4 Pick. 460; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339.

<sup>4</sup> *Gilman v. Philadelphia*, 3 Wall. 713, 724; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; 1 Woolw. 150; *South Carolina v. Georgia*, 93 U. S. 4; *Georgetown v. Alexandria Canal*

impediments to the right of passage over any navigable waters.<sup>1</sup> In the case of boundary waters between States, legislation by both States is, at least, necessary to authorize obstructions, which affect citizens of both States or other States, as the authority of one State is limited to its own waters, shores and harbors.<sup>2</sup> A civil action may be maintained in the Federal courts against a city for damage to a vessel arising from one of its bridges, in which it fails to maintain a draw of the width required by State legislation, although such right of action is not conferred by statute.<sup>3</sup>

§ 133. **Same — The Ordinance of 1787.**— The effect of that provision of the Ordinance of 1787, which declares the navigable waters leading into the Mississippi and St. Lawrence to be common highways and forever free,<sup>4</sup> was formerly the subject of much discussion with respect to its operation as a restraint upon the power of Congress or of the State legislatures to pass laws not assented to by both, which authorize impediments to the free navigation of the rivers within its scope. In Ohio it was held that the ordinance was in the nature of a perpetual compact;<sup>5</sup> but that State laws for the improvement of the rivers for hydraulic purposes, and laws which authorize bridges causing equal inconvenience to citizens of Ohio and of other States, are not within its meaning.<sup>6</sup> In Indiana it was

Co., 12 Peters, 91; Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508, 517; Miller v. New York, 13 Blatch. 469; Baltimore R. Co. v. Wheeling Transportation Co., 32 Ohio St. 116; Richmond v. Dubuque R. Co., 33 Iowa, 422.

<sup>1</sup> Ibid.; Miller v. New York, 13 Blatch. 469; People v. Kelly, 5 Abb. N. Cas. 383, 440; Baltimore R. Co. v. Wheeling Transportation Co., 32 Ohio St. 116; *ante*, § 129.

<sup>2</sup> Rutz v. St. Louis, 2 McCrary, 344; Quincy Bridge Co. v. Adams Co., 88 Ill. 615.

<sup>3</sup> Boston v. Crowley, 38 Fed. Rep. 212.

<sup>4</sup> *Ante*, § 68.

<sup>5</sup> See Columbus Ins. Co. v. Curti-

nus, 6 McLean, 209; Jolly v. Terre Haute Drawbridge Co., *id.* 237; Columbus Ins. Co. v. Peoria Bridge Co., *id.* 70; Spooner v. McConnell, 1 McLean, 337; Palmer v. Cuyahoga County, 3 McLean, 226; Lewis v. Bard, *id.* 56; Astrow v. Hammond, *id.* 107; Vaughan v. Williams, *id.* 530; Jones v. Van Zandt, 2 McLean, 611.

<sup>6</sup> Hogg v. Zanesville Canal Co., 5 Ohio, 419; Hutchinson v. Thompson, 9 Ohio, 52; Gavit v. Chambers, 3 Ohio, 496; Hickok v. Hine, 23 Ohio St. 523, 527; Symonds v. Cincinnati, 14 Ohio, 147; Kramer v. Chicago R. Co., 5 Ohio St., 140; Hubbard v. Toledo, 21 Ohio St. 379; Guthrie v. McConnell, 2 McVey's Ohio Dig. 343, pl. 8.



held that the ordinance was superseded by the Federal Constitution; but that it had been so far recognized and adopted, with respect to navigable streams, by subsequent acts of Congress, that it had the force of a subsisting law of the United States, and that the total obstruction of these streams by dams or otherwise is illegal.<sup>1</sup> In Wisconsin the adoption and ratification of the State Constitution have been held to operate as a repeal of the ordinance, so far as its provisions are in conflict with that Constitution.<sup>2</sup> In certain cases in the Supreme Court of the United States, it was held that other provisions of this ordinance were superseded by the adoption of the Federal Constitution, and that its provisions, so far as they have been preserved, owe their validity and authority to that Constitution and to the Constitutions and laws of the respective States.<sup>3</sup> The ordinance clearly does not deprive the State of power to

In *Commissioners v. Board of Public Works*, 39 Ohio St. 628, 633, the court said: "The doctrine now firmly established is that over the navigable waters within the boundaries of these States, Congress, in the assertion of its power under the constitution to regulate commerce among the several States, may exercise control to the extent necessary to protect, preserve and improve their free navigation; but that while this power remains dormant and until that body act, the States have plenary authority over bridges across them, and that there is nothing in the ordinance of 1787 that precludes them from exercising that authority."

<sup>1</sup> *Cox v. State*, 3 Blackf. 193, 200; *Depew v. Board of Trustees*, 5 Ind. 8, 11; *Johnson v. Chambers*, 12 Ind. 102; *Crake v. Crake*, 18 Ind. 156; *Williams v. Beardsley*, 2 Ind. 591; *Terre Haute Drawbridge Co. v. Halliday*, 4 Ind. 36; *Commissioners v. Pidge*, 5 Ind. 13; *Neaderhauser v. State*, 28 Ind. 257, 266; *Chandler v. Douglass*, 8 Blackf. 10, 12; *Tyrrell v. Lockhart*, 3 id. 136. See, also, *Illinois River Packet Co. v. Peoria Bridge Association*, 38 Ill. 467;

*Chicago v. McGinn*, 51 Ill. 266, 271; *People v. St. Louis*, 5 Gilman, 351, 368; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 308, 515; *Phœbe v. Jay*, 1 Scam. 207; *Peters v. New Orleans R. Co.*, 56 Ala. 528, 535.

<sup>2</sup> *Connecticut Mutual Ins. Co. v. Cross*, 18 Wis. 109. See *Newcomb v. Smith*, 1 Chand. 71; *Stoughton v. State*, 5 Wis. 291; *Cobb v. Smith*, 16 Wis. 661; *Enos v. Hamilton*, 24 Wis. 658; *Wisconsin River Improvement Co. v. Lyons*, 80 Wis. 61; *State v. Eau Claire*, 40 Wis. 533; *Attorney General v. Eau Claire*, 87 Wis. 400; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255; *Milwaukee Gaslight Co. v. The Gamecock*, 23 Wis. 144.

<sup>3</sup> See *Strader v. Graham*, 10 How. 82; *Pollard v. Hagan*, 3 How. 212; *Parmoli v. First Municipality*, id. 589; 7 Op. At. Gen. 571; *Menard v. Aspasia*, 5 Peters, 505; *Dred Scott v. Sandford*, 19 How. 393, 490; *Woodman v. Kilbourn Manuf. Co.*, 1 Abb. (U. S.) 158, 162; *Duluth Lumber Co. v. St. Louis Boom Co.*, 5 McCrary, 382; 17 Fed. Rep. 419.



obstruct, within its own limits, bayous and sloughs, not useful for interstate commerce;<sup>1</sup> to improve the navigation;<sup>2</sup> and to exact tolls for the use of an improved water-way,<sup>3</sup> especially in waters only floatable;<sup>4</sup> or to grant ferry licenses.<sup>5</sup> If the ordinance is an existing law, it would deprive the new States of such power as the original States possess to terminate navigation, and would so limit the powers of Congress that the assent of the States interested would be necessary to validate its action. "If," says Miller, J.,<sup>6</sup> "the ordinance were obligatory in every particular, and not altered by common consent nor superseded by the Constitution of the United States, the States embraced within the North-western Territory could not have been admitted into the Union on an equality with the other States, which is a fundamental principle of the Constitution, the basis of this Union."

**§ 134. Same — Statutory authority — Construction.**— A bridge or dam, erected in navigable waters and not sanctioned by any statute, is indictable as a public nuisance,<sup>7</sup> even though

<sup>1</sup> *Ingraham v. Chicago R. Co.*, 34 Iowa, 249; *Shepard v. Gates*, 50 Mich. 495.

<sup>2</sup> *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255; *Attorney General v. Eau Claire*, 37 Wis. 400; *Commissioners v. Pidge*, 5 Ind. 13; *Williams v. Beardsley*, 2 Ind. 591; *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155; *Lorman v. Benson*, 8 Mich. 18, 26; *Commissioners v. Withers*, 29 Miss. 41.

<sup>3</sup> *Ibid.*; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288; *Manistee River Improvement Co. v. Sands*, 53 Mich. 593; *Huse v. Glover*, 119 U. S. 543; 11 Biss. 550.

<sup>4</sup> *Ibid.*; *Osborne v. Knife Falls Boom Co.*, 32 Minn. 412.

<sup>5</sup> *Fanning v. Gregoire*, 9 How. 534; *Conway v. Taylor*, 1 Black, 603, 634; *Chapin v. Crusen*, 31 Wis. 209; *State v. New Orleans Navigation Co.*, 11 Martin, 309, 323; *Chiapella v. Brown*, 14 La. Ann. 189; *Marshall v. Grimes*,

41 Miss. 27; *Wiggins Ferry Co. v. East St. Louis*, Chicago Legal News (1882), p. 228.

<sup>6</sup> *Woodman v. Kilbourn Manuf. Co.*, 1 Abb. (U. S.) 158, 162; *Escabana Co. v. Chicago*, 107 U. S. 678; *Huse v. Glover*, 119 U. S. 543; 11 Biss. 550; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288.

<sup>7</sup> *Reg. v. Betts*, 16 Q. B. 1022, 1037; *State v. Freeport*, 43 Maine, 198, 201; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *People v. Vanderbilt*, 26 N. Y. 287; 38 Barb. 282; *Blanchard v. Western Union Telegraph Co.*, 60 N. Y. 510; *Woodman v. Kilbourn Manuf. Co.*, 1 Abb. (U. S.) 158, 166; *State v. Dibble*, 4 Jones (N. C.), 107; *State v. Parrott*, 71 N. C. 311; *Barnes v. Racine*, 4 Wis. 454; *Walker v. Shepardson*, 2 Wis. 384; *Yates v. Judd*, 18 Wis. 118; *Potter v. Menasha*, 30 Wis. 492; *Newark Plank Road Co. v. Elmer*, 1

the structure is shown to be of public convenience and utility,<sup>1</sup> and a statutory ratification of the obstruction after its erection does not preclude a recovery for damages sustained before the statute was enacted.<sup>2</sup> A State cannot declare that a bridge, constructed without a draw, is not an obstruction to interstate communication, and the question whether it is a material obstruction can only be determined in the courts of the United States.<sup>3</sup> When Congress has exercised its power to regulate navigation, its authority is paramount, and excludes or supersedes State legislation upon the same subject.<sup>4</sup> An obstruction to navigation authorized by a State may become a nuisance, and liable to be removed, under the subsequent action of Congress.<sup>5</sup> When authority from the State is adequate to legalize such an obstruction, it is not necessary that compensation be provided,<sup>6</sup> but the requirements of the statute conferring such authority must be fully observed, in order that it may afford protection. A statute authorizing a partial obstruction of the navigation will not protect an impediment not contemplated by the statute, but any excess or irregularity in the exercise of the power, by which the navigation is impaired, becomes a nuisance *pro tanto*.<sup>7</sup> An au-

Stock. 754, 788; *Yolo Co. v. Sacramento*, 36 Cal. 193; *Works v. Junction Railroad*, 5 McLean, 425.

<sup>1</sup> *Ante*, § 94.

<sup>2</sup> *Smith v. Louisville R. Co.*, 62 Miss. 510.

<sup>3</sup> *Ibid.*; *Columbus Ins. Co. v. Peoria Bridge Co.*, 6 McLean, 70; *Miller v. New York*, 13 Blatch. 469; *United States v. Milwaukee R. Co.*, 5 Biss. 410, 420.

<sup>4</sup> *Ante*, § 129; *Willson v. Blackbird Creek Marsh Co.*, 2 Peters, 245; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 518; 18 How. 421; *Pound v. Turck*, 95 U. S. 459; *Silliman v. Hudson River Bridge Co.*, 4 Blatch. 74, 395; 1 Black, 582; 2 Wall. 403; *United States v. Duluth*, 1 Dillon, 469; *Works v. Junction R. Co.*, 5 McLean, 425; *United States v. Milwaukee R. Co.*, 5 Biss. 410; *United States v. Railroad Bridge*, 6 McLean,

518; *South Carolina v. Georgia*, 93 U. S. 4; *Wisconsin v. Duluth*, 96 U. S. 378, 387.

<sup>5</sup> *Ibid.*; *Gibbons v. Ogden*, 9 Wheat. 196; *The Passenger Cases*, 7 How. 283, 394; *People v. Brooks*, 4 Denio, 469; *Sturgis v. Spofford*, 45 N. Y. 446; *Henderson v. Spofford*, 59 N. Y. 131; *Ex parte McNeil*, 13 Wall. 236; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 244; *Sherlock v. Alling*, 93 U. S. 99.

<sup>6</sup> *Sugar Refining Co. v. Jersey City*, 11 C. E. Green, 247; *Glover v. Powell*, 2 Stock. 211.

<sup>7</sup> *Renwick v. Morris*, 3 Hill (N. Y.), 621; 7 id. 575; *Blanchard v. Western Union Telegraph Co.*, 60 N. Y. 510; *State v. Freeport*, 43 Maine, 198; *Knox v. Chaloner*, 42 Maine, 150; *State v. Dibble*, 4 Jones (N. C.), 107, 115; *State v. Parrott*, 71 N. C. 311; *Healy v. Joliet R. Co.*, 2 Brad. (Ill.)

thorized privilege to exclusively navigate a river upon condition of removing obstructions cannot be exercised until the improvement is completed.<sup>1</sup> Where a railway company was empowered by act of Parliament to construct a swing bridge across a navigable stream, and the act provided that it should not be lawful to keep the bridge closed so as to obstruct the navigation for a longer time than was sufficient to enable those ready to use the bridge to cross it, and for opening it to admit vessels, it was held that the company was liable in damages to the owner of a vessel detained by reason of a defective construction of the bridge, which prevented it being opened, and that the company was not relieved of the duty to preserve the navigation by the fact that it had employed a contractor to build the bridge in conformity with the provisions of the act.<sup>2</sup> Where a way was authorized to be located across a tidal creek, by a statute of the State of Maine, which provided that it should be a bridge with a suitable draw, and subject to the approval of the harbor commissioners of Portland, a location which made no mention of a bridge or draw and was not approved by the harbor commissioners, was held to be unauthorized and void.<sup>3</sup>

§ 135. Same — Same.— Statutes providing for the erection of drawbridges, or of dams with shutes or locks, over navi-

435; *Hickok v. Hine*, 23 Ohio St. 523; *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410; *State v. Bell*, 5 Porter, 365; *Newark Plank Road Co. v. Elmer*, 1 Stock. 790. See *White v. King*, 5 Leigh, 726; *Ottawa v. People*, 48 Ill. 233; *Korah v. Ottawa*, 32 Ill. 121; *Harlem v. Emmert*, 41 Ill. 319; *Van Wagenen v. Newark Plank Road Co.*, 1 Stock. 754; 4 Hal. Ch. 586; *Allen v. Monmouth Co.*, 2 Beas. 68; *Attorney General v. New York R. Co.*, 9 C. E. Green, 59. If the location of a bridge over a navigable stream be changed without authority, it becomes a public nuisance. *Allen v. Monmouth*, 2 Beas. 68, 73. See *North British Railway v. Perth*,

10 App. Cas. 579; *Gates v. No. Pac. R. Co.*, 64 Wis. 64.

<sup>1</sup> *Alabama S. R. Nav. Co. v. Georgia Pac. Ry. Co.*, 87 Ala. 154.

<sup>2</sup> *Hole v. Sittingbourne Ry. Co.*, 6 H. & N. 488; *Wiggins v. Boddington*, 3 C. & P. 544; *Attorney General v. Mid Kent Ry. Co.*, L. R. 3 Ch. 100; *Attorney General v. Furness Ry. Co.*, 38 L. T. N. s. 555; *Pickard v. Smith*, 10 C. B. N. s. 170. See *Terre Haute Drawbridge Co. v. Halliday*, 4 Ind. 36; *Patterson v. Proprietors*, 40 Maine, 404; *Cuff v. Newark R. Co.*, 6 Vroom, 17, 574; *Jones v. Chantry*, 1 Hun, 613; 4 Supt. Ct. 63; *Davis v. Jenkins*, 5 Jones (N. C.), 290.

<sup>3</sup> *Cape Elizabeth v. County Commissioners*, 64 Maine, 456.

gable waters, are construed strictly, like all public grants, and in favor of the pre-existing right of navigation.<sup>1</sup> If the act provides for a draw but does not designate its size, it will not be held that the legislature intended the draw to be insufficient for the convenience of navigation.<sup>2</sup> One who is authorized to erect a bridge over navigable water, with a draw not less than fifteen feet wide, is not required to make the draw wider than fifteen feet, although vessels of a greater breadth have been accustomed to sail in such water.<sup>3</sup> But under an act of incor-

<sup>1</sup> *New Orleans Ry. Co. v. Mississippi*, 112 U. S. 12; *Texas Ry. Co. v. Interstate Trans. Co.*, 45 Fed. Rep. 5; *Commonwealth v. Breed*, 4 Pick. 460, 464; *State v. Freeport*, 43 Maine, 198; *Attorney General v. Hudson River R. Co.*, 9 N. J. Eq. 526; *Commonwealth v. Church*, 1 Penn. St. 105; *Hickok v. Hine*, 28 Ohio St. 523, 531; *State v. Godfrey*, 12 Maine, 361; *Mason v. Boom Co.*, 3 Wall. Jr. 252; *Doxey v. Long Island R. Co.*, 35 Hun, 362; *Newark Plank Road Co. v. Elmer*, 9 N. J. Eq. 754; *Dugan v. Bridge Co.*, 27 Penn. St. 303; *Selman v. Wolfe*, 27 Texas, 68; *Minturn v. Lisle*, 4 Cal. 181; *Barnes v. Racine*, 4 Wis. 454; *United States v. New Bedford Bridge*, 1 Wood. & M. 401; *Healy v. Joliet R. Co.*, 2 Brad. (Ill.) 435; *Nelson v. St. Croix Boom Co.*, 52 Wis. 647. Power given to a railroad company to construct the road "along" a river will not be extended by implication to authorize its construction in or upon the river, or below high-water mark of tide water. *Stevens v. Erie Ry. Co.*, 21 N. J. Eq. 259; *Stevens v. Paterson R. Co.*, 34 N. J. L. 532. See *Abraham v. Great Northern Ry. Co.*, 16 Q. B. 586; *Van Wagenen v. Newark Plank Road Co.*, 4 Hal. Ch. 586; 1 Stock. 754; *Attorney General v. Stevens*, Sax. 570. So authority to construct a boom along the banks or across a branch of a river does not give the right to maintain booms across the entire river. *Stevens*

*Point Boom Co. v. Reilly*, 46 Wis. 237; 44 Wis. 295; *Plummer v. Penobscot Lumber Association*, 67 Maine, 363. So of a canal. *State v. Duplin Canal Co.*, 91 N. C. 637. As to the proper or negligent management of the draw, see 1st, as to navigators, *West Lancashire Ry. Co. v. Iddon*, 49 L. T. N. S. 600; *In re Pratt*, 24 Fed. Rep. 335; *Etheridge v. Philadelphia*, 26 id. 43; *Edgerton v. New York*, 27 id. 230; *Jennings v. Fitchburg R. Co.*, 146 Mass. 621. 2d, as to travelers across a toll bridge, *Goodale v. Portage Lake Bridge Co.*, 55 Mich. 413. The admiralty has jurisdiction of a libel *in personam* for the negligent management of a draw-bridge. *Hill v. Board of Chosen Freeholders*, 45 Fed. Rep. 260.

<sup>2</sup> *Baltimore v. Stoll*, 52 Md. 435.

<sup>3</sup> *Commonwealth v. Breed*, 4 Pick. 460. A corporation empowered by the legislature to maintain a mill-dam "on their own land" across the head of a harbor, with flood-gates thereto at least fifteen feet wide, so as to admit the passage of gondolas and boats at high water, may erect the dam below high-water mark at the head of the harbor, and across a part of the channel where the tide ebbs and flows; and the words "on their own land" merely exclude the inference that the lands of others may be taken. *Parker v. Cutler Mill-dam Co.*, 20 Maine, 353.

poration authorizing the building of a bridge across a navigable river, "with two suitable draws which shall be at least thirty feet wide," the company is bound not only to make the draws sufficiently wide to accommodate navigation at the time of their construction, but if rendered necessary by an increase in the size of vessels, or a difference in their mode of construction, or from any other cause, to so enlarge the draws from time to time as to permit the passage of any vessels having occasion to pass the bridge.<sup>1</sup> So a provision in an act authorizing a dam across a navigable river, which required "a good and sufficient slide, that will admit the passage of all such rafts as may navigate said river," was construed as referring to such rafts as might navigate the river after its condition was improved by the dam.<sup>2</sup> Authority conferred upon a railroad corporation to bridge a navigable stream includes the right to make repairs, and for that purpose to close the draw for a reasonably necessary time.<sup>3</sup> Where the charter of a railroad company authorized it to bridge a navigable stream, provided that the navigation of the stream should not be thereby obstructed, a temporary obstruction, caused by the necessary framework and scaffolding used in erecting the bridge, was held to be an obstruction within the meaning of the proviso, for which the company was liable to any person injured thereby.<sup>4</sup> A charter granted to a bridge company, requiring a "convenient draw" in the bridge, is violated if the draw cannot be passed without danger or vexatious delay.<sup>5</sup> A charter which authorizes the

<sup>1</sup> *Commonwealth v. New Bedford Bridge*, 2 Gray, 339, 352; *Dugan v. Bridge Co.*, 27 Penn. St. 303. See *New Haven Toll Bridge Co. v. Bunnell*, 4 Conn. 54; *Middlesex R. Co. v. Wakefield*, 103 Mass. 261; *Dow v. Wakefield*, id. 267.

<sup>2</sup> *Volk v. Eldred*, 23 Wis. 410. This was an action for injuries to a raft caused by obstructions at a dam. It was held in defense that the raft could not have navigated the river at all before the dam was built.

<sup>3</sup> *Central Trust Co. v. Wabash Ry. Co.*, 32 Fed. Rep. 566; *Lister v. Newark Plank Road Co.*, 36 N. J. Eq. 477;

*Hamilton v. Vicksburg R. Co.*, 119 U. S. 280; *Jones v. Baltimore R. Co.*, 4 Mackey (D. C.), 106.

<sup>4</sup> *Memphis & Ohio R. Co. v. Hicks*, 5 Sneed, 427; *Snure v. Great Western Ry. Co.*, 13 Q. B. (Can.) 376.

<sup>5</sup> *Jolly v. Terry Haute Drawbridge Co.*, 6 McLean, 237; *Attorney General v. New York R. Co.*, 9 C. E. Green, 49; *Proprietors v. Hoboken Land Co.*, 2 Beas. 504; *New Haven Toll Bridge Co. v. Bunnell*, 4 Conn. 58. A city which is required by statute to maintain a bridge as a public highway, is not liable for the detention of a vessel caused by the

building of a dam across a navigable channel, with the proviso that it be "so constructed as to leave the channel of the river as safe and convenient for the descent of rafts as it now is," has been construed to mean the least obstruction of navigation consistent with the user of the dam for the purpose contemplated by the charter.<sup>1</sup> Where the passage way for vessels between the piers of a drawbridge across navigable waters is required to be of a certain width, a clear width of the required distance must be left open across the channel, and the measurement cannot be made along the line of the bridge, if it is built diagonally across the stream.<sup>2</sup> If a statute authorizes the erection of a bridge with piers, in such manner as not "to injure, stop, or interrupt the navigation," but does not fix the number and location of the piers, the State may complain if the piers are so injudiciously located as to obstruct the navigation, but the owner of a vessel which is injured thereby, although entitled to recover damages for a wanton abuse or negligent exercise of the discretion thus confided to the builders of the bridge, cannot maintain an action for a mere error of judgment in locating the piers.<sup>3</sup> In general, the erection of a

draw of the bridge not being of the prescribed width, or by the neglect of the superintendent of the bridge, unless such liability is expressly created by statute. *French v. Boston*, 129 Mass. 592. A railroad bridge is not "a road-bed or right of way." *Cass County v. C. B. & Q. R. Co.*, 25 Neb. 348; *C. B. & Q. R. Co. v. School District No. 1*, id. 359. See "Bridge" defined in *Bick v. Post*, 39 Fed. Rep. 249.

<sup>1</sup> *Whitaker v. Delaware Canal Co.*, 87 Penn. St. 34. That drift should not be permitted to accumulate about the piers, see *St. Louis Ry. Co. v. Meese*, 44 Ark. 414.

<sup>2</sup> *Hannibal R. Co. v. Missouri River Packet Co.*, 125 U. S. 260; 1 McCrary, 281; *Assante v. Charleston Bridge Co.*, 41 Fed. Rep. 865. See *Silver v. Mo. Pac. Ry. Co.*, 101 Mo. 79; 18 S. W. 410; *Texas Ry. Co. v. Interstate Trans. Co.*, 42 Fed. Rep. 261; *St.*

*Louis Packet Co. v. Keokuk Bridge Co.*, 31 Fed. Rep. 755.

<sup>3</sup> *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Flanagan v. Philadelphia*, 42 Penn. St. 219; s. c., 8 Phila. 110; *Philadelphia R. R. Co. v. Philadelphia*, 8 Phila. 112, 284; *Clarke v. Birmingham Bridge Co.*, 41 Penn. St. 147; *Dugan v. Monongahela Bridge Co.*, 27 Penn. St. 303; 1 Pitts. 404; *Coon v. Monongahela Navigation Co.*, 6 Penn. St. 382; *Board of Wardens v. Philadelphia*, 43 Penn. St. 209; *Bacon v. Arthur*, 4 Watts, 437; *Plummer v. Alexander*, 2 Jones, 81; *Chestnut Hill Turnpike Co. v. Rutter*, 4 S. & R. 4; *Henry v. Bridge Co.*, 8 Watts & S. 27; *Delaware Canal Co. v. Torrey*, 33 Penn. St. 150; *Stephens Transportation Co. v. Central R. Co.*, 34 N. J. L. 280; 33 id. 229; *Attorney General v. New York R. Co.*, 24 N. J. Eq. 49; *Attorney General v. Hudson River R. Co.*, 1 Stock. 526; *Sewall's*



bridge over navigable waters, with or without a draw, by authority of the legislature, is a regulation of a public right, and not the deprivation of any private right, which can be a ground for damages to individuals.<sup>1</sup> A refusal to open an authorized railroad bridge may not give cause for an action, if the mast of the plaintiff's vessel can be readily lowered and a passage thus effected.<sup>2</sup>

§ 136. *Same — Same.*—Corporate charters, so far as they contain unqualified grants, are contracts which the State cannot constitutionally impair, alter, or repeal; and it is incompetent for the legislature, having once empowered persons or corporations to maintain a bridge which necessarily causes an obstruction to the navigation, to amend the act by making such persons or corporations liable for the obstruction.<sup>3</sup> Even where a charter reserved to the legislature the right of modification after the corporators should be repaid their expenses in building the bridge, an amendment before such payment, requiring the construction of a draw fifty feet wide, in place of one thirty-two feet wide, was held to be unconstitutional

*Falls Bridge v. Fisk*, 23 N. H. 171; *Turnpike Road Co. v. Campbell*, 44 Cal. 89.

<sup>1</sup> *Ibid.*; *Davidson v. Boston Railroad*, 3 Cush. 91, 106; *Blackwell v. Old Colony Railroad*, 122 Mass. 1; *Thayer v. New Bedford Railroad*, 125 Mass. 253; *Ely v. Rochester*, 26 Barb. 133; *Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247; *State v. Narrows Island Club*, 100 N. C. 477; *United States v. St. Louis R. Co.*, 43 Fed. Rep. 414; *Pound v. Turck*, 95 U. S. 459; *Kearns v. Cordwainers' Co.*, 6 C. B. N. s. 388. A provision made in the charter of a corporation, or in a general statute in force at the time, or in the constitution, that the legislature may revoke, alter, or annul a charter, is one of the conditions of the grant and of the terms of the charter. *Chincleclamouche Lumber Co. v. Commonwealth*, 100 Penn. St. 438. The declaration of

the legislature that if the navigation of an artificial channel is permitted to be obstructed, the collection of tolls shall be temporarily suspended, waives the right to a forfeiture for such cause. *State v. Morris*, 73 Tex. 435.

<sup>2</sup> *West Lancashire Ry. Co. v. Iddon*, 49 L. T. N. s. 600.

<sup>3</sup> *Bailey v. Philadelphia R. Co.*, 4 Harr. (Del.) 889; *Commonwealth v. Pennsylvania Canal Co.*, 66 Penn. St. 41; *Angell & Ames on Corporations*, §§ 31, 767; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 48; *Derby Turnpike Co. v. Parks*, 10 Conn. 541; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 178; *Enfield Toll Bridge Co. v. Hartford Railroad Co.*, 17 Conn. 55; *Bronson v. Taylor*, 33 Conn. 116. There is no element of contract in a special remedy given by statute. *Chattaroi Ry. Co. v. Kinner*, 81 Ky. 221.



and void.<sup>1</sup> If the legislature authorizes a dam or other obstruction to be erected across a navigable stream situated within the State, the person erecting the structure under such authority is not subject to a prosecution for maintaining a public nuisance, nor can the obstruction be abated as such by reason of the fact that the health of the neighborhood is thereby impaired, or that other injuries, not involving the direct appropriation of property, result to persons residing in the vicinity.<sup>2</sup> Nor does the fact that a bridge or dam, which is built with draws or locks in strict compliance with its charter, becomes at a subsequent period impassable to vessels, from causes not attributable to the proprietor,—such as low water, or sand-bars across the channel, or fallen trees or wrecks,—render the proprietor liable, at least before there has been time to repair, for the loss of the navigation or injuries sustained from these causes, in the space to which he has limited the navigation.<sup>3</sup> If the legislature authorizes a dam across a navigable river with the proviso that it shall be so constructed as not to substantially obstruct the navigation, an injunction will not be granted by the courts, in advance of the construction of the dam, on the ground that the proposed structure must necessarily obstruct the navigation.<sup>4</sup> Under an act which authorizes the construction of a boom on the south side of a stream, and which restricts its limits only by the requirement that navigation shall not be impeded, the

<sup>1</sup> *Washington Bridge Co. v. State*, 18 Conn. 53.

<sup>2</sup> *Neaderhauser v. State*, 28 Ind. 257; *Depew v. Board of Trustees*, 5 Ind. 8; *Butler v. State*, 6 Ind. 165; *Stoughton v. State*, 5 Wis. 291; *Barnes v. Racine*, 4 Wis. 494; *Harris v. Thompson*, 9 Barb. 350; *People v. Law*, 34 Barb. 514; *Williams v. New York Central R. Co.*, 18 Barb. 222; *Clark v. Syracuse*, 13 Barb. 32. A public improvement, like a canal, erected under authority from the State, is not a public or private nuisance, because it renders the neighborhood unhealthy, except where the water is permitted to escape and form

stagnant and noisome pools on the adjoining lands. *Commonwealth v. Reed*, 34 Penn. St. 275; *Delaware Canal Co. v. Commonwealth*, 60 Penn. St. 367; *Steele v. Western Inland Lock Navigation*, 2 Johns. 288.

<sup>3</sup> *Board of Commissioners v. Pidge*, 5 Ind. 18; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 625; *Roush v. Walter*, 10 Watta, 86; *Plumer v. Alexander*, 12 Penn. St. 81.

<sup>4</sup> *Wisconsin v. Eau Claire*, 40 Wis. 533; *Attorney General v. Eau Claire*, 37 Wis. 400; *Woodman v. Kilbourn Manuf. Co.*, 1 Abb. (U. S.) 158; *United States v. Ruggles*, 5 Blatch. 35.

boom need not be confined to the south side of the stream if a sufficient channel for navigation is left on the north side.<sup>1</sup> As against the riparian owners, a charter which authorizes the erection of a toll-bridge across a river, does not authorize taking the land of such owners at the side of the bridge for the purpose of a toll-house; and in the land which is covered by the bridge it creates only an easement.<sup>2</sup> An act of the legislature, giving an unqualified authority to construct a bridge or dam across a stream, is a justification only with respect to public interests. It gives, by implication, authority to appropriate, without compensation, such portion as is necessary for the purpose of the lands belonging to the State under water.<sup>3</sup> But it affords no protection for a private injury, such as the overflow of lands belonging to the riparian owners,<sup>4</sup> or the building of piers and abutments on lands under water belonging to individuals,<sup>5</sup> without payment or tender of compensation. If one railroad corporation constructs its road across the track of another railroad corporation, the latter is entitled to damages, although its track is laid upon piles over tide water.<sup>6</sup>

<sup>1</sup> *Powers v. Bald Eagle Boom Co.*, 125 Penn. St. 175.

<sup>2</sup> *Thompson v. Androscoggin Bridge*, 5 Greenl. 62.

<sup>3</sup> *Pennsylvania R. Co. v. New York R. Co.*, 23 N. J. Eq. 157; *Attorney General v. Hudson Tunnel Co.*, 27 N. J. Eq. 176, 573; *Stevens v. Paterson R. Co.*, 34 N. J. L. 532; *Black River Imp. Co. v. La Crosse Booming Co.*, 54 Wis. 659. See *Commonwealth v. Boston & Maine Railroad*, 3 Cush. 25.

<sup>4</sup> *Trenton Water Power Co. v. Raff*, 7 Vroom, 335; *Delaware Canal Co. v. Lee*, 22 N. J. L. 243; *Sinnickson v. Johnson*, 17 N. J. L. 129; *Ten Eyck v. Delaware Canal Co.*, 18 N. J. L. 200; *Brown v. Cayuga R. Co.*, 12 N. Y. 486; *Cott v. Lewiston R. Co.*, 86 N. Y. 214; *Turner v. Blodgett*, 5 Met. 210; *Cogswell v. Essex Mill Co.*, 6 Pick. 94; *Thatcher v. Dartmouth Bridge*, 18 Pick. 501; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143; *Hooker v. New Haven Co.*,

14 Conn. 147; *Denslow v. New Haven Co.*, 16 Conn. 103; *Shaver v. Eldred*, 114 N. Y. 236; *Crittenden v. Wilson*, 5 Cowen, 165; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Baltimore R. Co. v. Reaney*, 42 Md. 117; *Thien v. Voegtlander*, 3 Wis. 461. See *Dodd v. Williams*, 3 Mo. App. 278.

<sup>5</sup> *Morris Canal Co. v. Jersey City*, 26 N. J. Eq. 294; *Gunter v. Geary*, 1 Cal. 462; *State v. Glenn*, 7 Jones (N. C.), 321; *Cornelius v. Glenn*, id. 512. The owner may maintain trespass *quare clausum* for an unlawful invasion of land covered by water. *Ibid.*; *Smith v. Ingraham*, 7 Ired. (N. C.) 175; *Champlain R. Co. v. Valentine*, 19 Barb. 484; *People v. Mauran*, 5 Denio, 389; *Walker v. Shepardson*, 4 Wis. 486.

<sup>6</sup> *Grand Junction R. Co. v. Middlesex Commissioners*, 14 Gray, 553; *Fitchburg Railroad v. Boston & Maine Railroad*, 8 Cush. 58.

§ 137. **Same — Same.**— It is not necessary for the legislature to give a special and direct sanction to the erection or continuance of every obstruction in navigable waters, but such authority may be granted by implication.<sup>1</sup> An act, for example, which authorizes a town to purchase and maintain an existing bridge over a navigable stream, is a legislative recognition of the legality of the bridge and of the right of the town to maintain it.<sup>2</sup> If the charter of a railroad corporation contains a general authority to erect bridges and all other works necessary for the construction of the road, it includes, by implication, the power to bridge a navigable river on the route of such road.<sup>3</sup> The same is true of an unrestricted grant of authority to construct a railroad from one designated point to another, when the road cannot be reasonably constructed without crossing a navigable stream.<sup>4</sup> So, if the legislature makes an appropriation for rebuilding a canal dam, and directs that the money be expended by the commissioner in charge, it impliedly sanctions the building of the new dam at the same height as the old one, though the latter was raised by the canal officers to a height not strictly authorized by statute.<sup>5</sup>

§ 138. **Same — Harbor lines.**— It is competent for State legislatures to control the management and occupation of wharves and piers in navigable waters, even in the hands of private persons;<sup>6</sup> to establish wharf or harbor lines, and to empower commissioners to license structures extending to such lines.<sup>7</sup> Such statutes do not conflict with the commercial

<sup>1</sup> *Fall River Iron Works v. Old Colony Railroad*, 5 Allen, 221; *Boston Water Power Co. v. Boston & Worcester Railroad*, 23 Pick. 360.

<sup>2</sup> *Castello v. Landwehr*, 28 Wis. 522; *Saugatuck Bridge Co. v. Westport*, 89 Conn. 337.

<sup>3</sup> *Attorney General v. Stevens*, Sax. (N. J.) 370; *Union Pacific R. Co. v. Hall*, 91 U. S. 343, 350; *People v. Saratoga R. Co.*, 15 Wend. 130; *Mohawk Bridge Co. v. Utica R. Co.*, 6 Paige, 554; *Springfield v. Connecticut River R. Co.*, 4 Cush. 63; *Miller v. Prairie du Chien Ry. Co.*, 84 Wis. 533; *Hamil-*

*ton v. Vicksburg R. Co.*, 84 La. Ann. 970.

<sup>4</sup> *Fall River Iron Works v. Old Colony Railroad*, 5 Allen, 221; *Hughes v. Northern Pacific Ry. Co.*, 18 Fed. Rep. 106. But see *Little Rock R. Co. v. Brooks*, 89 Ark. 403.

<sup>5</sup> *Shaver v. Eldred*, 114 N. Y. 236; *Wright v. Eldred*, 46 Hun, 12. See *Re New York & W. S. R. Co.*, 89 N. Y. 453; 27 Hun, 57; 28 Hun, 472; 29 Hun, 269, 646.

<sup>6</sup> *Re Union Ferry Co.*, 98 N. Y. 139.

<sup>7</sup> *State v. Sargent*, 45 Conn. 358; *Commonwealth v. Alger*, 7 Cush. 81, 104.

power of Congress, so long as the latter remains unexercised;<sup>1</sup> they do not impair the right to maintain wharves lawfully erected before their passage,<sup>2</sup> nor are they unconstitutional, as appropriating private property to public uses without compensation, even in those States in which the shores of tide waters to low-water mark are the private property of the riparian owners.<sup>3</sup> The mere establishment of a harbor or dock line is not an abandonment of the right of the State to control and regulate the waters within the line.<sup>4</sup> The statutes of some of the States establishing these lines restrain the littoral proprietors from extending wharves beyond high-water mark without the authority of the legislature, or a license from the harbor commissioners,<sup>5</sup> while those of other States expressly

<sup>1</sup> *Savannah v. State*, 4 Ga. 26.

<sup>2</sup> *Commonwealth v. Alger*, 7 Cush. 53; *Garey v. Ellis*, 1 Cush. 306; *Attorney General v. Boston & Lowell R. Co.*, 118 Mass. 345. See *Yates v. Milwaukee*, 10 Wall. 497; *Crocker v. New York*, 15 Fed. Rep. 405; *Martin v. Evansville*, 32 Ind. 85; *Martin v. O'Brien*, 34 Miss. 21.

<sup>3</sup> *Commonwealth v. Alger*, 7 Cush. 53; *Garey v. Ellis*, 1 Cush. 306; *State v. Sargent*, 45 Conn. 358. See *Walker v. Shepardson*, 4 Wis. 486; *Re Port Warden's Line*, 13 Phila. 453. A city authorized by the legislature to establish dock and wharf lines in a river, and to prevent obstructions to the navigation thereof, cannot by ordinance declare a private wharf a nuisance and order its abatement as obstructing the navigation, if in fact it is not a nuisance. *Yates v. Milwaukee*, 10 Wall. 497.

<sup>4</sup> *Weber v. Harbor Commissioners*, 18 Wall. 57; *Aborn v. Smith*, 12 R. L. 370; *Engs v. Peckham*, 11 R. L. 210; *Brown v. Goddard*, 13 R. L. 76; *Hardy v. McCullough*, 23 Gratt. 251; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384; *Kingsland v. New York*, 85 Hun, 458; *Attorney General v. Hudson Tunnel Co.*, 27 N. J. Eq. 176, 573; *Wilson v. Ingles*, 11 Gill & J.

351; *Boston Steamboat Co. v. Munson*, 117 Mass. 34; *Yates v. Judd*, 18 Wis. 118; *People v. Broadway Wharf Co.*, 31 Cal. 33; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Kissling v. Johnson*, 13 Cal. 56; *San Francisco v. Straut*, 84 Cal. 124; 24 Pac. 814; *Guy v. Harmance*, 5 Cal. 73; *Eldridge v. Cowell*, 4 Cal. 80; *Stone v. Elkins*, 24 Cal. 127; *Holladay v. Frisbie*, 15 Cal. 630; *Knight v. Haight*, 51 Cal. 169; *People v. Williams*, 64 Cal. 498. The Mass. St. of 1866, ch. 149, gave to the littoral proprietors upon the Acushnet River, for the purpose of building wharves, a possessory title out to the channel, sufficient to enable them to maintain trespass if their rights were invaded. *Hamlin v. Pairpoint Manuf. Co.*, 141 Mass. 51; *Haskell v. New Bedford*, 108 Mass. 208.

<sup>5</sup> *Commonwealth v. Alger*, 7 Cush. 53; *Attorney General v. Woods*, 108 Mass. 436; *Attorney General v. Boston & Lowell R. Co.*, 118 Mass. 345; *Attorney General v. Cambridge*, 119 Mass. 518; *Weber v. Harbor Commissioners*, 18 Wall. 57. If harbor commissioners, in letting a contract for the construction of a wharf, do not comply with the provisions of the statute from which their authority is

grant the privilege to occupy and fill out to the prescribed limits,<sup>1</sup>—a privilege which has been held to accrue to the ownership of the upland, however such ownership has been acquired, but not to divest the title of the State to the space within the lines, until it has been actually occupied or filled.<sup>2</sup> The case of levees located upon the margin of a river, or as near the river as is practicable for the purpose of reclaiming the adjoining lands, is governed by similar rules. When actually constructed, under authority of the State legislature, such a levee becomes the conventional or artificial bank of the river, defining the line of high-water mark in those States in which riparian ownership is held limited by that line, and entitling the riparian proprietors to accretions subsequently added thereto.<sup>3</sup> A municipal corporation cannot exact wharfage dues from vessels landing at the natural bank of a river,

derived, the contract is void. *Cowell v. Martin*, 43 Cal. 665; *People v. San Francisco R. Co.*, 35 Cal. 606; *People v. Klumpke*, 41 Cal. 263. See *People v. Pacific R. M. Co.*, 60 Cal. 323; *People v. San Francisco Gaslight Co.*, 60 Cal. 349; *id.* 351, 567. As to harbor-masters, see *The Rosina*, 10 P. D. 24, 181; *Cole v. Mahoney*, 65 How. Pr. 499; 67 *id.* 226; *Groner v. Portsmouth*, 77 Va. 488.

<sup>1</sup> *Bailey v. Burges*, 11 R. L. 330; *Engs v. Peckham*, 11 R. L. 210; *Manchester v. Hudson*, cited 11 R. L. 224; *Providence Steam Engine Co. v. Providence Steamship Co.*, 12 R. L. 348; *Aborn v. Smith*, 12 R. L. 370; 11 R. L. 594; *Clark v. Peckham*, 9 R. L. 455, 473; 10 R. L. 35; *Simmons v. Mumford*, 2 R. L. 172. See *People v. New York Ferry Co.*, 68 N. Y. 71; *In re City of Brooklyn*, 73 N. Y. 179; *People v. Vanderbilt*, 26 N. Y. 287; *Hart v. Albany*, 9 Wend. 571; *Hecker v. New York Balance Dock Co.*, 24 Barb. 215; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182, 184; *Winpenny v. Philadelphia*, 65 Penn. St. 135; *Norfolk City v. Cooke*, 29 Gratt. 480. See *Texas Ry. Co. v. New*

*Orleans*, 40 Fed. Rep. 111; *Miller v. Mendenhall*, 43 Minn. 95.

<sup>2</sup> *Aborn v. Smith*, 12 R. L. 370; *Engs v. Peckham*, 11 R. L. 210; *post*, § 165. Under the New York statute of 1848, the owners of lands on the East River have not only the right to construct bulkheads and wharves to the water line established in 1836, but also title to the land under water to that line. *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70; *People v. Kelley*, 38 Barb. 269; 14 Abb. Pr. 372. See *Miller v. Mendenhall*, 43 Minn. 95; 8 L. R. A. 89, and note.

<sup>3</sup> *Musser v. Hershey*, 42 Iowa, 356, 363; *New Orleans v. United States*, 10 Peters, 711. See *Barkley v. Levee Commissioners*, 93 U. S. 258; *The Police Jury v. Britton*, 15 Wall. 566; *Alcorn v. Hamer*, 38 Miss. 652; *Williams v. Cammack*, 27 Miss. 209; *Daily v. Swope*, 47 Miss. 367; *Vasser v. George*, *id.* 713; *Smith v. Atlantic R. Co.*, 25 Ohio St. 91; *Wright v. Thomas*, 26 *id.* 346; *Texas Ry. Co. v. New Orleans*, 40 Fed. Rep. 111. As to suits for breaking private artificial levees, see *Belcher v. Murphy*, 81 Cal. 39.

although within the wharf limits established by ordinance, if no artificial facilities are furnished.<sup>1</sup>

§ 139. **Same — Subordinate authorities.**— The legislature alone has the right to determine whether and to what extent the public convenience requires an interruption of the public right of navigation.<sup>2</sup> In the absence of direct authority, the subordinate authorities of a State, such as towns, surveyors of highways, or county commissioners, are not invested with power to obstruct navigable waters, whether fresh or salt, by constructing highways below high-water mark, or authorizing dams or bridges across them.<sup>3</sup> In Massachusetts and other States, it is held that a general statutory authority to lay out roads and highways does not confer power to construct them across navigable waters or below the high-water mark, upon the ground that, navigable waters being of common right public highways, a general authority to lay out a new highway does not warrant the obstruction of a highway which is already in use by the public.<sup>4</sup> In Connecticut such authority is held to authorize by implication the construction of highways

<sup>1</sup> *Cape Girardeau v. Campbell*, 26 Mo. App. 12; *The Lizzie E.*, 30 Fed. Rep. 876.

<sup>2</sup> *Wales v. Stetson*, 2 Mass. 146; *Commonwealth v. Charleston*, 1 Pick. 180; *Commonwealth v. Breed*, 4 Pick. 460; *Cape Elizabeth v. County Commissioners*, 64 Maine, 456.

<sup>3</sup> *Commonwealth v. Coombs*, 2 Mass. 489; *Arundel v. McCulloch*, 10 Mass. 70; *Commonwealth v. Charlestown*, 1 Pick. 180; *Commonwealth v. Breed*, 4 Pick. 460; *Kean v. Stetson*, 5 Pick. 492; *Wellington, Petitioner*, 16 Pick. 87; *Charlestown v. Middlesex Commissioners*, 3 Met. 202; *Henshaw v. Hunting*, 1 Gray, 203; *Attorney General v. Cambridge*, 16 Gray, 247; *Boston v. Richardson*, 105 Mass. 365; *Commonwealth v. Gloucester*, 110 Mass. 491; *Dunbar v. Vinal*, 2 Dane Abr. 695; *State v. Anthoine*, 40 Maine, 485; *State v. Wilson*, 42 Maine, 9; *Attorney General v. Stevens*, Sax.

(N. J.) 870; *Tucker v. Burlington Co.*, id. 283; *Allen v. Monmouth*, 2 Beas. 68. As to the liability of a corporation for its servant's negligent management of the draw, see *Butterfield v. Boston*, 148 Mass. 544; *Briggs v. N. Y. Central R. Co.*, 30 Hun, 291.

<sup>4</sup> *Ibid.*; *Commonwealth v. Coombs*, 2 Mass. 489; *Arundel v. McCulloch*, 10 Mass. 70; *Wales v. Stetson*, 2 Mass. 143; *Commonwealth v. Charlestown*, 1 Pick. 180; *Springfield v. Connecticut River R. Co.*, 4 Cush. 63; *Commonwealth v. Alger*, 7 Cush. 53; *Commonwealth v. Roxbury*, 9 Gray, 451, 493; *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446, 449; *Marblehead v. County Commissioners*, 5 Gray, 453; *Boston & Maine R. Co. v. Boston & Lowell R. Co.*, 124 Mass. 368, 371; *United States v. New Bedford Bridge*, 1 Wood. & M. 407; *Simmons v. Mumford*, 2 R. L. 172, 185.



below high-water mark,<sup>1</sup> or bridges with draws across navigable streams.<sup>2</sup> In *Charlestown v. Middlesex Commissioners*,<sup>3</sup> in Massachusetts, the legislature authorized a bridge to be built over a navigable stream, "either solid or on piles, leaving sufficient passage for the water," as certain commissioners might deem necessary. Under the direction of these commissioners the bridge was made solid for two-thirds of its length, and the other third, being on piles over the channel and deeper parts of the stream, afforded passage for small vessels without masts when loaded or empty. It was held that the stream was still navigable, and that the county commissioners were not authorized to locate a highway over it. In *Marblehead v. Essex Commissioners*,<sup>4</sup> the county commissioners were held to have no jurisdiction to lay a highway along a beach forming the side of a harbor, which was not covered by the ordinary tides but by spring tides only, it appearing that the probable effect would be to lessen the usefulness of the harbor for the purpose of navigation, and to interfere with public measures for its protection and improvement. A highway may be located, without special authority from the legislature, over flats between the original high and low-water mark which have been lawfully reclaimed and filled up;<sup>5</sup> and upon an indictment for creating a nuisance in a part of a town-way laid out by the side of navigable water and above high-water mark, it is not a defense that another part of the way is below high-water mark.<sup>6</sup> Under the constitutional provision that the judicial power of a State shall be vested in the various courts, it is incompetent for the legislature to declare it unlawful to drive piles in certain parts of a particular river, and to command the courts to enjoin such acts without

<sup>1</sup> *Groton v. Hurlburt*, 22 Conn. 183; *Weathersfield v. Humphrey*, 20 Conn. 218; *Clark v. Saybrook*, 21 Conn. 313; *Brown v. Preston*, 38 Conn. 219; *Saugatuck Bridge Co. v. Westport*, 39 Conn. 337, 350.

<sup>2</sup> *Brown v. Preston*, 38 Conn. 219; *Bryan v. Branford*, 50 Ct. 246.

<sup>3</sup> 3 Met. 202. In *People v. Meach*, 14 Abb. Pr. N. S. 429, it was held that supervisors will not be restrained

from erecting a bridge over a stream in which the tide ebbs and flows, if it is doubtful whether the stream could ever be navigated.

<sup>4</sup> 5 Gray, 451.

<sup>5</sup> *Henshaw v. Hunting*, 1 Gray, 203; *Clement v. Burns*, 43 N. H. 609; *Attorney General v. Old Colony Railway*, 12 Allen, 404.

<sup>6</sup> *Commonwealth v. Weiher*, 3 Met. 445.



proof of injury thereby caused, such a statute being discriminating and class legislation and contrary to the spirit of both the State and the Federal constitutions.<sup>1</sup>

§ 140. Same — Wharves.— The right to build out wharves or piers into public waters, as incident to the ownership of the adjoining land, is a riparian right, and, as such, will be considered in a subsequent chapter.<sup>2</sup> All such structures, as well as bridges, dams and booms, which are not authorized by the legislature, or which are not erected in accordance with the authority conferred,<sup>3</sup> are public nuisances so far as they interfere with the passage of vessels, or limit such passage to a portion of the navigable channel.<sup>4</sup> But it is competent for the legislature to authorize their erection even beyond the point of navigability, and the reclamation of land from the

<sup>1</sup> *Janesville v. Carpenter*, 77 Wis. 288; 46 N. W. 128.

<sup>2</sup> *Post*, ch. 5.

<sup>3</sup> *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *Commonwealth v. Nashua Railroad*, 2 Gray, 54; *Commonwealth v. Gloucester*, 110 Mass. 491.

<sup>4</sup> *Williams v. Wilcox*, 8 Ad. & El. 314; *Dimes v. Petley*, 15 Q. B. 276; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *Atlee v. Packet Co.*, 21 Wall. 389; 2 Dill 479; *State v. Freeport*, 43 Maine, 198; *Knox v. Chaloner*, 42 Maine, 150; *State v. Sturtevant*, 21 Maine, 9; *State v. Godfrey*, 24 Maine, 232; *People v. St. Louis*, 5 Gilman, 351; *Hogg v. Zanesville Manuf. Co.*, *Wright (Ohio)*, 139; *Clark v. Lake*, 1 Scam. 229; *Porter v. Allen*, 8 Ind. 1; *Olson v. Merrill*, 42 Wis. 203; *Attorney General v. Eau Claire*, 37 Wis. 400; *Walker v. Shepardson*, 2 Wis. 384; 4 Wis. 486; *Barnes v. Racine*, 4 Wis. 454; *Yates v. Judd*, 18 Wis. 118; *In re Eldred*, 46 Wis. 530; *Newark Plank Road Co. v. Elmer*, 1 Stock. 754, 790; *Commonwealth v. Church*, 1 Penn. St.

105; *Hart v. Albany*, 9 Wend. 571; 8 Paige, 213; *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 38 Barb. 282; *Moore v. Commissioners*, 32 How. Pr. 184; *Attorney General v. Stevens*, Sax. (N. J.) 370; *Tucker v. Burlington Co.*, id. 282; *Allen v. Monmouth Co.*, 2 Beas. 68; *Atkinson v. Philadelphia R. Co.*, 14 Haz. Pa. Reg. 10; *Dimmett v. Eskridge*, 6 Munf. 308; *State v. Dibble*, 4 Jones (N. C.), 107; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Rhodes v. Otis*, 33 Ala. 578; *South Carolina R. Co. v. Moore*, 28 Ga. 398; 24 Ga. 418; *Gold v. Carter*, 9 Humph. 369; *Commonwealth v. Knowlton*, 2 Mass. 530; *Borden v. Vincent*, 24 Pick. 301; *Franklin Wharf Co. v. Portland*, 67 Maine, 46; *Plank Road Co. v. Elmer*, 9 N. J. Eq. 754; *People v. Gutches*, 48 Barb. 656; *Selman v. Wolfe*, 27 Texas, 68; *Sherlock v. Bainbridge*, 41 Ind. 35; *Morrison v. Thurman*, 17 B. Mon. 249; 14 id. 371; *Macon R. Co. v. Pate*, 50 Ga. 156; *State v. Merrit*, 35 Conn. 314; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *Enos v. Hamilton*, 24 Wis. 658; 27 Wis. 256.

water, for the encouragement of navigation and commerce, although the effect may be to confer privileges which are wholly private and exclusive in their nature.<sup>1</sup>

§ 141. Tolls—Right to—How acquired.—Hindrances to navigation, and the necessity for legislative sanction to legalize them, may also arise by the exaction of charges and tolls from those who navigate the sea or public rivers. It is a principle of the common law that no man can take a settled and constant toll, even on his own private land, for a common passage without the king's license.<sup>2</sup> Nor is a grant from the Crown sufficient for this purpose, unless some benefit is shown to the community at large which forms a just consideration.<sup>3</sup> "If," says Hale, C. J., "any man will prescribe for a toll upon the sea, he must allege a good consideration; because by Magna Charta and other statutes every one has a right to go and come upon the sea without impediment."<sup>4</sup> The ownership of the soil of an arm of the sea, which is not a port, does not support a claim for tolls, even on the ground of immemorial

<sup>1</sup> *Ante*, § 122; Phipp's Appeal, 28 Md. 380; Mayor v. State, 4 Ga. 26; Martin v. O'Brien, 34 Miss. 21; Yaddin Navigation Co. v. Benton, 2 Hawks (N. C.), 10; Cottrill v. Myrick, 12 Maine, 222; Hannibal v. Winchell, 54 Mo. 172; Frisbie v. McClernin, 38 Cal. 568; Templeton v. Coburn, 48 Cal. 563; Eldridge v. Cowell, 4 Cal. 41; Rush v. Jackson, 24 Cal. 308; Payne v. English, 79 Cal. 540; Stevens v. Walker, 15 La. Ann. 577; Pontchartrain R. Co. v. Orleans Navigation Co., 15 La. Ann. 404; Delaware Canal Co. v. Lawrence, 2 Hun, 163; Hoeft v. Seaman, 38 N. Y. Sup. Ct. 62; Jeffersonville v. Louisville Ferry Co., 27 Ind. 100; Bingham v. Doane, 9 Ohio, 165; Snyder v. Rockport, 6 Ind. 237. Under a charter by which the construction of a railroad is authorized "to the place of shipping lumber" on a navigable river, the road may be extended into the water to a convenient point for ship-

ment. Peavey v. C. R. Co., 30 Maine, 498.

<sup>2</sup> Hale, De Jure Maris, ch. 3; Hargrave's Law Tracts, 10, 46, 73, 78.

<sup>3</sup> Haspurt v. Wills, 1 Mod. 47; 1 Sid. 454; 1 Vent. 71; 2 Keb. 624, 665; Vinkensterne v. Ebdon, 1 Salk. 248; 1 Ld. Raym. 384; Hill v. Smith, 4 Taunt. 520; Falmouth v. George, 5 Bing. 286; Brett v. Beales, 10 B. & C. 508; Gann v. Whitstable Free Fishers, 11 H. L. Cas. 192; Heddy v. Wheelhouse, Cro. Eliz. 558; Nottingham v. Lambert, Willes, 111; Exeter v. Warren, 5 Q. B. 773; Kingston Docks v. La Marche, 8 B. & C. 42; Jenkins v. Harvey, 1 C. M. & R. 877; 1 Gale, 23. See Woolrych on Waters, 299, 303; Gunning on Tolls, *passim*; Coulson & Forbes on Waters, ch. 9.

<sup>4</sup> Warren v. Prideaux, 1 Mod. 105; Woolrych on Waters, 237; Matson v. Scobell, 4 Burr. 2258; Juxon v. Thornhill, Cro. Car. 132.

usage, from those who, in the usual course of navigation, exercise there the common rights of passage and anchorage.<sup>1</sup> The making of a port is, however, a consideration for toll;<sup>2</sup> so is the keeping of a capstan and rope necessary to assist vessels;<sup>3</sup> the maintenance of lights, beacons, or buoys;<sup>4</sup> the cleansing of a river;<sup>5</sup> the repairing of a port,<sup>6</sup> or the liability to repair the same, in case repairs are not needed.<sup>7</sup> And the right to collect such a charge, within the limits of a port, may be acquired by prescription.<sup>8</sup> In *Foreman v. Whitstable Free Fishers*,<sup>9</sup> the respondents' claim to anchorage dues was

<sup>1</sup> *Gann v. Free Fishers*, 11 H. L. Cas. 193; 19 C. B. N. s. 802; *Colchester v. Brooke*, 7 Q. B. 339; *Woolrych on Waters*, 299; *Nottingham v. Lambert*, Willes, 111; *Wilkes v. Kirby*, 1 Lutw. 490; 2 id. 519; Com. Dig. tit. Toll Thorough, and Prerogative, D. 48.

<sup>2</sup> *Ibid.*; *Yarmouth v. Eaton*, 3 Burr. 1402; Hale, *De Jure Maris*, ch. 8; *Hargrave's Law Tracts*, 51; *Exeter v. Warren*, 5 Q. B. 773; *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 281. See *London v. Hunt*, 2 Lev. 37; *Wilkes v. Kirby*, 2 Lutw. 1519; *Woolrych on Waters*, 300; *Topsell v. Ferrers*, Hob. 175; *London v. Hunt*, 3 Lev. 37.

<sup>3</sup> *Falmouth v. George*, 5 Bing. 286; *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 285.

<sup>4</sup> *Ibid.*; *Foreman v. Whitstable Free Fishers*, L. R. 2 C. P. 688; L. R. 3 C. P. 586; L. R. 4 H. L. 266; *Trinity House v. Sorsbie*, 3 T. R. 768, n. (a); *Matson v. Scobell*, 4 Burr. 2258; *Poole v. Johnson*, 2 W. Bl. 764; *Woolrych on Waters*, 304; *Smithett v. Blythe*, 1 B. & Ad. 509; *Trinity House v. Clark*, 4 M. & S. 88; *Hamilton v. Stow*, 5 B. & A. 649; *Rex v. Jones*, 8 East, 451; *Trinity House v. Staples*, 2 Chitty, 689; *Vallego v. Wheeler*, Cowper, 143; *Rex v. Rebowe*, id. 583; *Reg. v. Durham*, 2 El. & El. 230; *Rex v. Tynemouth*, 12 East, 46; *Rex v. Coke*, 5 R. & C. 797.

<sup>5</sup> *Ibid.*; *Haspurt v. Wills*, 1 Mod. 47; *King v. London*, 4 T. R. 21.

<sup>6</sup> *Casher v. Holmes*, 2 B. & Ad. 592; *Jones v. Phillips*, 7 Ex. 85; *Wilson v. Robertson*, 4 El. & Bl. 923; *Ribble Navigation Co. v. Hargraves*, 17 C. B. 285; *Harvey v. Lyme Regis*, L. R. 4 Ex. 260.

<sup>7</sup> *Vinkensterne v. Ebdon*, 1 Salk. 248; 1 Ld. Raym. 384; 5 Mod. 359; *Yarmouth v. Eaton*, 3 Burr. 1402; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93; *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 266; L. R. 3 C. P. 586; L. R. 2 C. P. 688.

<sup>8</sup> *Woolrych on Waters*, 238, 305; *Exeter v. Warren*, 5 Q. B. 773; *London v. Hunt*, 3 Lev. 37; *Exeter v. Trimlet*, 2 Wils. 95; *Wilkes v. Kirby*, 2 Lutw. 1519; *Yarmouth v. Eaton*, 3 Burr. 1402; *Sargent v. Reed*, 2 Stra. 1228; 1 Wils. 91; *Colton v. Smith*, 1 Cowper, 47; *Falmouth v. George*, 5 Bing. 286; *Pelham v. Pickersgill*, 1 T. R. 660; *Richards v. Bennett*, 1 B. & C. 223; *Nottingham v. Lambert*, Willes, 111; *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 281; *Whitstable Free Fishers v. Foreman*, L. R. 2 C. P. 688; *Jenkins v. Harvey*, 1 Cr. M. & R. 877. A mortgage of harbor duties may be an interest in land. *Re Christmas*, 34 W. R. 8.

<sup>9</sup> L. R. 4 H. L. 266; L. R. 3 C. P. 578; L. R. 2 C. P. 688. See *Aiton v. Stephen*, 1 App. Cas. 456; *Durham v. Bishopwearmouth*, 2 El. & El. 230.

maintained upon evidence of their ownership of the soil of the anchorage, of the maintenance of buoys and beacons, and the immemorial payment of tolls for merchandise and anchorage, these facts being held sufficient to warrant the inference that a port had once existed, although the place in question was not artificially formed, but was a natural roadstead, imposing no obligation on the owner to repair it and keep it accessible, so as to form a consideration for the toll demanded.

§ 142. **Same — Under statutes.**— In general, and especially in this country, where grants from the Crown and prescriptive rights of this character are comparatively unknown, a toll, being in the nature of a common charge upon the public, can be exacted for passing upon the sea or upon rivers only under the sanction of acts of the legislature.<sup>1</sup> Such acts will be effectual to enforce a toll anywhere within their operation.<sup>2</sup> The franchise of collecting wharfage,<sup>3</sup> or of taking tolls upon public bridges, ferries and canals,<sup>4</sup> is a part of the sovereign power reserved to the States and not delegated to the general government.<sup>5</sup> But under the constitution and laws of the United States, the States or municipal corporations cannot impose taxes on vessels mooring at wharves or the banks of navigable rivers, except as a compensation for the advantage gained and the expense of maintaining them.<sup>6</sup> A riparian pro-

<sup>1</sup> *Kingston Docks v. La Marche*, 8 B. & C. 42; *Wadsworth v. Smith*, 11 Maine, 278; *Olcott v. Banfill*, 4 N. H. 537; *State v. Olcott*, 6 N. H. 74; *McKee v. Grand Rapids Ry. Co.*, 41 Mich. 274, 279; *Pennsylvania R. Co. v. National Ry. Co.*, 8 C. E. Green, 441; *Camden R. Co. v. Briggs*, 2 Zab. 623; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Blake v. Winona R. Co.*, 19 Minn. 418; *Boykin v. Shaffer*, 13 La. Ann. 129; *Turnpike Co. v. Illinois*, 96 U. S. 63; *Bonaparte v. Camden R. Co.*, Bald. C. C. 205; *The Geneva*, 16 Fed. Rep. 874; *State v. Real Estate Bank*, 5 Ark. 595; *McPheeters v. Merimac Bridge Co.*, 28 Mo. 465; *Turnpike Road Co. v. Campbell*, 44 Cal. 89; *State v. Lake*, 8 Nev. 272. See *Reg. v. Salisbury*, 8 Ad. & El. 716; *Duluth Lumber Co. v. St. Louis Boom Co.*, 17 Fed. Rep. 419.

<sup>2</sup> *Woolrych on Waters*, 299. A bridge company chartered by a single State cannot collect toll from a person who passes over a part of the bridge which is beyond the limits of the State, unless there is an express promise to pay. *Middle Bridge Co. v. Marks*, 26 Maine, 326; *South Carolina R. Co. v. Jones*, 4 Rich. Eq. (S. C.) 459; *Claremont Bridge Co. v. Royce*, 42 Vt. 730.

<sup>3</sup> *Pelham v. Woolsey*, 16 Fed. Rep. 418.

<sup>4</sup> *Morris v. State*, 62 Texas, 728.

<sup>5</sup> *Hudson v. State*, 3 Zab. 206; 4 Zab. 718.

<sup>6</sup> *Cannon v. New Orleans*, 20 Wall. 579; *Packet Co. v. Keokuk*, 95 U. S.

prietor may open or improve an unnavigable stream, or excavate a canal, upon his own land and for his own accommodation, and refuse to permit others to use it without making compensation.<sup>1</sup> But the owner of either or both banks of a stream, although he may exclude the public therefrom and prohibit vessels and boats from landing thereon, could not maintain a public ferry,<sup>2</sup> a lock in aid of navigation,<sup>3</sup> or a wharf,<sup>4</sup> and collect a settled toll from all who use it, without prescription time out of mind, a charter from the king, or, in this country, the consent of the legislature. To establish a

80; *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, id. 480; *Guy v. Baltimore*, id. 484; *St. Martinville v. The Mary Lewis*, 32 La. Ann. 1293; *New Orleans v. Wilmot*, 31 La. Ann. 65; *Huse v. Grover*, 119 U. S. 543; *ante*, § 35; *New Orleans R. Co. v. Ellerman*, 105 U. S. 166.

<sup>1</sup> Hale, *De Jure Maris*, ch. 8; Hargrave's *Law Tracts*, 9, 10; *Wadsworth v. Smith*, 11 Maine, 278; *Dwinel v. Barnard*, 28 Maine, 554; *Harvey v. Potter*, 19 La. Ann. 264. A tow boat has not such relation to a vessel in tow as to make it liable for tolls authorized by statute and due from the towed vessel for passing through a private channel. *The Fox*, 4 Woods, 199.

<sup>2</sup> *Post*, § 144; *Mills v. St. Clair Co.*, 8 How. 581; *Conway v. Taylor*, 1 Black, 608; *Pennsylvania R. Co. v. National Ry. Co.*, 23 N. J. Law, 441; *Prosser v. Wapello Co.*, 18 Iowa, 327; *Trustees v. Tatman*, 18 Ill. 27; *Nashville Bridge Co. v. Shelby*, 10 Yerger, 280; *McRoberts v. Washburne*, 10 Minn. 28; *Norris v. Farmers' Co.*, 6 Cal. 590; *Henshaw v. Supervisors*, 19 Cal. 150; *Enfield Toll Bridge Co. v. Hartford R. Co.*, 17 Conn. 40, 64; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 170; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 229; *Fitch v. New Haven Co.*, 80 Conn. 39; *Stark v. Miller*, 8 Mo. 470; *Young v.*

*Harrison*, 6 Ga. 130; *Greer v. Haugabook*, 47 Ga. 282; *Murray v. Menifee*, 20 Ark. 561; *Cloyes v. Keatts*, 18 Ark. 19; *Bell v. Clegg*, 25 Ark. 26; *Haynes v. Wells*, 26 Ark. 464; *Prosser v. Wapello County*, 18 Iowa, 327; *Pipkin v. Wynns*, 2 Dev. (N. C.) 402. A grant from the State of land on a river, "with the appurtenances," conveys no right to maintain a public ferry. *Harrison v. Young*, 9 Ga. 859; 2 Black. Com. 38, 236. In *Braddock Ferry Co.'s Appeal*, 3 Penny. (Pa.) 82, 86, the master, in an opinion accepted by the court, after referring to the legislation of Pennsylvania, said: "The conclusion to be drawn is that the right to keep and maintain a public ferry belonged to every riparian owner, so long as it did not conflict with any exclusive grant. The paucity of exclusive grants over the Monongahela, Allegheny, and Ohio rivers, compared with the number of ferries we know to be maintained over these streams, leads to the irresistible conclusion that the right to maintain a public ferry was and is common to all, and restricted only when interfering with special grants; otherwise, the river was and is a highway of wrong-doers."

<sup>3</sup> *Boykin v. Shaffer*, 13 La. Ann. 129.

<sup>4</sup> *Ante*, § 120.

toll, the channel or passage must be open, for a fixed compensation, to the use of all who may have occasion to use it, and must have become such a common way, by the owner's consent, that he cannot maintain an action of trespass against those who use it and are willing to pay the prescribed toll.<sup>1</sup> This general right, in favor of those paying toll, is, however, subject to reasonable limitations. If, for example, a company, authorized to construct a canal, is bound to keep it in good order, it doubtless has necessarily discretionary powers essential to regulate the canal and its navigation, and, acting in good faith, may exercise these powers so as to exclude steamers if they injure the canal and impede the navigation.<sup>2</sup>

§ 143. *Same — Same.*— The provisions in State constitutions and bills of rights, prohibiting the taking of private property without due process of law or without compensation, do not impair the power of State legislatures to regulate compensation in the shape of tolls.<sup>3</sup> Nor are the States prevented by their constitutions, or by the commerce clause of the federal constitution, in the absence of Congressional action thereunder, or by that prohibiting tonnage duties, from improving their rivers or delegating this power to others.<sup>4</sup> State legis-

<sup>1</sup> *Dwinel v. Barnard*, 28 Maine, 554; *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *Walker v. Jackson*, 10 M. & W. 161; *Bonaparte v. Camden & Amboy R. Co.*, Bald. C. C. 205; *Per-rine v. Chesapeake Canal Co.*, 9 How. 172. See *Boston & Roxbury Mill Dam v. Newman*, 12 Pick. 476; *Commonwealth v. Wilkinson*, 16 Pick. 175.

<sup>2</sup> See *Sheldon v. New Orleans Canal Co.*, 9 Rob. (La.) 360.

<sup>3</sup> *Munn v. People*, 69 Ill. 80; *Munn v. Illinois*, 94 U. S. 113; *Burlington v. Beasley*, id. 310; *Peik v. Chicago Ry. Co.*, 94 U. S. 164; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288; 53 Mich. 593; *Blake v. Winona R. Co.*, 19 Minn. 418; *Aborn v. Dubuque Mining Co.*, 48 Ill. 140, 144. See *Androscoggin Booms v. Haskell*, 7

Maine, 474; *Middlesex Turnpike Co. v. Freeman*, 14 Conn. 91.

<sup>4</sup> *Ante*, § 85; *Withers v. Buckley*, 20 How. 84; *United States v. Des Moines River Nav. Co.*, 43 Fed. Rep. 1; *Huse v. Glover*, 15 id. 292; 119 U. S. 543; *Thompson v. Androscoggin River Co.*, 58 N. H. 108; *Chicago v. McGinn*, 51 Ill. 266; *Carondelet Canal Co. v. Parker*, 29 La. Ann. 430; *Kellogg v. Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500; *Risley v. Farwell*, 4 Chand. (Wis.) 106; *Fall v. Sutter*, 21 Cal. 237; *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. 71; *Spring v. Russell*, 7 Maine, 273; *Moor v. Veazie*, 32 Maine, 343; 31 Maine, 360; 14 How. 568; *Knox v. Chaloner*, 42 Maine, 156. See *Anderson v. Hill*, 54 Mich. 477. Power reserved by the government to regu-



latures may determine the mode and extent of such improvements; may sanction the construction and maintenance of dams and locks upon navigable streams, or the removal of obstructions from the channel, for the purpose of improving the navigation or of facilitating the passage and collection of logs and rafts; and may authorize persons or corporations erecting such structures to collect reasonable tolls for the increased facilities thus afforded for public travel and transportation.<sup>1</sup> The privilege thus created is a franchise, and it is necessary to its validity that the grantee shall be certain. A statute which purported to grant the right to collect tolls upon logs floated in a navigable river, to any person or corporation which should improve the navigation of such river in the manner prescribed in the statute, is void for want of a certain grantee.<sup>2</sup> If the State, or its agents or grantees, in improving the navigation, takes, flows, or otherwise injures private property, compensation must be afforded therefor.<sup>3</sup>

late tolls is not lost by non-user. *Chicago R. Co. v. Iowa*, 94 U. S. 155.

<sup>1</sup> *Ibid.*; *Attorney General v. Eau Claire*, 37 Wis. 400; *Risley v. Farwell*, 4 Chand. (Wis.) 106; *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 265; *Tewksbury v. Schulenberg*, 41 Wis. 584; 48 Wis. 577; *Wisconsin v. Eau Claire*, 40 Wis. 533; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 287; 44 Wis. 295; *Osborne v. Knife Falls Boom Co.*, 32 Minn. 412; *American Dock Co. v. Public School Trustees*, 39 N. J. Eq. 409; *Susquehanna Boom Co. v. Dubois*, 58 Penn. St. 182; *McKeen v. Delaware Division Canal Co.*, 49 Penn. St. 424; *White Deer Creek Improvement Co. v. Sassaman*, 67 Penn. St. 415; *Hart v. Hill*, 1 Whart. 136; *Boykin v. Shaffer*, 13 La. Ann. 129; *McReynolds v. Smallhouse*, 8 Bush, 447; *Simpson County Court v. Arnold*, 7 Bush, 354; *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155; *People v. New York Ferry Co.*, 68 N. Y. 71; *Muskegon Booming Co. v. Evart Booming Co.*, 34 Mich. 462; *Ryerson v. Utley*,

16 Mich. 269; *Plecker v. Rhodes*, 30 Gratt. 795; *Moor v. Veazie*, 14 How. 568; 32 Maine, 343; 31 Maine, 360. Such tolls are not taxes. *Manistee River Improvement Co. v. Sands*, 53 Mich. 593; 123 U. S. 288. As to improvements in a river by an improvement company beyond the State line, see *Abbott v. Baltimore Steam Packet Co.*, 1 Md. Ch. Dec. 542. If a corporation for the improvement of a boundary river between States is chartered in both States, it may be sued in the State in which its principal place of business is, and its principal officers reside. *Culbertson v. Wabash Navigation Co.*, 4 McLean, 544. See *State v. St. Croix Boom Co.*, 60 Wis. 565.

<sup>2</sup> *Ibid.*; *Sellers v. Union Lumbering Co.*, 39 Wis. 525; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 8 Hun, 292.

<sup>3</sup> *Thompson v. Androscoggin River Co.*, 58 N. H. 108; *Orr v. Quimby*, 54 N. H. 590; *Wood v. Nashua Manuf. Co.*, 5 N. H. 467; *Lebanon v. Alcott*, 1 N. H. 339; *Moor v. Veazie*, 81



Statutes authorizing bridges, booms, and similar structures are not construed as authorizing the taking of the private property of riparian proprietors without their consent, further than is necessary to give a reasonable construction to the act.<sup>1</sup> If a corporation is created "for making, laying and maintaining side booms in suitable and convenient places in a river," it has no authority to enter upon private lands adjoining the river without the owner's consent.<sup>2</sup> The State or its grantees are not liable for remote or incidental injuries to individuals, caused by improving the navigation of those rivers which are public property,<sup>3</sup> or for injuries, however serious, which,

Maine, 360; *White Deer Creek Improvement Co. v. Sassaman*, 67 Penn. St. 415; *Sharpless v. Philadelphia*, 21 Penn. St. 147, 170; *Schuylkill Navigation Co. v. Freedley*, 6 Whart. 109; *Ten Eyck v. Delaware Canal Co.*, 18 N. J. L. 200; *Clay v. Pennoyer Creek Improvement Co.*, 34 Mich. 204; *Cooper v. Williams*, 5 Ohio, 391; *Ryan v. Brown*, 18 Mich. 196; *Hamilton v. Fond du Lac*, 40 Wis. 47; *Alexander v. Milwaukee*, 16 Wis. 247; *Steele v. Western Inland Lock Navigation*, 2 Johns. 283. See *Chicago v. McGraw*, 75 Ill. 566; *Nash v. Upper Appomattox Co.*, 5 Gratt. 332; *James River Co. v. Thompson*, 3 Gratt. 270; *Avery v. Police Jury*, 12 La. Ann. 554; *Walker v. Board of Public Works*, 16 Ohio, 540. If the water at a public ford is raised by the dam of a navigation company chartered by the State so as to make the ford useless, the public right is restored upon the destruction of the dam. *Crump v. Mims*, 65 N. C. 767; *Bisher v. Richards*, 9 Ohio St. 495. Where a navigation company, empowered by private act to make a river navigable, to take tolls and to alter bridges and highways, leaving them or others as convenient in their place, it was held liable to repair a bridge built by them at a point where they had destroyed a ford by deepening the water. *Rex*

*v. Kent*, 18 East, 221; *Rex v. Lindsey*, 14 East, 317. If lumber in a boom is under the charge of its owners, and not of the boom company, which is empowered to charge boomage, the company is not liable for injury not caused by its negligence, to lands within the limits of the boom upon which the lumber floats on breaking adrift. *Dever v. South Bay Boom Co.*, 1 Pugsley (N. B.), 109.

<sup>1</sup> *Hood v. Dighton Bridge*, 3 Mass. 263; *Thatcher v. Dartmouth Bridge*, 18 Pick. 501.

<sup>2</sup> *Perry v. Wilson*, 7 Mass. 393.

<sup>3</sup> *Henly v. Lyme*, 5 Bing. 91; *Rex v. Pegham*, 5 B. & C. 350; *British Cast Plate Manufacturers v. Meredith*, 4 T. R. 794; *Lansing v. Smith*, 8 Cowen, 146; *Spring v. Russell*, 7 Greenl. 273; *Parker v. Cutler Mill Dam Co.*, 20 Maine, 353; *Moor v. Veazie*, 31 Maine, 360; *Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247; *Tensman v. Belvidere Delaware Railroad Co.*, 26 N. J. L. 148; *Hollister v. Union Co.*, 9 Conn. 436; *Hooker v. New Haven Co.*, 15 Conn. 323; *Alexander v. Milwaukee*, 16 Wis. 247; *Commonwealth v. Fisher*, 1 Penn. 462; *Hart v. Hill*, 1 Whart. 124, 136; *Zimmerman v. Union Canal Co.*, 1 Watts & Serg. 346; *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. 71; *Lehigh Bridge Co. v. Lehigh*

being common to all others similarly situated, result from the regulation of the navigation.<sup>1</sup> Tolls may be authorized for the use of a stream, the navigation of which has been improved, but which was navigable in its natural condition, if such navigation is thereby facilitated.<sup>2</sup> But tolls cannot be exacted for the passage of rafts at high water, if the navigation is then unobstructed and the rafts do not use the locks,<sup>3</sup> or for the use of that part of a stream where the dams or other improvements have been destroyed and not rebuilt.<sup>4</sup>

§ 144. *Same — Same.*— The power of a corporation to demand toll, when chartered, like a canal company, for the purposes of public transportation, depends upon the terms of its charter and not upon the rules of the common law entitling the owner of property to demand such compensation and from such persons using his property as he may elect.<sup>5</sup> If certain rates of toll are fixed by the charter of a corporation, a subsequent act, inflicting penalties on the corporation for exceeding the charter rates, is not a violation of the contract of the

Coal Co., 4 Rawle, 9; *Bell v. McClintock*, 9 Watts, 119; *Bald Eagle Boom Co. v. Sanderson*, 81 Penn. St. (Pt. 2) 402; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Schuylkill Navigation Co. v. Freedley*, 6 Whart. 109; *Newport Bridge Co. v. Foote*, 9 Bush, 264; *Barney v. Keokuk*, 94 U. S. 324; *Canal Appraisers v. People*, 17 Wend. 571; 13 id. 355; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Coster v. Albany*, 43 N. Y. 399; 52 Barb. 276; *Waddell v. New York*, 8 N. Y. 95; *Chapman v. Albany Railroad Co.*, 10 N. Y. 360; *Ely v. Rochester*, 26 N. Y. 133; *Sweet v. Troy*, 62 N. Y. 630; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Spring v. Russell*, 7 Maine, 273; *Parker v. Cutler Mill Dam Co.*, 20 Maine, 353.

<sup>1</sup> *Ante*, § 122. When a company is authorized by the State to improve the navigation of a stream, subsequent purchasers from the State are

not entitled to damages for a diversion of the water of the stream by the company, for the purpose of improving the navigation. *Black River Improvement Co. v. La Crosse Booming Co.*, 54 Wis. 659. See *Same v. Ketchum*, id. 318. A canal cut for the purpose of improving the navigation of a stream may be dedicated to the public. *Weatherby v. Meiklejohn*, 56 Wis. 73.

<sup>2</sup> *Nelson v. Cheboygan Slackwater Navigation Co.*, 44 Mich. 7. In this case Cooley, J., doubted whether the State can give to private parties the control of a navigable stream for improvement, with power to charge toll at discretion.

<sup>3</sup> *Green River Nav. Co. v. Palmer*, 83 Ky. 646.

<sup>4</sup> *Lehigh Coal & Nav. Co. v. Brown*, 100 Penn. St. 338.

<sup>5</sup> *Perrine v. Chesapeake Canal Co.*, 9 How. 172.

charter, and is valid.<sup>1</sup> The right to impose toll, conferred upon a company, in consideration of its undertaking an enterprise for the public benefit, is not lost by reason of the fact that the work does not prove beneficial,<sup>2</sup> or that the improvements mentioned in the statute are not in all respects completed,<sup>3</sup> when such condition is not prescribed by its charter;<sup>4</sup> and the neglect or inability of a corporation to perform the duties required by its charter, although sufficient to produce a forfeiture, or to make it liable to indictment,<sup>5</sup> is a matter between the State and the corporation, which cannot be taken advantage of collaterally until it is judicially determined,<sup>6</sup>

<sup>1</sup> Camden Railroad Co. v. Briggs, 22 N. J. L. 623.

<sup>2</sup> Bennett's Branch Improvement Co.'s Appeal, 65 Penn. St. 242, 251; Susquehanna Boom Co. v. Dubois, 58 Penn. St. 182. See Commonwealth v. Allegheny Bridge Co., 20 Penn. St. 185; Carman v. Clarion River Navigation Co., 81 Penn. St. (Pt. 2) 412. See Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 43; Kellogg v. Union Co., 12 Conn. 18; Commonwealth v. Breed, 4 Pick. 460. Proprietors are liable for losses occasioned by want of ordinary care and the incapacity of their piers and booms to secure logs. Weld v. Androscoggin Side Booms, 6 Maine, 93. But they are entitled to toll on logs actually stopped, although other logs of the same owner are lost in consequence of the same defects. Side Booms v. Weld, 6 Maine, 105; Penobscot Boom Co. v. Baker, 16 Maine, 233; Penobscot Boom Co. v. Wadleigh, id. 235. Bridge-tolls may constitute an interest in land within the statute of 9 Geo. 2, ch. 36. *In re Davis*, 43 Ch. D. 27; *In re Christmas*, 55 L. T. N. S. 197.

<sup>3</sup> Tamar Navigation Co. v. Wagstaff, 4 B. & S. 288; Quincy Canal v. Newcomb, 7 Met. 276; Carmen v. Clarion River Navigation Co., 33 Leg. Int. 239; 2 W. N. C. 720. See *ante*,

§ 115; Port Credit Harbor Co. v. Jones, 5 Q. B. (Can.) 144.

<sup>4</sup> See Swift River Imp. Co. v. Brown, 77 Maine, 40.

<sup>5</sup> Lumbard v. Stearns, 4 Cush. 62; Commonwealth v. Newburyport Bridge, 9 Pick. 142. If a penalty is imposed by the statute incorporating a bridge company for unreasonably delaying or neglecting to raise the draw of the bridge, such delay or neglect does not operate as a forfeiture of the franchise. Commonwealth v. Breed, 4 Pick. 460. If the company builds its bridge and takes toll, it may be indicted before the expiration of the time specified for completing the bridge, for a failure to comply with the requirements of its charter. Commonwealth v. Newburyport Bridge, 9 Pick. 142. An indictment for neglect to provide a pier at the draw of the bridge should directly aver that a bridge has been built. Ibid. If a navigation company fails to improve the navigation of a stream as required by its charter, it will not be restrained by a court of equity from collecting the tolls allowed by the charter. The proper proceeding is by *quo warranto* at suit of the Commonwealth. Pixley v. Roanoke Navigation Co., 75 Va. 320.

<sup>6</sup> Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 46; Kel-

when the charter contains no reservation or condition with a view to the particular interests of individuals.<sup>1</sup> A corporation which is authorized by its charter to improve the navigation of a river, is not liable for injuries sustained by those who navigate the river, if it has not completed the improvement or charged toll,<sup>2</sup> or if the charter merely gives permission and does not create an obligation to make the improvement.<sup>3</sup> But, being so authorized, it is bound to keep the river in a navigable condition, in consideration of the tolls it receives, and is liable to a navigator who is injured by its neglect of such duty.<sup>4</sup> If real estate acquired by the corporation is necessary for the uses in which the public is concerned, it cannot be sold or taken on execution, apart from the incidents and burdens of the franchise, so as to give the purchaser a title divested of the obligations of the company.<sup>5</sup> In general,

*logg v. Union Co.*, 12 Conn. 20; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 173; *Pearce v. Olney*, 20 Conn. 557; *Lewiston Steam Mill Co. v. Richardson Lake Dam Co.*, 77 Maine, 387; *Hamilton v. Annapolis R. Co.*, 1 Md. 553; 1 Md. Ch. 107; *Commissioners v. State*, 9 Gill, 397; *New Central Coal Co. v. George Creek Coal Co.*, 87 Md. 537; *Commonwealth v. Breed*, 4 Pick. 460; *Shand v. Gage*, 9 S. C. 187; *Young v. Harrison*, 6 Ga. 130; *Buncombe Turnpike Co. v. McCarson*, 1 Dev. & Bat. (N. C.) 306; *People v. Reclamation District*, 53 Cal. 346; *Sterrett v. Houston*, 14 Texas, 158; *State v. New Orleans Navigation Co.*, 7 La. Ann. 679; *Osborne v. Knife Falls Boom Co.*, 32 Minn. 412. Upon a proceeding by the State to have a valid franchise declared forfeited or abandoned, the State has the burden of proof. *State v. Haskell*, 14 Nev. 209. No action is necessary to enforce or to judicially establish a forfeiture which is expressly declared by statute. *Upham v. Hosking*, 62 Cal. 250. A franchise may be adjudged forfeited upon proof of long-continued and intentional non-user, but only

in a proceeding to test the right; and a court of equity will not grant an injunction when the effect will be to work, by indirection, a forfeiture of a charter, in which there is no provision for its termination. *Ottaquechee Woolen Co. v. Newton*, 57 Vt. 451.

<sup>1</sup>*Proprietors v. Hahn*, 28 Maine, 300; *Riddle v. Locks & Canals*, 7 Mass. 169.

<sup>2</sup>*James River Co. v. Early*, 13 Gratt. 541. This was an action of trespass on the case to recover the value of a boat and its cargo of salt, lost by striking a snag in the Kanawha river, on which the specified improvements were to be made at certain places only. The company was held not liable for the loss, which occurred at a place that it was not charged to keep in order. See *The Leona*, 67 Texas, 308.

<sup>3</sup>*Ante*, § 115; *Goodrich v. Chicago*, 20 Ill. 445; *Chicago v. McGraw*, 75 Ill. 566; *Mills v. Brooklyn*, 32 N. Y. 489; *Daniels v. Denver*, 2 Col. 669.

<sup>4</sup>*Tompkins v. Kanawha Board*, 21 W. Va. 224.

<sup>5</sup>*Gue v. Tide Water Canal*, 24 How.

if no provision is made in the charter, the franchise of incorporation, when granted for the purpose of constructing works of public utility, and collecting tolls, is a personal trust and not assignable by voluntary conveyance or forced sale;<sup>1</sup> but a legislative grant to a particular person, his associates and assigns, gives him the right to select the persons to be associated with him in the enterprise.<sup>2</sup> If a private corporation holds an entire franchise for the improvement of the navigation of a river between certain points, with power to lease a portion of the works, a lessee of such portion holds subject to the liability to forfeiture of the entire franchise in case the lessor makes default in duly improving any other portion of the stream.<sup>3</sup> Failure on the part of the corporation to improve the streams, or keep them in order, as its charter prescribes, is not remediable in equity, but only by *quo warranto* at the suit of the State.<sup>4</sup>

§ 145. **Same — Same.**— Statutes imposing toll, being in derogation of common right, are strictly construed.<sup>5</sup> An act which authorizes the erection of a toll-bridge, and the purchase

257; *East Alabama Ry. Co. v. Doe*, 114 U. S. 353; *Gooch v. McGee*, 83 N. C. 59 (restricting *State v. Rivers*, 5 Ired. 297, and *Arthur v. Bank*, 9 S. & M. 394); *Ammand v. Turnpike Co.*, 13 Serg. & R. 210; *Railroad Co. v. Colwell*, 39 Penn. St. 337; *Foster v. Fowler*, 66 Penn. St. 27; *Youngman v. Railroad Co.*, 65 Penn. St. 278; *Morris Canal Co. v. Central R. Co.*, 1 C. E. Green, 419; *Coe v. Railroad Co.*, 10 Ohio, 372. See *Attorney General v. Roanoke Navigation Co.*, 84 N. C. 705. An execution sale of the booms and piers of a boom company passes no right to the leasehold of shores and flats used by the company. *Rollins v. Clay*, 33 Maine, 132.

<sup>1</sup> *Ibid.*; *Lord v. Oconto*, 47 Wis. 386; *People v. Duncan*, 41 Cal. 507; *O. R. Co. v. O. B. Co.*, 45 Cal. 365; *Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Tippets v. Walker*, 4 Mass. 595; *East Boston Freight R. Co. v.*

*Hubbard*, 10 Allen, 459, note; *Roper v. McWhorter*, 77 Va. 214; *Mille Lacs Improvement Co. v. Bassett*, 32 Minn. 375. The distinction is between the franchise to be a corporation and the franchise to maintain and operate the works; the latter may be mortgaged, etc. *Memphis R. Co. v. Railroad Commissioners*, 112 U. S. 609; *Ragan v. Aiken*, 9 Lea (Tenn.), 609. The mortgagee of the franchise, tolls, etc., after foreclosure, can sue only in the mortgagor's name. *Whiteside v. Bellchamber*, 22 C. P. (Can.) 241.

<sup>2</sup> *Powell v. Maguire*, 43 Cal. 11.

<sup>3</sup> *People v. Kankakee Improvement Co.*, 103 Ill. 491.

<sup>4</sup> *Pixley v. Roanoke Nav. Co.*, 75 Va. 320.

<sup>5</sup> *Sprague v. Birdsall*, 2 Cowen, 419; *Cayuga Bridge Co. v. Stout*, 7 Cowen, 33. As to town license for letting boats for hire, see *Poyer v. Desplaines*, 22 Ill. App. 576.

of flats adjoining, does not, as incident to the business of maintaining the bridge, give power to build and rent wharves;<sup>1</sup> and a company which is empowered to boom lumber, and to receive toll therefor, is not entitled to demand toll for driving lumber.<sup>2</sup> The business of improving the navigability of a river for the purpose of aiding the running of logs and timber therein, has a natural and legitimate connection with the business of running logs and timber in the river when improved; and it has accordingly been held that an act creating an improvement company, which was afterwards amended so as to include the running of logs and timber, and the collection of tolls on logs, is not obnoxious to a constitutional provision that statutes shall not contain more than one subject.<sup>3</sup> When a corporation is created for the purpose of mak-

<sup>1</sup>Toll Bridge Co. v. Osborne, 35 Conn. 7. Power given by statute to a municipal corporation to make by-laws "to regulate the anchorage, lading and unlading of vessels," does not authorize the imposition of a toll for anchorage. Reg. v. Dowling, Stevens' N. B. Digest, p. 87, pl. 4. And if such a corporation, being empowered by its charter to regulate the navigation, anchoring and fastening of vessels, and to make by-laws, etc., grants the right to plaintiff to extend a wharf and collect wharfage thereat, the corporation cannot by contract limit its power to make by-laws under its charter; and may, from time to time, make the plaintiff's grant subject to such by-laws as it deems necessary for vessels, as, e. g., that no vessel shall lie at that wharf with her bow to the south. Walker v. St. John, id. p. 87, pl. 5. A conveyance of a "bridge" across a certain stream, "together with the toll-house, stables, and outhouses of every description," and "all the privileges and appurtenances appertaining or in any wise belonging to said bridge," passes the land upon which the bridge and buildings are erected. Sparks v. Hess, 15 Cal. 186.

<sup>2</sup>Bangor Booming Co. v. Whiting, 29 Maine, 123.

<sup>3</sup>Yellow River Improvement Co. v. Arnold, 46 Wis. 214. Where, by a constitutional provision, the subject of every private or local bill was to be single and expressed in its title, the title of an act "to authorize the town to raise money to construct a town-dock," was held to indicate by reasonable intendment the power to charge wharfage, and the act was held not in that respect unconstitutional. Pelham v. Woolsey, 16 Fed. Rep. 418. See Hoboken v. Pennsylvania R. Co., 124 U. S. 656; Thomas v. Wabash Ry. Co., 40 Fed. Rep. 126; Astor v. New York Ry. Co., 113 N. Y. 93; Webb v. New York, 64 How. Pr. 10; Sweet v. Syracuse, 11 N. Y. S. 114; Richman v. Supervisors, 77 Iowa, 513; State v. Norris, 70 Md. 91; People v. Parks, 58 Cal. 624; Doane v. Weil, id. 334; David v. Portland, 14 Oregon, 98; Golden Canal Co. v. Bright, 8 Col. 144. A charter to build a toll-bridge, which is swept away and cannot stand, is not forfeited by erecting a strong levee with a small portion bridged for the passage of the water. Chandler v. State, 38 Ark. 197.



ing an impassable stream navigable, and no particular mode of accomplishing that result is indicated by the charter, it may be done by any of the known methods;<sup>1</sup> but the manner of doing the work pointed out by the charter, if at all, must be pursued.<sup>2</sup> If a grant from the State of the right to erect a toll-bridge or wharf, or to maintain a ferry across a river does not in terms restrict the right of the legislature to make similar grants to others, a subsequent charter authorizing another similar structure upon the same river does not violate any vested rights of those to whom the privilege is first granted, or require any provision for compensation to them, although the effect may be to lessen their tolls and profits by the diversion of tolls and travel.<sup>3</sup>

<sup>1</sup> *Canal Co. v. Railroad Co.*, 4 Gill & J. 1.

<sup>2</sup> *Farnum v. Blackstone Canal Co.*, 1 Sumner, 47. Injuries by a dam erected for the improvement of the navigation of a river are to be compensated in the manner provided by statute, if any, and not by action. *Calking v. Baldwin*, 4 Wend. 667.

<sup>3</sup> *Charles River Bridge v. Warren Bridge*, 11 Peters, 420; 6 Pick. 376; 7 Pick. 344; *Richmond R. Co. v. Louisa R. Co.*, 13 How. 71; *The Binghamton Bridge*, 3 Wall. 51; *Turnpike Co. v. State*, 3 Wall. 210; *Pennsylvania College Cases*, 13 Wall. 190, 214; *Fanning v. Gregoire*, 16 How. 524; *Conway v. Taylor*, 1 Black, 603; *Parrott v. Lawrence*, 2 Dillon, 332; *Hopkins v. Great Northern Ry. Co.*, 2 Q. B. D. 224; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 48; *Salem Turnpike Co. v. Lyme*, 18 Conn. 457; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Fitch v. New Haven R. Co.*, 30 Conn. 89; *White River Co. v. Vermont Central R. Co.*, 21 Vt. 590; *Mohawk Bridge Co. v. Utica R. Co.*, 6 Paige, 554; *Fort Plain Bridge Co. v. Smith*, 80 N. Y., 44; *Thompson v. New York R. Co.*, 3 Sandf. Ch. 625; *Aiken v. Western R. Co.*, 20 N. Y. 870; 30

*Barb.* 805; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547; *Re Union Ferry Co.*, 98 N. Y. 139; *Martin v. O'Brien*, 34 Miss. 21; *Canal Co. v. Railroad Co.*, 4 Gill & J. 1; *Lafayette Plankroad Co. v. New Albany R. Co.*, 18 Ind. 90; *Wright v. Shorter*, 56 Ga. 72; *Greer v. Hanga-book*, 47 Ga. 282; *McLeod v. Savannah R. Co.*, 25 Ga. 445; *Shorter v. Smith*, 9 Ga. 517; *Washington Toll Bridge Co. v. Beaufort*, 81 N. C. 491; *McRee v. Wilmington R. Co.*, 2 Jones (N. C.), 186; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; 20 id. 223; *Pratt v. Brown*, 8 Wis. 603; *Fall v. Sutter*, 21 Cal. 237; *Norris v. Farmers' Co.*, 6 Cal. 590; *Indian Canyon Road Co. v. Robinson*, 13 Cal. 519; *Richmond R. Co. v. Rogers*, 1 Duv. (Ky.) 138; *Lake v. Virginia R. Co.*, 7 Nev. 294; *Piatt v. Covington Bridge Co.*, 8 Bush, 31; *Chapin v. Crusen*, 31 Wis. 209; *Janesville Bridge Co. v. Stoughton*, 1 Pinney (Wis.), 667; *Ward v. Severance*, 7 Cal. 126; *Dyer v. Tuscaloosa Bridge*, 2 Porter, 296; *Gates v. McDaniel*, 2 Stew. (Ala.) 211; *Douglas County Road Co. v. Canyonville Road Co.*, 8 Oregon, 102, 108; *Canyonville Road Co. v. Stephenson*, id. 263; *Henderson v. Maybin*, 8 Rich. (S. C.)



§ 146. **Same — Exclusive privileges.**— If such a legislative grant gives, for an adequate consideration, privileges which are clearly exclusive, it amounts to a public pledge, and, being accepted by the grantee, has the force of a contract which the legislature has no constitutional power to impair.<sup>1</sup> Where, for instance, a company was authorized by its charter to construct and maintain a toll-bridge within certain defined limits, it was held that the franchise thus created could not be taken away by a statute which authorized another bridge within the same limits unless provision was made for compensation to the first grantee, as in other cases where private property is taken or vested rights are invaded under the right of eminent domain.<sup>2</sup>

153; *Trent v. Cartersville Bridge Co.*, 11 Leigh, 521; *Tuckahoe Canal Co. v. James River R. Co.*, id. 42; *Allen v. Buncombe Turnpike Co.*, 1 Dev. Eq. 119; 2 Dev. & Bat. Eq. 115. An act incorporating a ferry, toll-bridge or railroad is a private act. *Carrow v. Bridge Co.*, Phil. L. (N. C.) 118; *Burhop v. Milwaukee*, 21 Wis. 257. A grant by the State of the right "to dig, mine, and remove from the beds of navigable streams and waters within the State" certain minerals, on payment of one dollar per ton, does not convey an exclusive right. *Bradley v. So. Carolina Phosphate Co.*, 1 Hughes, 72. But see *Massot v. Moses*, 3 S. C. 168; *Doe v. Wood*, 2 B. & Ald. 724.

<sup>1</sup>So held, *e. g.*, of the exclusive privilege of supplying water to a city. *New Orleans W. W. Co. v. Rivers*, 115 U. S. 674; *Same v. Tammany W. W. Co.*, 14 Fed. Rep. 194; *Lehigh Water Co.'s Appeal*, 102 Penn. St. 515. So of a similar municipal contract. *Los Angeles v. Los Angeles City W. Co.*, 61 Cal. 65; *New Orleans W. Co. v. Louisiana Sugar Refinery Co.*, 85 La. Ann. 1111. See *Miss. & Rum River Boom Co. v. Prince*, 84 Minn. 79. Power granted by a special act to a corporation to improve the navigation of a river is not repealed by a

general law authorizing the incorporation of companies with similar powers. *Black River Improvement Co. v. La Crosse Booming Co.*, 54 Wis. 659; *Sinking Fund Commissioners v. Green Nav. Co.*, 79 Ky. 73. Or by a general act upon the same subject containing different provisions, if the acts can be reasonably construed so as to stand together. *Harrisburg v. Sheck*, 104 Penn. St. 53; *State v. Sturgess*, 9 Oregon, 537; 10 id. 58; *Justice v. Commonwealth*, 81 Va. 209; *Dismal Swamp Canal Co. v. Commonwealth*, id. 220. See *Schneider v. Staples*, 60 Wis. 167. A statute which grants to one person the privilege of erecting a weir in certain tide waters is not repealed or modified by a subsequent general act which gives to all others the same right under certain conditions precedent. *State v. Cleland*, 68 Maine, 258; *McKenna v. Edmundstone*, 91 N. Y. 231.

<sup>2</sup>*Ibid.*; *Piscataqua Bridge v. New Hampshire Bridge Co.*, 7 N. H. 35; *Crosby v. Hanover*, 86 N. H. 404; *Backus v. Lebanon*, 11 N. H. 19; *Johnson v. Crow*, 87 Penn. St. 184; *Hartford Bridge Co. v. East Hartford*, 10 How. 511; 16 Conn. 149; 17 Conn. 79, 98; *Enfield Toll Bridge Co. v. Hartford R. Co.*, 17 Conn. 40; *The Bingham-*

So, where the legislature granted the right to collect toll for a limited time, in consideration of the capital and labor to be expended in opening a canal through a slough which was not navigable, it was held that the grant could not be revoked without remunerating the grantee, and that he was entitled to collect toll after the expiration of the term.<sup>1</sup> So, also, if the proprietor of a wharf in a harbor is authorized by the State to extend the same into the channel to a harbor line, and, before the extension is made, a railroad company is incorporated with power to construct its road over the flats between the end of the wharf and the harbor line, the first act is not a mere revocable license but a grant which is not impaired by the act of incorporation.<sup>2</sup> But a statute which merely authorizes a corporation to open and widen a creek or stream for the public good is not a compact, and may be repealed by the legislature.<sup>3</sup> The grant by a State legislature of a charter for a ferry across a navigable river does not give the grantee any right to control the channel of the river or to prevent its improvement without compensation to him by the United States.<sup>4</sup> A grant of a bridge or ferry franchise, which is not in terms exclusive, does not preclude a subsequent grant, to other parties, of another franchise which impairs the value and takes away the profits of the first.<sup>5</sup> But a statute which authorizes lands to be taken for a railway must be construed strictly, and not ex-

ton Bridge, 3 Wall. 51; 27 N. Y. 87; Bridge Proprietors v. Hoboken Co., 1 Wall. 116; Hamilton Gas Light Co. v. Hamilton, 37 Fed. Rep. 132; Crocker v. New York, 21 Blatch. 197; Commonwealth v. New Bedford Bridge, 2 Gray, 339; Newburgh Turnpike Road v. Miller, 5 Johns. Ch. 101; Aiken v. Western R. Co., 20 N. Y. 370; Cayuga Bridge Co. v. Stout, 6 Wend. 85; Chenango Bridge Co. v. Lewis, 63 Barb. 111; Proprietors of Bridges v. Hoboken Land Co., 13 N. J. Eq. 81, 503; 1 Wall. 116; McRoberts v. Washburne, 10 Minn. 23; Norris v. Farmers' Co., 6 Cal. 590; Midland G. Co. v. Wilson, 28 N. J. Eq. 537; Fraser v. Drynan, 4 Allen (N. B.), 74.

<sup>1</sup> Grant v. Leach, 20 La. Ann. 239.

See New Orleans R. Co. v. Ellerman, 105 U. S. 166.

<sup>2</sup> Fitchburg Railroad v. Boston & Maine Railroad, 3 Cush. 58.

<sup>3</sup> Frederick v. Goshon, 30 Md. 436; Annapolis v. Harwood, 32 Md. 480; West Maryland R. Co. v. Patterson, 37 Md. 138.

<sup>4</sup> Lonergan v. Mississippi River Bridge Co., 2 McCrary, 451; Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508; Tugwell v. Eagle Pass Ferry Co., 74 Texas, 480; Hanger v. Little Rock Ry. Co., 52 Ark. 61; Belmont Bridge v. Wheeling Bridge, 138 U. S. 287; Broadnax v. Baker, 94 N. C. 675; New York v. Independent S. Co., 22 Fed. Rep. 801.

<sup>5</sup> Fall v. Sutter, 21 Cal. 237; Gibbes

tended to a taking for ferries.<sup>1</sup> And if a charter expressly provides that no other bridge or ferry shall be maintained on the same river within five miles either above or below the bridge which it authorizes, the distance is to be measured by the course of the river.<sup>2</sup> Such provision does not confer the right to close up existing public fords.<sup>3</sup> An exclusive ferry privilege is infringed upon by a free ferry,<sup>4</sup> or by a free bridge.<sup>5</sup> A statute which prohibits the establishment of private ferries within a certain distance from any public bridge does not prohibit private ferries within such distance from a public ferry.<sup>6</sup> The right to a ferry does not include the power to erect a bridge, nor does a right to build a bridge convey a ferry franchise.<sup>7</sup> A ferry does not necessarily infringe upon an exclusive right to maintain a bridge.<sup>8</sup> An exclusive right to maintain a toll-bridge is not infringed by the erection of a railroad bridge, or the maintenance of a railroad ferry, within the specified limit.<sup>9</sup> If the owner of an exclusive ferry franchise fails to properly accommodate the public, a court of equity may decline to aid him by enjoining the infringement of his right, and leave him to his action for damages.<sup>10</sup> Such exclusive right may be lost by estoppel, as by silently permitting another ferry or bridge to be completed at great expense.<sup>11</sup> The provision of a charter authorizing a railroad company to cross a river by a bridge or ferry, "as may be most convenient," regards the convenience both of the navigation and the

*v. Beaufort*, 20 S. C. 213. See *Innis v. Cedar Rapids Ry. Co.*, 76 Iowa, 165. See *Burkhalter v. Edwards*, 16 Ga. 593; *Texas Ry. Co. v. Baton Rouge*, 86 Fed. Rep. 845.

<sup>1</sup> *Sandford v. Martin*, 31 Iowa, 67.

<sup>2</sup> *McLeod v. Burroughs*, 9 Ga. 213; *Bodley v. Taylor*, 5 Cranch, 191; *Littlepage v. Fowler*, 11 Wheat. 215.

<sup>3</sup> *Compton v. Waco Bridge Co.*, 62 Texas, 715. See *Wright v. Morris*, 43 Ark. 193.

<sup>4</sup> *Chiapella v. Brown*, 14 La. Ann. 189; *Smith v. Harkins*, 3 Ired. Eq. 613.

<sup>5</sup> *Norris v. Farmers' & Teamsters' Co.*, 6 Cal. 590; *Gates v. McDaniel*, 2 Stew. (Ala.) 211.

<sup>6</sup> *Greer v. Haugabook*, 47 Ga. 282.

<sup>7</sup> *Cooper v. Athens*, 53 Ga. 638; *Hall v. Boyd*, 14 Ga. 1; *Shorter v. Smith*, 9 Ga. 517; *Sandford v. Martin*, 31 Iowa, 67.

<sup>8</sup> *Parrott v. Lawrence*, 2 Dillon, 332; *Piatt v. Carrington Bridge Co.*, 8 Bush, 31; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

<sup>9</sup> *Lake v. V. & S. R. Co.*, 7 Nev. 294; *Mayor v. New England Transportation Co.*, 14 Blatch. 159; *Enfield Bridge Co. v. Hartford R. Co.*, 17 Conn. 40; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.

<sup>10</sup> *Ferrel v. Woodward*, 20 Wis. 458.

<sup>11</sup> *Fremont Ferry Co. v. Dodge Co.*, 6 Neb. 18.

railroad; and, if there is nothing in the charter to the contrary, the decision as to which will be most convenient rests with the railroad company, which is not deprived of the right to build a bridge by the fact that a bridge would be less convenient to navigation than a ferry.<sup>1</sup> A toll-bridge corporation, if its charter is not exclusive, has no cause of action against others who open a winter road near by across the river with the intention of diverting travel.<sup>2</sup> A charter which grants to a corporation the exclusive right to supply a city with water is a contract which the State cannot impair under the Federal constitution.<sup>3</sup>

§ 147. **Same — Remedies.**— At common law a right of distress is incident to all tolls.<sup>4</sup> Persons or companies authorized to receive tolls may also recover upon an express promise to pay;<sup>5</sup> and if the statute provides no remedy for non-payment, the law will imply a promise to pay, which will sustain an action,<sup>6</sup> even though the defendant claimed an exemption from toll and refused to pay.<sup>7</sup> If a company is authorized by its charter to “demand and recover” tolls for the passage of logs, and to stop and detain them until the tolls are paid, it can maintain an action to recover toll.<sup>8</sup> But if a summary

<sup>1</sup> *Easton v. New York R. Co.*, 24 N. J. Eq. 49.

<sup>2</sup> *Union Bridge Co. v. Spaulding*, 63 N. H. 298.

<sup>3</sup> *St. Tammany Water Works Co. v. New Orleans Water Works Co.*, 120 U. S. 64; 4 Woods, 134.

<sup>4</sup> Vin. Abr. tit. Toll, 1; Bacon's Abr. tit. Distress, pl. 6; Heddy v. Wheelhouse, Cro. Eliz. 558; Vinkersterne v. Ebdon, 1 Salk. 248; 1 Ld. Raym. 386. See Woolrych on Waters, 61, 312; Dresser v. Bosanquet, 4 B. & S. 460; Stourbridge Canal v. Wheeley, 2 B. & A. 793; Jenkins v. Cooke, 1 Ad. & El. 871; Fraser v. Swansea Coal Co., id. 354; Nicholl v. Gardner, 13 Wend. 288; Mangum v. Farrington, 1 Daly, 236; Warren v. McDiar-mid, 84 How. Pr. 304; Wooster v. Blossom, 5 Jones (N. C.), 244; State v. Patrick, 3 Lev. (N. C.) 478.

<sup>5</sup> *Dorman v. Turnpike Co.*, 3 Watts, 126; *Beeler v. Turnpike Co.*, 14 Penn. St. 162; *Penobscot Boom Co. v. Baker*, 16 Maine, 233; *Middle Bridge Co. v. Marks*, 26 Maine, 326; *Proprietors of Upper Locks v. Abbott*, 14 N. H. 157.

<sup>6</sup> *Hopkins v. Stockton*, 2 Watts & Serg. 163; *Kellogg v. Union Co.*, 12 Conn. 16; *Baltimore v. White*, 2 Gill, 444; *Quincy Canal v. Newcomb*, 7 Met. 276. See *A Coal Float*, 112 Ind. 15.

<sup>7</sup> *Central Bridge v. Abbott*, 4 Cush. 473. See *Manistee River Imp. Co. v. Lamport*, 49 Mich. 442.

<sup>8</sup> *Bear Camp River Co. v. Woodman*, 2 Maine, 404; *Penobscot Boom Co. v. Baker*, 16 Maine, 233; *Bronte Harbour Co. v. White*, 23 C. P. (Can.) 164.

remedy only is given by statute to enforce the payment of tolls, a promise to pay them is not implied, and an action of debt or *assumpsit* will not lie.<sup>1</sup> A promise to pay toll is without consideration, if the promisor is not legally liable to pay.<sup>2</sup> If tolls are paid under compulsion, or the actual or threatened exercise of power possessed to exact them, from which the person of whom they are demanded has no other means of relief, they may be recovered back, with interest from the date of payment.<sup>3</sup> A person is not liable in damages who avoids a toll-bridge and the payment of tolls, or who induces others to do so.<sup>4</sup>

<sup>1</sup> *Vestry of St. Pancras v. Batterbury*, 2 C. P. N. s. 477; *Blackburn v. Parkinson*, 1 El. & El. 71; *Turnpike Co. v. Brown*, 2 P. & W. 462; *Dorman v. Turnpike Co.*, 3 Watts, 126; *Bealer v. Turnpike Co.*, 14 Penn. St. 162; *Chestnut Hill Turnpike Co. v. Martin*, 12 Penn. St. 361; *Kidder v. Boom Co.*, 24 Penn. St. 193; *Russell v. Turnpike Co.*, 13 Bush, 307; *Turnpike Co. v. Van Dusen*, 10 Vt. 197; *Witt v. Jefcoat*, 10 Rich. (S. C.) 389. See *Middle Bridge Co. v. Brooks*, 13 Maine, 391; *State v. Dearborn*, 15 Me. 402; *Middle Bridge Co. v. Marks*, 26 Maine, 326; *Chase v. Dwinal*, 7 Maine, 134; *Hunter v. Perry*, 33 Maine, 159; *Penobscot Boom Co. v. Lamson*, 16 Maine, 224; *Proprietors v. Hahn*, 28 Maine, 300; *Louisville v. Bank of United States*, 3 B. Mon. 188, 158;

*Penobscot Boom Co. v. Penobscot Lumber Association*, 61 Maine, 533.

<sup>2</sup> *Waterloo Turnpike Road Co. v. Cole*, 51 Cal. 381.

<sup>3</sup> *Lehigh Canal Co. v. Brown*, 100 Penn. St. 338; *Little v. Dundas Road Co.*, 2 C. P. (Can.) 399. Cf. *Marsh v. Port Hope Harbour Co.*, 6 O. S. (Can.) 100. See *Wausau Boom Co. v. Dunbar*, 75 Wis. 133; *Appleman v. Myre*, 74 Mich. 359.

<sup>4</sup> *Wright v. Morris*, 43 Ark. 193. See "toll-bridge" defined in *State v. Hannibal R. Co.*, 97 Mo. 348. As to contracts relating to wharfage, see *Taylor v. Albemarle Steam Nav. Co.*, 105 N. C. 484; *Philadelphia C. & I. Co. v. New York*, 21 Fed. Rep. 97 (lease). Upon equality of rates of boomage, see *Merritt v. Knife Falls Boom Co.*, 34 Minn. 245.

## CHAPTER V.

### RIPARIAN RIGHTS — BOUNDARIES.

#### SECTION.

- 148, 149. Riparian rights defined.
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- 155–157. Accretions.
- 158, 159. The effect upon private rights of sudden changes caused by the currents.
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- 162–165. Apportionment of alluvion between coterminous proprietors.
- 166. Islands.
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- 174. The same in California.
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- 198. The location of a stream's thread as a boundary.
- 199, 200. Boundary when limited to high-water mark or bank.
- 201. Course of stream not always followed as a boundary.
- 202. Boundaries of towns, parishes and nations upon waters.
- 203. Boundaries upon lakes and ponds.

§ 148. **Riparian rights — Defined.**— Riparian rights, according to the strict meaning of the term, are such as follow or are connected with the ownership of the banks of streams or rivers.<sup>1</sup> Those whose lands border upon tide waters are called “littoral” proprietors, and there appears to be no word

<sup>1</sup> Riparian is derived from Latin *ripa*, a river bank.

or phrase of sufficiently broad meaning to include both riparian and littoral, although each is sometimes used to denote the other.<sup>1</sup> The distinction between tide waters and fresh, or between public and private waters, is not necessarily a material consideration in determining questions relating to riparian rights, since riparian rights proper depend upon the ownership of land contiguous to the water, and are the same whether the proprietor of such land owns the soil under the water or not. In *Lyon v. Fishmongers' Co.*,<sup>2</sup> Lord Selbourne thus states what is now to be regarded as the established law upon this subject: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. With respect to the ownership of the bed of the river, this cannot be the foundation of riparian rights properly so called, because the word 'riparian' is relative to the bank, and not to the bed of the stream, and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but on grant or presumption of law. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good *jure naturæ* as vertical."<sup>3</sup> "It is true that the banks of a

<sup>1</sup> Littoral is derived from Latin *littus*, the sea-shore. It is now in general use, and should be employed rather than "riparian," in respect to the shores of the sea, and also, according to important authorities, as including "riparian." *Regina v. Keyn*, 2 Ex. D. 63; *Boston v. Lecraw*, 17 How. 432, 433; *West Roxbury v. Stoddard*, 7 Allen, 158, 167; 9 Gray, 521, note; *Hamilton v. Meniffee*, 11

Texas, 718; *Smith v. Power*, 14 Texas, 146.

<sup>2</sup> 1 App. Cas. 662; L. R. 10 Ch. 679; *Diedrich v. Northwestern Ry. Co.*, 42 Wis. 248; *Stevens Point Booming Co. v. Reilly*, 44 Wis. 295, 305; *Morrill v. St. Anthony Falls Co.*, 26 Minn. 222; *Meyers v. St. Louis*, 8 Mo. App. 266.

<sup>3</sup> *Miner v. Gilmour*, 12 Moo. P. C. 181; *Chasemore v. Richards*, 7 H. L. Cas. 349, 373, 382. See, also, *Lord v.*



tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of a stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right." All riparian rights depend upon the ownership of land which is contiguous to and touches upon the water;<sup>1</sup> and, in the case of tide waters, at common law, upon the ownership of the land above and adjoining the edge of the water at ordinary high-water mark.<sup>2</sup> They attach to the land, and an express mention in the deed that they are sold with it is surplusage.<sup>3</sup> They do not attach to any lands, however near, which do not extend to the water;<sup>4</sup> nor do they necessarily attach to a State grant of lands lying below the tidal high-water mark.<sup>5</sup> An allegation in a bill in equity that the plaintiff owns land "lying upon the bay" does not clearly imply a water boundary.<sup>6</sup> A mere right of way along the banks, reserved in a grant of land bounded by a river, being merely an easement, does not deprive the grantee of his rights as a riparian proprietor.<sup>7</sup> The mere opportunity, because of

Commissioners of Sidney, 12 Moo. P. C. 473.

<sup>1</sup> Jones v. Johnston, 18 How. 150; Johnston v. Jones, 1 Black, 209; Bates v. Illinois Central R. Co., 1 Black, 204; *post*, § 155, note. If there is clear water between the grounds of different proprietors they are not adjoining owners. Rowe v. Luddington, 51 Conn. 184.

<sup>2</sup> Ibid.; Lyon v. Fishmongers' Co., above quoted; Potomac S. Co. v. Upper Potomac S. Co., 109 U. S. 672, 683; McArthur & M. 285; Deerfield v. Arms, 17 Pick. 41; State v. Brown, 3 Dutch. 13, 648; Hoboken Land Co. v. Hoboken, 7 Vroom, 540, 550; Hayden v. Long, 8 Oregon, 244. See Shirley v. Bishop, 67 Cal. 543; New Orleans W. Co. v. Ernst, 32 Fed. Rep. 5; *Re* State Reservation Commissioners, 37 Hun, 537.

<sup>3</sup> Meyers v. Mathis (La.), 7 So. 605; Hanford v. St. Paul R. Co., 43 Minn. 104; Tappendorf v. Downing, 76 Cal.

169. See, *contra*, as to accretions on the Mississippi river in Louisiana, Ferrière v. New Orleans, 35 La. Ann. 209.

<sup>4</sup> Ibid.

<sup>5</sup> This depends upon the terms and purpose of the grant, the user, conduct of parties, etc. Turner v. People's Ferry Co., 21 Fed. Rep. 90 (case of wharfage).

<sup>6</sup> Sullivan v. Moreno, 19 Fla. 200.

<sup>7</sup> Hagan v. Campbell, 8 Porter, 9; Stetson v. French, 16 Maine, 204; Stetson v. Bangor, 60 Maine, 313; Barclay v. Howell, 6 Peters, 498; Parish v. Stevens, 1 Oregon, 59; St. Louis Public Schools v. Hammond, 21 Mo. 238; Rowan v. Portland, 8 B. Mon. 239. If the width of a street is clearly defined in a town plat, land lying between the street and the low-water mark of a river is not thereby dedicated to the public. McLaughlin v. Stevens, 18 Ohio, 94; Kennedy v. Jones, 11 Ala. 63. If the land dedi-

the situation of a mill, to use the tide as its motive power is not an easement which, if disturbed, confers a right of action.<sup>1</sup> But if the granted premises are bounded in terms by a public road which separates them from the water, they extend only to the centre of the road, and the grantee is not a riparian owner.<sup>2</sup> So, if a meander line, run by government surveyors in surveying the public lands, leaves between such line and the bank of the stream a considerable body of land which is above the ordinary stage of the water in the stream, and is covered with vegetation or timber, the patent of the surveyed land is limited by the meander line and the patentee is not a riparian proprietor.<sup>3</sup> When a title to land enclosed by a river is acquired by disseisin, and the disseisor occupies as near the river as convenient, it may amount to a possession of the whole lot, if such was his intention, although there is a narrow strip uncultivated along the river; and he may thus be entitled to riparian rights.<sup>4</sup> And a person who is entitled to the exclusive possession and use of land abutting on navigable waters is entitled to the riparian rights incident to the land, although not the owner of the fee.<sup>5</sup> Riparian rights are not dependent upon the existence of a current; they exist in lakes and ponds, and also in waters which are not navigable in fact.<sup>6</sup>

§ 149. **Same — The right of access.**— Riparian rights exist on the banks of navigable waters as well as of unnavigable streams. In the former case they are subordinate to the public right of navigation; and, while in a non-navigable river

cated for a highway is delineated on a map as extending to the high-water mark of tide-water, it is subject to a public easement, but remains the property of the State. *Hoboken v. Pennsylvania R. Co.*, 16 Fed. Rep. 816. See *Schenley v. Pittsburgh*, 104 Penn. St. 472.

<sup>1</sup> *Folsom v. Freeborn*, 13 R. L. 200.

<sup>2</sup> *Banks v. Ogden*, 2 Wall. 57; *People v. Colgate*, 67 N. Y. 512; *Jewell v. Lee*, 14 Allen, 145; *Allegheny City v. Morehead*, 80 Penn. St. 118; *Brisbine v. St. Paul R. Co.*, 23 Minn. 114; *Allen v. Munn*, 55 Ill. 486; *Field v. Carr*, 59 Ill. 198; *Cowles v. Gray*, 14 Iowa, 1;

*Grant v. Davenport*, 18 Iowa, 179; *Mariner v. Schulte*, 13 Wis. 692; *Arnold v. Elmore*, 16 Wis. 509; *Yates v. Judd*, 18 Wis. 118. A right of way may be appurtenant to land, from which it is divided by a navigable river. *In re Lazaretto Road*, 1 Ash. (Penn.) 417.

<sup>3</sup> *Lammers v. Nissen*, 4 Neb. 250, 452.

<sup>4</sup> *Allen v. Holton*, 20 Pick. 458; *Ridgway v. Ludlow*, 58 Ind. 248.

<sup>5</sup> *Hanford v. St. Paul R. Co.*, 43 Minn. 104.

<sup>6</sup> *Turner v. Holland*, 65 Mich. 458.

all the riparian owners might combine to completely divert, diminish, or pollute the stream, in a navigable river the right of navigation would intervene and prevent this being done.<sup>1</sup> The rights actually exercised by the proprietors of land on the shores of tide water are often dissimilar from those enjoyed by proprietors above the flow of the tide, since salt water is less available in the arts, or for irrigation, etc., than fresh. But a littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water, for the purpose of using the right of navigation. This right of access is his only, and exists by virtue and in respect of his riparian property. It exists, in the case of tide waters, even when the shore is the sovereign's property, both when the tide is out and when it is in.<sup>2</sup> It is distinct from the public right of navigation, and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance, or authorized by the legislature.<sup>3</sup> In the above case of *Lyon v. Fishmongers' Co.*,<sup>4</sup> it was held that the power given to conservators of the Thames, under the act of Parliament by which they were constituted, to grant a license to a riparian owner to make an embankment in front of his land on the river, did not authorize the licensee to embank in front of his own land so as to affect injuriously the rights of an adjoining riparian owner, though such license might be a justification with respect to the public right of navigation. In *Yates v. Milwaukee*,<sup>5</sup> in the Supreme Court of the United States, a municipal corporation, which was authorized by the legislature to establish dock and wharf lines upon

<sup>1</sup> *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Orr Ewing v. Colquhoun*, 2 App. Cas. 656.

<sup>2</sup> *Byron v. Stimpson*, 1 Pug. & B. (N. B.) 697.

<sup>3</sup> *Ante*, § 124; *Yarmouth v. Simmons*, 10 Ch. D. 518.

<sup>4</sup> 1 App. Cas. 662; L. R. 10 Ch. 679. See *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 388; *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; L. R. 3 Ex. 306; *Attorney Gen-*

*eral v. Conservators of the Thames*, 1 H. & M. 1; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Bell v. Quebec*, 5 App. Cas. 84; *Brown v. Gugsy*, 10 Jur. N. S. 525; *Attorney General v. Wemyss*, 13 App. Cas. 192; *North Shore Railway v. Pion*, 14 id. 612; *Parkdale v. West*, 12 App. Cas. 602; 4 *Harvard Law Rev.* 14.

<sup>5</sup> 10 Wall. 497.

rivers within its limits, and to restrain and prevent encroachments upon the rivers and obstructions thereto, declared by ordinance that the plaintiff's wharf was a nuisance to the navigation, and ordered it abated. In deciding that such ordinance was of itself insufficient evidence upon the question whether the wharf was in fact a nuisance,<sup>1</sup> Miller, J., said, with respect to lots adjoining navigable rivers: "Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public."<sup>2</sup> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested,<sup>3</sup> the owner can only be deprived in accordance with established law; and, if necessary that it be taken for the public good, upon due compensation."<sup>4</sup>

§ 150. Same — Same.— This right is limited to the right to enter from one's own estate upon the highway, and to pass

<sup>1</sup> Generally, authority to abate nuisances, or to regulate wharves, does not include the power to declare that a nuisance which is not so in fact. *Pye v. Peterson*, 45 Texas, 312; *Evansville v. Martin*, 41 Ind. 145; *Everett v. Council Bluffs*, 46 Iowa, 66; *Babcock v. Buffalo*, 56 N. Y. 268.

<sup>2</sup> *Dutton v. Strong*, 1 Black, 25; *Schurmeir v. Railroad Co.*, 7 Wall. 272; *Atlee v. Packet Co.*, 21 Wall. 389; *Carli v. Stillwater Street Ry. Co.*, 28 Minn. 373.

<sup>3</sup> In this case the wharf which it was attempted to condemn as a nuisance was actually built.

<sup>4</sup> See also *Webber v. Harbor Commissioners*, 18 Wall. 57; *Atlee v.*

*Packet Co.*, 21 Wall. 389; *Richardson v. Boston*, 24 How. 188; *Van Dolsen v. New York*, 21 Blatch. 454; *Baltimore R. Co. v. Chase*, 43 Md. 23; *Harrison v. Sterrett*, 4 H. & McHen. 540; *Diedrich v. Northwestern Ry. Co.*, 42 Wis. 248; *Delaphine v. Chicago Ry. Co.*, id. 214; *Meyers v. St. Louis*, 8 Mo. App. 266; *Myers v. St. Louis*, 82 Mo. 367; *Barron v. Baltimore*, 2 Am. Jurist, 203; *Clark v. Peckham*, 10 R. I. 35, 38; 9 R. I. 455; *Morrill v. St. Anthony Falls Co.*, 26 Minn. 222; *Norfolk City v. Cooke*, 27 Gratt. 430, 435. If the loss occasioned by an interruption of the right of access to a highway is capable of pecuniary compensation, the remedy

from the highway to one's own estate, and does not include the right to redress for an obstruction which is not against the front of the plaintiff's land, even when it entirely closes the highway.<sup>1</sup> It doubtless follows, from the important decisions just referred to, that access, as thus defined, cannot, without compensation, be taken away by the State, as owner in fee of the bed and shores of navigable waters, or by virtue of its power to regulate and control them for public purposes. In *Buccleuch v. Metropolitan Board of Works*,<sup>2</sup> the House of Lords held that the owner of an estate upon the tide waters of the Thames was entitled to compensation, not only for the land actually taken for the construction of a public road, but also for the change of his premises from river-side to road-side property, including his individual and particular right to use the shore of the river in which he had no proprietary interest. In Wisconsin a riparian proprietor is entitled to compensation from a railroad corporation, which so builds its road, under the authority of the State, as to deprive him of access to and from his land, and of the facilities which the location of the land affords, although the road is constructed beyond the water's edge, which is the boundary of his title.<sup>3</sup> This view has been approved in Rhode Island<sup>4</sup> and Minnesota.<sup>5</sup>

is by an action at law for damages, and not by proceedings in equity for an injunction. *Stone v. Peckham*, 12 R. I. 27.

<sup>1</sup> *Ante*, § 124; *Bailey v. Philadelphia R. Co.*, 4 Harr. (Del.) 389; *Boston & Worcester Railroad v. Old Colony Railroad*, 12 Cush. 605; *Hotz v. Hoyt* (Ill.), 25 N. E. 753.

<sup>2</sup> L. R. 5 H. L. 418; L. R. 3 Ex. 306; L. R. 5 Ex. 221. See, also, the English and Massachusetts cases cited *ante*, §§ 122, 124. *Beckett v. Midland Ry. Co.*, L. R. 3 C. P. 82; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Ricket v. Metropolitan Ry. Co.*, L. R. 2 H. L. 175; *Bell v. Hull*

& Selby Ry. Co., 6 M. & W. 699; *Chamberlain v. West End of London Ry. Co.*, 2 B. & S. 605; *Moore v. Great Southern Ry. Co.*, 10 Ir. R. C. L. 46; *Regina v. Rynd*, 16 Ir. R. C. L. 29; *Widder v. Buffalo & Lake Huron Ry. Co.*, 20 Q. B. (Can.) 638; 24 id. 520; 27 id. 425; *Reg. v. Buffalo & Lake Huron Ry. Co.*, 23 id. 208; *In re Miller & Great Western Ry. Co.*, 13 id. 582.

<sup>3</sup> *Chapman v. Oshkosh & Mississippi R. Co.*, 33 Wis. 629; *Delaphine v. Chicago R. Co.*, 42 Wis. 214; *Diedrich v. Northwestern Ry. Co.*, id. 248, 264; *Holton v. Milwaukee*, 31 Wis. 38.

<sup>4</sup> *Providence Steam Engine Co. v.*

<sup>5</sup> *Brisbine v. St. Paul R. Co.*, 23 Minn. 114; *Carli v. Stillwater Street Ry. Co.*, 28 Minn. 373.

§ 151. *Same—Same.*—Upon the other hand it was held in New York, in *Gould v. Hudson River Railroad Co.*,<sup>1</sup> which was prior to the decision of the Supreme Court of the United States in *Yates v. Milwaukee*,<sup>2</sup> that, as the owners of lands adjoining a navigable river have no private right of property in the waters of the river, or in its shores below high-water mark, they are not entitled to compensation when a railroad, constructed under a grant from the legislature along the shore between high and low-water mark, cuts off all communication between such lands and the river otherwise than across the road.<sup>3</sup> It has been suggested that this doctrine may result, in New York, from the civil-law doctrine, applicable to the Hudson, which was the river here in question. This doctrine, which rests apparently upon the ground that the injury suffered by the riparian owner, though greater in degree, is the same in kind as that sustained by the general public and by those who, not being riparian owners, have occasion to approach it over that part of the bank occupied by the road,<sup>4</sup> is also supported by *Tomlin v. Dubuque Railroad*,<sup>5</sup> in Iowa, decided

*Providence Steamship Co.*, 12 R. L. 348, 361; *Clark v. Peckham*, 10 R. L. 35, 38; 9 R. L. 455. See *Cooley, Const. Lim.* 544, note; *Cleveland R. Co. v. Ball*, 5 Ohio St. 568; *Rice v. Ruddiman*, 10 Mich. 125; *Lorman v. Benson*, 8 Mich. 18; *Lehigh Valley R. Co. v. Trone*, 28 Penn. St. 206; *In re Philadelphia R. Co.*, 6 Whart. 25, 46; *Commonwealth v. Richter*, 1 Penn. 467; *Pittsburgh v. Scott*, 1 Penn. St. 309, 317; *Ashby v. Eastern R. Co.*, 5 Met. 368; *Dodge v. County Commissioners*, 3 Met. 380; *Chicago Railroad v. Stein*, 75 Ill. 41.

<sup>1</sup> *Gould v. Hudson River R. Co.*, 6 N. Y. 522; 12 Barb. 616; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *People v. Tibbetts*, 19 N. Y. 523, 528; *Langdon v. New York*, 93 N. Y. 129, 144; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 245; *People v. New York Ferry Co.*, 68 N. Y. 71, 78; 7 Hun, 105; *People v. Vanderbilt*, 26 N. Y. 287; *People v. Canal*

*Appraisers*, 33 N. Y. 461, 467; *People v. New York*, 8 Abb. Pr. 7, 12; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233; 7 Rob. 523; *Hudson River R. Co. v. Loeb*, 7 Rob. 418; *Getty v. Hudson River R. Co.*, 21 Barb. 617; *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70, 96. But see *Story v. New York Elevated R. Co.*, 90 N. Y. 122; *New York & W. S. R. Co.*, 29 Hun, 269, 646; *Fowler v. Mott*, 19 Barb. 204, 220; *Organ v. Memphis R. Co.*, 51 Ark. 285 (partition).

<sup>2</sup> 10 Wall. 497; *ante*, § 149.

<sup>3</sup> *Smith v. Rochester*, 92 N. Y. 463, 482; *ante*, § 57.

<sup>4</sup> See remarks of Beasley, C. J., in *Stevens v. Paterson R. Co.*, 34 N. J. L. 532, 549.

<sup>5</sup> 32 Iowa, 106. See *McManus v. Carmichael*, 3 Iowa, 1. The following decisions in Iowa recognize or support *Tomlin v. Dubuque R. Co.*: *Ingraham v. Chicago R. Co.*, 34 Iowa, 249, 252; *Cook v. Burlington*, 36



shortly after *Yates v. Milwaukee*, which is not there referred to, and prior to the English cases above cited;<sup>1</sup> and by *Stevens v. Paterson Railroad Co.*,<sup>2</sup> in New Jersey, which was decided just before *Yates v. Milwaukee*, and in which the decision of the Exchequer Chamber in *Buccleuch v. Metropolitan Board of Works*<sup>3</sup> was relied upon,<sup>4</sup>—a decision which was afterwards reversed by the House of Lords upon the grounds above stated.<sup>5</sup> When it is conceded that riparian rights are property, the question as to the right to take them without compensation would appear to be at an end, and the above doctrine is now of at least doubtful authority.<sup>6</sup>

§ 152. *Same—Same.*—If a city so constructs its sewers and drains discharging its navigable waters that their contents are not carried away by the tides or current, but cause accumulations in front of a wharf and obstruct the access of vessels, the owner of the wharf may recover damages against the city in an action of trespass on the case,<sup>7</sup> or he may obtain relief by injunction against the continuance of the nuisance.<sup>8</sup>

Iowa, 357, 365; *Musser v. Hershey*, 42 Iowa, 356, 361; *Kucheman v. The C. C. & D. R. Co.*, 46 Iowa, 366, 378. The matter is not provided for by statute in this State. See *Renwick v. The D. & N. W. R. Co.*, 49 Iowa, 664, 669; *Railway Co. v. Renwick*, 102 U. S. 180; *Barney v. Keokuk*, 94 U. S. 324; *Houghton v. The C. D. & M. R. Co.*, 47 Iowa, 370.

<sup>1</sup> *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; L. R. 10 Ch. 679; *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; L. R. 5 Ex. 222; L. R. 3 Ex. 306; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Bell v. Quebec*, 5 App. Cas. 84.

<sup>2</sup> *Stevens v. Paterson R. Co.*, 34 N. J. L. 532; 20 N. J. Eq. 126. See *Stockham v. Browning*, 18 N. J. Eq. 390; *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. L. 148; 25 id. 255.

<sup>3</sup> L. R. 5 Ex. 221.

<sup>4</sup> 34 N. J. L. 543, 544.

<sup>5</sup> L. R. 5 H. L. 418; *Meyers v. St. Louis*, 8 Mo. App. 266, 276.

<sup>6</sup> *Boston v. Richardson*, 19 How. 263, 270; *Boston v. Lecraw*, 17 How. 426; *Clark v. Peckham*, 10 R. I. 35; 9 R. I. 455.

<sup>7</sup> See *Rumsey v. N. Y. & N. E. R. Co.*, 114 N. Y. 423; 25 N. E. 1080; 4 N. Y. S. 293; *Williams v. New York*, 105 N. Y. 419, 436; *Van Dolsen v. New York*, 21 Blatch. 454; *Chapman v. Oshkosh R. Co.*, 33 Wis. 629.

<sup>8</sup> *Ante*, § 121; *Breed v. Lynn*, 126 Mass. 367, 370; *Haskell v. New Bedford*, 108 Mass. 208, 216; *Rowe v. Granite Bridge*, 21 Pick. 344, 347; *District Attorney v. Lynn R. Co.*, 16 Gray, 242, 245; *Henry v. Newburyport*, 149 Mass. 587; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42; *Goldsmid v. Tunbridge Wells Commissioners*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Attorney General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146, 163; *Attorney General v. Leeds*, L. R. 5 Ch. 583.



In the latter case the proof that a nuisance exists must be clear,<sup>1</sup> and the court in granting the injunction will postpone its operation for a reasonable time in order that the city may take measures to remove the nuisance without unnecessary injury to the public health or interests.<sup>2</sup>

§ 153. *Same — Same.*— The right of unobstructed access is also limited to the front of the land, and does not include the right, if the riparian owner fills out his entire frontage, to have the docks or water spaces on either side kept open in order that he may have access to the sides of his wharf.<sup>3</sup> If the adjoining owners do not fill up in front of their lands, the general public and the owner of the improved bank may alike use the water for navigation, and thus have access to the sides of the wharf.<sup>4</sup> But the adjoining proprietors, so far as they have the right to wharf out, may at pleasure close up the water spaces in front of their own lands, even at the sides of another's wharf which is expressly authorized by the legislature.<sup>5</sup>

§ 154. *Same — Same.*— The existence of this right of access does not preclude any lawful exercise by the public of the right of navigation or of a similar right of access by adjoining proprietors. If a wharf is extended not only in front of one's own land, but also in front of that of an adjoining proprietor, it is an encroachment upon the latter's rights which may be redressed by injunction.<sup>6</sup> In *Marshall v. Ulleswater Steam*

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*; *Attorney General v. Birmingham*, 4 K. & J. 528, 548; *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71, 84; *Attorney General v. Gee*, L. R. 10 Eq. 131, 135; *Breed v. Lynn*, 126 Mass. 367, 370; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *post*, § 223.

<sup>3</sup> *Gray v. Bartlett*, 20 Pick. 186; *Clark v. Peckham*, 10 R. I. 35; 9 R. I. 455; *Central Wharf v. India Wharf*, 123 Mass. 567.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*; *Keyport Steamboat Co. v. Farmers' Trans. Co.*, 18 N. J. Eq. 13,

511. As to maintaining use and occupation for the use of a dock or unimproved shore, see *Easby v. Patterson*, 19 Am. L. Reg. N. S. 145; *Moore v. Jackson*, 2 Abb. N. C. 211; *Stewart v. Fitch*, 31 N. J. L. 17; *Hall v. Jacobs*, 7 Bush, 595.

<sup>6</sup> *Thornton v. Grant*, 10 R. I. 477, 487; *Gray v. Bartlett*, 20 Pick. 186; *Frink v. Lawrence*, 20 Conn. 121; *Van Der Brooks v. Currier*, 2 Mich. N. P. 21. In deciding cases of this character the respective convenience or inconvenience of the parties should be reasonably considered. *Garret v. Squarebriggs*, 2 Haszard & W. (Pr.

Navigation Co.,<sup>1</sup> the owner of the soil of a navigable lake, which was a public highway, permitted a pier to be erected on his land, and afterwards maintained it, and it was held that he had no cause of action against the owners of steamboats who landed and embarked passengers at the pier, it appearing that this structure prevented the defendants from using their own adjoining land as a landing. In *Original Hartlepool Collieries Co. v. Gibb*,<sup>2</sup> it was held that a navigable river, being a public highway, open to the reasonable use of all subjects of the realm, a riparian proprietor was entitled to moor to his wharf for a reasonable time vessels which overlapped the wharf of an adjoining proprietor, if the free and necessary access to the latter wharf was not obstructed thereby. The right of each of several adjoining proprietors is the right to approach the front of his land or wharf, and one proprietor has no cause of action against his neighbor, if the latter's improvement of his own estate and in front thereof prevents vessels from approaching the side of the former's wharf.<sup>3</sup> Where A. leased to B. land in front of the city of Toronto, with the use of the water adjacent, and the corporation cut off the access to the water by the construction of an esplanade, B. was held to be still bound to perform his agreement and to pay rent.<sup>4</sup>

§ 155. **Accretions.**—This right of access is not lost by the gradual formation of new soil upon the margin of the water caused by the action of the tides or current. Estates bordering upon navigable waters often derive a great part of their value from that circumstance; and the riparian owners, if deprived of the benefit of that situation by extraneous additions, would suffer hardship and injustice, even when they obtained the full proportion of the land measured by the surface.<sup>5</sup> Land formed by *alluvion*, or the gradual and imperceptible accretion from the water, and land gained by *reliction*, or the gradual

Edw. Island) 351. See *Kingsland v. New York*, 45 Hun, 198; *Payne v. English*, 79 Cal. 540; *Hatch v. Kaighns Point Ferry Co.* (N. J.) 16 Atl. 433.

<sup>1</sup> L. R. 7 Q. B. 166; *Eastern Counties Railway Co. v. Dorling*, 5 C. B. N. S. 821.

<sup>2</sup> 5 Ch. D. 713; *ante*, § 96.

<sup>3</sup> *Gray v. Bartlett*, 20 Pick. 186; *United States v. Bain*, 3 Hughes, 593. See *Davis v. Atkins*, 9 Cush. 13.

<sup>4</sup> *Lyman v. Snarr*, 9 C. P. (Can.) 104.

<sup>5</sup> *Deerfield v. Arms*, 17 Pick. 41, 45; *Cambre v. Cohn*, 8 N. S. (La.) 576.

and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made.<sup>1</sup> There is no distinction in this respect between soil gained by accretions and that uncovered by reliction.<sup>2</sup> The change is imperceptible when it is not discernible in its progress, though the fact that there has been an increase may be perceptible year by year or at shorter intervals.<sup>3</sup> Conversely land gradually

<sup>1</sup> *Rex v. Yarborough*, 3 B. & C. 91; 5 Bing. 163; 2 Bligh (N. S.), 147; 1 Dow (N. S.), 178; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; *New Orleans v. United States*, 10 Peters, 662; *County of St. Clair v. Livingston*, 23 Wall. 46; *Rutz v. Seeger*, 35 Fed. Rep. 188; *Perry v. Pratt*, 31 Conn. 442; *Morgan v. Scott*, 26 Penn. St. 51; *Gerrish v. Clough*, 48 N. H. 9; *Morgan v. Livingston*, 6 Martin, 216; *Livingston v. Heerman*, 9 Martin, 656; *Ingraham v. Wilkinson*, 4 Pick. 268, 273; *Deerfield v. Arms*, 17 Pick. 41; *Hopkins Academy v. Dickenson*, 9 Cush. 551; *Spigener v. Cooner*, 8 Rich. (S. C.) 301; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Patterson v. Gelston*, 23 Md. 482; *Goodsell v. Lawson*, 42 Md. 348; *Baltimore R. Co. v. Chase*, 43 Md. 23; *Ridgely v. Johnson*, 1 Bland Ch. 316, note; *Barrett v. New Orleans*, 13 La. Ann. 105; *Barre v. New Orleans*, 22 La. Ann. 613; *Hagan v. Campbell*, 8 Porter, 9; *Schultes' Aquatic Rights*, 116; 2 Am. Law Journ. 283, 393. The right to alluvion depends upon contiguity, and the accretions belong to the land immediately adjoining the water, however narrow it may be, or whatever may be the size of the parcel behind it. *Saulet v. Shepard*, 4 Wall. 502; *Bates v. Illinois Central R. Co.*, 1 Black, 204, 208; *Bristol v. Carroll County*, 95 Ill. 84; *Beaufort v. Duncan*, 1 Jones (N. C.), 234; *Posey v. James*, 7 Lea (Tenn.), 98; *ante*, § 148.

<sup>2</sup> *Handly v. Anthony*, 5 Wheat. 380; *Boorman v. Sunnuchs*, 42 Wis. 283,

244. In *Linthicum v. Coan*, 64 Md. 439, 454, Bryan, J., said: "If the land in question was formed by gradual accretions extending from the shore into the river, it would belong to the riparian proprietor; and this would be the case notwithstanding the fact that, by the influence of floods and freshets, large deposits of mud may have been made in the bed of the river. These deposits would, of course, materially contribute to the formation of land, and would hasten the time when it would appear above the surface of the water. But the leading characteristic of alluvion is the gradual extension of the land from the shore into the water; and when this is the case it is irrelevant to consider the causes which, operating beneath the surface of the stream, have brought about the result. On the other hand, if land was formed in the river, and extended inwards towards the shore, it would be the property of the plaintiff, with all its accretions." See note to S. C. in 53 Am. Rep. 219, note.

<sup>3</sup> *Ibid.*; *Attorney General v. Chambers*, 4 De G. & J. 70; *Gifford v. Yarborough*, 5 Bligh, 163; *Attorney General v. Reeve*, 1 Times L. R. 675; *Shey v. McHeffey*, 1 Nova Scotia, 350; *Camden Land Co. v. Lippincott*, 45 N. J. L. 405; *Donovan v. New Orleans*, 35 La. Ann. 461; *Halstead v. Gay*, 7 Hawaiian, 587; 49 L. T. 162; 21 Law Rep. 1; 22 id. 513; 7 Am. L. Reg. 709; *Hale, De Jure Maris*, ch. 1, 4, 6; *Just. Inst. lib. 2, tit. 1, § 20*. In

encroached upon by navigable waters ceases to belong to the former owner.<sup>1</sup> The external bounds of estates situated upon the shore of the sea or of navigable rivers may thus gradually shift as the water recedes or encroaches, although the right to the shore itself of course remains in the Crown or State.<sup>2</sup> When a fresh river changes its course and its centre, even a lot not originally riparian may become so by such change and acquire the riparian right to accretions.<sup>3</sup> If estates separated by a public stream both receive accretions until they come together, the line of contact will be the boundary between them.<sup>4</sup> And if the upland is held subject to incumbrances, or has the benefit of certain rights, the same attaches also to the accretions.<sup>5</sup> The law upon this topic is based upon the maxim *Qui sentit onus debet sentire commodum*, since the owner takes the chance of gradual loss as well as of gradual gain;<sup>6</sup> and

*Boorman v. Sunnuchs*, 42 Wis. 233, 245, it was said that if a portion of the bed of a pond is laid bare within a day or week, although the human eye is not sufficiently acute to detect the process, yet the portion laid bare would not pass to the owner of the adjoining land, and that, while no precise rule of universal application can be laid down on the subject, yet the proofs should show more than the inability of a person who is watching the process to detect the recession of the water. In Louisiana the only right to accretions as property is that formed on rivers and running streams, and not on large bodies of water, like Lake Pontchartrain. *Ziller v. Yacht Club*, 34 La. Ann. 837; *Milne v. Girodeau*, 12 La. 324.

<sup>1</sup> *In re Hull & Selby R. Co.*, 5 M. & W. 327; *Foster v. Wright*, 4 C. P. D. 438; *Wilson v. Shively*, 11 Oregon, 215. There must be a change in the *locus* to constitute accretion. *Sewall & Day Cordage Co. v. Boston Water Power Co.*, 147 Mass. 61.

<sup>2</sup> *Scratton v. Brown*, 4 B. & C. 485; *Rex v. Yarborough*, *supra*; *Camden*

*Land Co. v. Lippincott*, 45 N. J. L. 405; *Mulvy v. Norton*, 100 N. Y. 424; 53 Am. Rep. 215, note; *Betchel v. Edgewater*, 45 Hun, 240; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; *St. Louis v. Lemp*, 93 Mo. 477; 1 Am. & Eng. Encl. of Law, 136.

<sup>3</sup> *Welles v. Bailey*, 55 Conn. 292. See *Wilhelm v. Burleyson*, 106 N. C. 381; *Esson v. Mayberry*, 1 Thom. (Nova Scotia) 144; *Standly v. Perry*, 3 S. C. R. (Canada) 356; 2 App. 195.

<sup>4</sup> *Buse v. Russell*, 86 Mo. 209.

<sup>5</sup> *Campbell v. Laclede Gas-Light Co.*, 84 Mo. 352.

<sup>6</sup> *County of St. Clair v. Lovington*, 23 Wall. 46, 63; *New Orleans v. United States*, 10 Peters, 662, 717; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Giraud v. Hughes*, 1 Gill & J. 249; *Berry v. Snyder*, 8 Bush, 266, 277; *Smith v. Public Schools*, 30 Mo. 290; *Stevens v. Paterson R. Co.*, 34 N. J. L. 532, 540; *Betchel v. Edgewater*, 45 Hun, 240; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 213. Blackstone and others refer to the maxim, *De minimis lex non curat*, as being the foundation of the rule. 2 Black. Com. 262; *Rex v. Yarborough*, above

upon the impracticability of identifying from day to day the small additions and subtractions caused by the constant action of the water.<sup>1</sup> The rule is the same when the old boundaries are not known, and when they can be ascertained.<sup>2</sup> But when the line along the shore is clearly and rigidly fixed by a deed or survey, it is not so certain that it will afterwards be changed because of accretions,<sup>3</sup> although, as a general rule, the right to alluvion passes as a riparian right.<sup>4</sup>

The doctrine as to alluvion is equally applicable to tide waters and to non-tidal rivers and lakes;<sup>5</sup> to land upon

cited; Woolrych on Waters, 445. In *Attorney General v. Chambers*, 4 DeG. & J. 55, 68, Lord Chelmsford, L. C., said: "I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson, in the case of *The Hull & Selby Ry. Co.*, (a) viz: 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.'" Accretions assume the quality of the land to which they attach themselves. If the lord of a manor is entitled to such land as part of his demesne, the accretions become his absolutely; if he is only entitled subject to a copyhold interest, then they will be his subject to such interest; and if the land is part of the waste of the manor, the lord's right to the increase will be subject to the rights of the tenants for commonage, etc., in the waste.

*Hall on the Seashore*, 127; *Hunt on Boundaries*, 24.

<sup>1</sup> *Foster v. Wright*, 4 C. P. D. 438.

<sup>2</sup> *In re Hull & Selby Ry. Co.*, 5 M. & W. 327; *Foster v. Wright*, 4 C. P. D. 438; *Rex v. Yarborough*, 8 B. & C. 106; *ante*, p. 109, n. 8; 2 Black. Com. 261; Hale, *De Jure Maris*, ch. 1, § 6; Britton, Bk. 2, ch. 2; Bracton, Bk. 2, ch. 2, § 1; Fleta, Bk. 3, ch. 2, §§ 2, 6; Callis on Sewers, 51. In Scotland, see *Stewart v. Greenock Harbor Trustees*, 4 Scot. Sea. Cas. (8d series) 283; *Smart v. Dundee*, 8 Bro. P. C. 199; *Todd v. Dunlop*, 2 Rob. Sc. App. 333.

<sup>3</sup> See *Fulton v. Frandolig*, 63 Texas, 330. See 6 Property Lawyer, 347; *James v. Howell*, 41 Ohio St. 696; *Buras v. O'Brien*, 42 La. Ann. 527.

<sup>4</sup> *Warren v. Chambers*, 25 Ark. 120; *Tappendorff v. Downing*, 76 Cal. 169; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122.

<sup>5</sup> *Foster v. Wright*, 4 C. P. D. 438; *Ford v. Lacy*, 7 H. & N. 151; Hale, *De Jure Maris*, ch. 1; *Barnes v. Keokuk*, 94 U. S. 324; *Banks v. Ogden*, 2 Wall. 57; *County of St. Clair v. Lovington*, 23 Wall. 46; *Lovington v. County of St. Clair*, 64 Ill. 56; *Granger v. Swart*, 1 Woolw. 88; *Ridgway v. Ludlow*, 58 Ind. 248; *Bissel v. Fletcher*, 26 Neb. 200; *Benson v. Morrow*, 61 Mo. 345; *Warren v. Chambers*, 25 Ark. 120; *Murry v. Sermon*, 1

strong and rapid rivers like the Mississippi and Missouri,<sup>1</sup> and to those waters which do and those which do not overflow their banks; and where dykes and other defenses are and where they are not necessary to keep the water within its proper limits. It is not applicable where the soil of another is laid bare by the gradual subsidence of a mill-pond caused by the decay of the dam;<sup>2</sup> but in general it applies to artificial ponds,<sup>3</sup> as well as to natural waters, and to changes made by artificial as well as natural causes, if the artificial cause is not itself unlawful, and the gradual acquisition of the new soil results from the exercise of lawful rights of property and not from operations tending or intended to produce the change.<sup>4</sup> "If," says Hunt,<sup>5</sup> "manufacturing or mining operations upon lands bordering on the sea or upon a public river cause a gradual silting up of rubbish, slate, or other matter, either upon the lands where the manufactories or mines are situated, or upon the neighboring property, the materials thus accumulated would appear to be subject to the ordinary rule relating to alluvion, just as if they had been deposited by purely natural causes. Where, however, the effect of the operations and works just alluded to is to produce, not a slow and gradual, but a great and sudden acquisition of additional land to any proprietor along the shore, the rule relating to relictions applies and the property gained will go to the Crown." The doctrine of accretion has no application to a moving island, or to a moving mass of alluvial deposits which travels more than a mile within a limited number of years,

Hawks (N. C.), 56; *Giraud v. Hughes*, 1 Gill & J. 249; *Lamb v. Ricketts*, 11 Ohio, 311; *Niehaus v. Shepherd*, 26 Ohio St. 40; *Burke v. Niles*, 2 Hannay (N. B.), 166.

<sup>1</sup> *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; 40 Fed. Rep. 386 (under U. S. Rev. Sts. § 2396); *St. Louis v. Rutz*, 138 U. S. 226; 35 Fed. Rep. 188.

<sup>2</sup> *Eddy v. St. Mars*, 53 Vt. 462.

<sup>3</sup> *Cook v. McClure*, 58 N. Y. 437.

<sup>4</sup> *Attorney General v. Chambers*, 4 De G. & J. 55; 4 De G. M. & G. 206; *Smart v. Magistrates of Dundee*, 8

Bro. P. C. 119; *Seebkristo v. East India Co.*, 10 Moo. P. C. 149; *Blackpool Pier v. Fylde Union*, 46 L. J. M. C. 189; *Adams v. Frothingham*, 3 Mass. 352; *Halsey v. McCormick*, 18 N. Y. 147; 13 N. Y. 296; *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118; *County of St. Clair v. Lovington*, 23 Wall. 46, 62; *Lovington v. County of St. Clair*, 64 Ill. 56; *Henry v. Vermont Central R. Co.*, 30 Vt. 638; *Standly v. Perry*, 3 Can. Sup. Ct. 356; 2 Can. App. 195; 23 Ch. (Can.) 507.

<sup>5</sup> Hunt on Boundaries (2d ed.), 23.



and from one State to another, the progress not being imperceptible in a legal sense.<sup>1</sup> So, if an embankment lawfully made on a man's own land causes a silting up of sand and mud, whereby soil is gradually gained from the sea, the owner of the embankment would doubtless be entitled to this increase.<sup>2</sup> In *Todd v. Dunlap*,<sup>3</sup> it was held that the grantee of land adjacent to, and described in the grant as bounded by, a public river, had no right of property in a large tract of ground afterwards gained from the channel of the river by the operations of the grantors, who were trustees for improving the navigation of the river. In *Attorney General v. Chamberlaine*,<sup>4</sup> where the Crown sought to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, and the defendant disputed the Crown's title to the soil between the then high and low-water marks, the vice-chancellor said that he apprehended that if the defendant had admitted the Crown's title to the soil between these lines, the onus would be upon the Crown to show that the ancient high-water mark extended further inland than at present. If it clearly appears that a wharf or pier built out into navigable water is a purpresture, and that its position causes sand and gravel to be gradually silted up against the adjoining land, the owner is not entitled to such increase.<sup>5</sup> If a stream is diverted artificially, and not imperceptibly, there is no change in the title to the ground which is laid bare.<sup>6</sup> But if the State excavates the soil of navigable waters, for the purpose of deepening a channel, and deposits the earth in front of premises which it has previously conveyed by patent, the riparian owner is entitled to this accretion.<sup>7</sup> So, a married woman is entitled to the accretions made by her husband or by a stranger

<sup>1</sup> *Carrick v. Lamar*, 116 U. S. 423; *St. Louis v. Le Roy*, 138 U. S. 226.

<sup>2</sup> *Attorney General v. Chambers*, 4 De Gex & J. 68, 70; *Smart v. Dundee*, 8 Bro. Parl. Cas. 119; *Smith v. Stair*, 6 Bell App. Cas. 487.

<sup>3</sup> 2 Rob. Scotch Appeals, 333.

<sup>4</sup> 4 K. & J. 292; *Attorney General v. Chambers*, 4 De Gex & J. 55.

<sup>5</sup> *Dana v. Jackson St. Wharf Co.*,

31 Cal. 118. Unless there has been long-continued and exclusive adverse possession. *Tracy v. Norwich R. Co.*, 39 Conn. 382. See *Mahon v. McCully*, 1 Nova Scotia, 323.

<sup>6</sup> *Halsey v. McCormick*, 18 N. Y. 147; 13 N. Y. 296.

<sup>7</sup> *Ledyard v. Ten Eyck*, 36 Barb. 102.



by filling in in front of her land.<sup>1</sup> Alluvion includes seaweed washed upon the shore as well as sand or gravel.<sup>2</sup>

§ 156. *Same.*—A riparian proprietor has no claim to the protection of the courts as to accretions which have not yet formed and may never be added to his property.<sup>3</sup> As between vendor and vendee, the right to alluvion depends upon the condition of the land at the time of the transfer of the legal title, and cannot be carried back by relation to the date of a title-bond under which the conveyance was made.<sup>4</sup> If land bounded by water is leased or mortgaged, the lessee or mortgagee is entitled to the benefit of accretions forming after the date of the instrument under which he claims.<sup>5</sup> So, the right to accretions passes with the land to an assignee in bankruptcy.<sup>6</sup> And the right of dower, if not released, attaches to accretions to lands of which the husband was seized during coverture, whether they accrued while he owned the land or after he parted with the title.<sup>7</sup>

§ 157. *Same.*—In general the owner of a city lot bounding upon water is entitled to the riparian right of accretions.<sup>8</sup> But if a street is laid out, or land is dedicated to public use, along the margin of the water, the grantee of a lot on the op-

<sup>1</sup> *Dickinson v. Codwise*, 1 Sand. Ch. 214.

<sup>2</sup> *Ante*, § 25; *Emans v. Turnbull*, 2 Johns. 313, 322; *Phillips v. Rhodes*, 7 Met. 523; *Chapman v. Kimball*, 9 Conn. 38; *Mather v. Chapman*, 40 Conn. 382.

<sup>3</sup> *Taylor v. Underhill*, 40 Cal. 471; *Blatchford v. Chicago Dredging Co.*, 22 Ill. App. 376.

<sup>4</sup> *Johnston v. Jones*, 1 Black, 209; *Jones v. Johnston*, 18 How. 150. See *Barre v. New Orleans*, 22 La. Ann. 813; *Cire v. Rightor*, 11 La. 140; *Cochran v. Fort*, 19 Martin, 622. If reference is made to a plan, the right to alluvion is determined by the date of the conveyance and not the date of the plan. *Jones v. Johnson*, 18 How. 150. See *Prior v. Comstock*, 17

R. L.; 19 Atl. 1079; *The Edmondson Island Case*, 42 Fed. Rep. 15.

<sup>5</sup> *Cobb v. Lavalley*, 89 Ill. 331; *Williams v. Baker*, 41 Md. 523.

<sup>6</sup> *Kinzie v. Winston*, 4 Bank. Reg. 21.

<sup>7</sup> *Lombard v. Kinzie*, 73 Ill. 446; *Gale v. Kinzie*, 80 Ill. 132; *Moore v. Kinzie*, 80 Ill. 132; *Hagan v. Campbell*, 8 Porter, 9.

<sup>8</sup> *Jones v. Soulard*, 24 How. 41; *Smith v. Public Schools*, 30 Mo. 301; *Le Beau v. Gavin*, 37 Mo. 556; *Public Schools v. Risley*, 40 Mo. 356; 10 Wall. 91; *Smith v. St. Louis*, 21 Mo. 86; *Yeatman v. New Orleans*, 13 La. Ann. 154; *Sarpy v. New Orleans*, 13 La. Ann. 349; *Barrett v. New Orleans*, 13 La. Ann. 105.

posite side of the street takes only to the centre of the street or dedicated land, and the original proprietor is entitled to accretions by alluvion upon the soil adjoining the river.<sup>1</sup> And if a levee or embankment is lawfully constructed by a city along the margin of waters which are the property of the State to high-water mark, it is the artificial boundary of the private lots adjoining, and accretions added thereto belong to the city as riparian owner.<sup>2</sup> A highway which extends across the shore to navigable water continues to the water if the shore is afterwards enlarged by accretions;<sup>3</sup> and the riparian owner cannot, by filling in, and thus extending his land, even when his right to do so is unquestioned, obstruct the public right of way to the water.<sup>4</sup> A city, being the owner of a quay, or river bank, is entitled to alluvial formations added thereto, like any riparian proprietor.<sup>5</sup> In *New Orleans v.*

<sup>1</sup> *New Orleans v. United States*, 10 Peters, 662; *Jones v. Soulard*, 24 How. 41; *Boston v. Richardson*, 24 How. 188; *Banks v. Ogden*, 2 Wall. 57; *Saulet v. Shepard*, 4 Wall. 502; *Schools v. Risley*, 10 Wall. 91; 40 Mo. 356; *Cook v. Burlington*, 30 Iowa, 94; 36 Iowa, 357; *Lebaume v. Pochtington*, 21 Mo. 36; *Morgan v. Livingston*, 6 Martin, 19, 251; *Municipality v. Orleans Cotton Press*, 18 La. 122, 240; *Kennedy v. Municipality No. 2*, 10 La. Ann. 54; *Remy v. Municipality No. 2*, 11 La. Ann. 148; 12 id. 500; *Barrett v. New Orleans*, 18 La. Ann. 105, 154, 349; *Carollton R. Co. v. Winthrop*, 5 La. Ann. 86; *Chambre v. Kohn*, 8 Martin, 572; *Cochran v. Fort*, 19 Martin, 622; *Cire v. Rightor*, 11 La. 140; *Winter v. City*, 26 La. Ann. 310; *Brisbine v. St. Paul R. Co.*, 23 Minn. 114. See *Watson v. Peters*, 26 Mich. 508; *State v. Nudd*, 23 N. H. 327; *Talbot v. Richmond R. Co.*, 31 Gratt. 685.

<sup>2</sup> *New Orleans v. United States*, 10 Peters, 662; *Musser v. Hershey*, 42 Iowa, 856; *C., B. & Q. R. Co. v. Porter*, 72 Iowa, 426; *Steers v. Brooklyn*, 101 N. Y. 51.

<sup>3</sup> *Wood v. San Francisco*, 4 Cal. 19; *Eldridge v. Cowell*, 4 Cal. 80; *Lockwood v. New York R. Co.*, 37 Conn. 387; *Godfrey v. Alton*, 12 Ill. 29; *Balliet v. Commonwealth*, 17 Penn. St. 509; *Stetson v. Bangor*, 60 Maine, 313; *Kennedy v. Jones*, 11 Ala. 63; *Magraw v. Hailman*, 23 Pitts. L. J. 113.

<sup>4</sup> *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540; *Jersey City v. Morris Canal Co.*, 12 N. J. Eq. 548, 253; *Newark Lime Co. v. Newark*, 15 N. J. Eq. 64; *Morris Canal Co. v. Central R. Co.*, 16 N. J. Eq. 419, 437; *Associates v. Jersey City*, 4 Hal. Ch. 714; *People v. Lambier*, 5 Denio, 9; *Peck v. Providence Steam Engine Co.*, 8 R. I. 853; *Lockwood v. New York R. Co.*, 37 Conn. 387; *Frankfort v. Lennig*, 1 Am. L. Reg. 357; *Standly v. Perry*, 3 Can. Sup. Ct. 356; 2 Can. App. 195; 23 Ch. (Can.) 507; *Demopolis v. Webb*, 87 Ala. 659. See *In re Yonkers*, 117 N. Y. 564.

<sup>5</sup> *New Orleans v. United States*, 10 Peters, 662; *Jones v. Soulard*, 24 How. 41; *Remy v. Municipality*, 15 La. Ann. 657; *Cochran v. Fort*, 7 N. S. (La.) 626; *Packwood v. Walden*,

United States,<sup>1</sup> it was held that the dedication, to the public use of a city, of a quay along a river bank, carried with it the gradual increase by alluvion formed by the river.

§ 158. *Same.*— When the denudation of the soil of the water is sudden and perceptible, the title is not changed. In the case of tide-waters the land thus gained belongs to the Crown at common law,<sup>2</sup> and in this country to the State.<sup>3</sup> This is true, also, of the navigable fresh-water rivers and lakes of this country in those States where the soil of such waters is held to be public property like the sea,<sup>4</sup> the title to such soil being in the State and not in the United States.<sup>5</sup> If navigable waters, owned by the Crown or State, suddenly encroach upon private lands adjoining, and there are marks by which their limits can be determined, the title to the soil thus covered remains in the former owner, and upon the recession of the water it is restored as his property.<sup>6</sup> Though the over-

id. 88; *Parish v. Municipality No. 2*, 8 La. Ann. 145.

<sup>1</sup> 10 Peters, 662, 712; *Hart v. New Orleans*, 12 Fed. Rep. 292. See *Ruge v. Apalachicola Oyster Co.*, 25 Fla. 656; *Leonard v. Baton Rouge*, 89 La. Ann. 275. The city of New Orleans may withdraw from public use a portion of the batture in front of the city, as by leasing it for a market bazaar. *New Orleans v. Morris*, 3 Woods, 115. As to the Batture, see *Board of Liquidation v. Louisville R. Co.*, 109 U. S. 221; *Sweeney v. Shakespeare*, 42 La. Ann. 614; *Leonard v. Baton Rouge*, 89 id. 275; *ante*, § 99.

<sup>2</sup> *Rex v. Yarborough*, above cited; *Foster v. Wright*, 4 C. P. D. 438; *Mussumat Imaum Bendi v. Hergovind Ghose*, 4 Moo. Ind. App. 405; *Hale, De Jure Maris*, chs. 1, 4, 6; *Hargrave's Law Tracts*, 15; 2 Black. Com. 261, 262; *Callis on Sewers*, 47, 51, 482; *Woolrych on Waters*, 34; *Dyer*, 326a; *Roll Abr.* 170; *Vin. Abr. tit. Prerogative, B.*; *Com. Dig. tit. Prerogative, D.* 62; *Bacon's Abr. tit.*

*Prerogative, B.*; *Phear's Rights of Water*, 48; *Attorney General v. Turner*, 2 Mod. 106; 1 Keb. 301; *Whitaker v. Wise*, 2 Keb. 750; *Royal Fishery of the Banne, Sir John Davies*, 59; 2 Vent. 188; *Commonwealth v. Alger*, 7 Cush. 53; *Chapman v. Kimball*, 9 Conn. 38, 41; *Champlain R. Co. v. Valentine*, 19 Barb. 484, 493; *Hagan v. Campbell*, 8 Porter, 9.

<sup>3</sup> *Ibid.*; *Boorman v. Sunnuchs*, 42 Wis. 233.

<sup>4</sup> *Ibid.*; *Murry v. Sermon*, 1 Hawks (N. C.), 56.

<sup>5</sup> *Ibid.*; 6 Op. Att. Gen. 172; 7 id. 314. But accretions added to improvements made by the United States belong to it. 5 Op. Att. Gen. 264.

<sup>6</sup> Note 2, *ante*, page 313; *Carlisle v. Graham*, L. R. 4 Ex. 361; *Ford v. Lacy*, 7 H. & N. 151; *Hale, De Jure Maris*, chs. 1, 6; *Hargrave's Law Tracts*, 2, 15; *Woolrych on Waters*, 22, 37; *Foster v. Wright*, 4 C. P. D. 438; *Murphy v. Norton*, 61 How. Pr.

flow continues for forty years, yet if the water recedes the owner has his land again.<sup>1</sup> Changes in a boundary river between States after their admission into the Union do not affect their dominion and jurisdiction.<sup>2</sup> Where the side of an island was gradually washed away by tide-water, and the soil was afterwards restored by the deposit of alluvion, the new soil was held to belong to the owner of the fast land.<sup>3</sup> But if the sea gradually and imperceptibly encroach upon private lands, or the bounds are lost, and the situation and extent of the lost land cannot be ascertained, or if a mere bar or shoal is formed,<sup>4</sup> it belongs to the Crown at common law, and in this country to the State.<sup>5</sup>

§ 159. Same.—When a tidal river does not work a shifting of the shore, but by the irruption of its waters forms an entirely new channel in private lands, not only does the right to the soil thus covered remain in the owner, but the right of fishery is his and not in the public, though the public right of navigation may extend to the new channel.<sup>6</sup> If an unnavigable stream, in which the title of the riparian owners extends *ad filum aquæ*, slowly and imperceptibly changes its course, the boundary line is at the centre of the new channel.<sup>7</sup> But

197; affirmed, *sub nom.*, *Mulry v. Norton*, 29 Hun, 660; 100 N. Y. 424; 53 Am. Rep. 206.

<sup>1</sup> 2 Roll. Abr. 168; *Schultes' Aquatic Rights*, 122; *Callis on Sewers*, 51, note. See *Mussumat Imam Bandi v. Hurgovind Ghose*, 4 Moo. Ind. App. 408.

<sup>2</sup> *Indiana v. Kentucky*, 136 U. S. 479; *State v. Young*, 46 Vt. 565.

<sup>3</sup> *Morris v. Brooke* (Del.), 25 Alb. L. Journ. 90; *Case of Sheyenne Island*, 18 A. G. Op. 280.

<sup>4</sup> *Ante*, § 77; *St. Louis Ry. Co. v. Ramsey*, 53 Ark. 314.

<sup>5</sup> *Ibid.*; *Dyer*, 326a; 2 Roll. Abr. 168; *Phear's Rights of Water*, 43; *Schultes' Aquatic Rights*, 122; *Woolrych on Waters*, 28, 37; *In re Hull & Selby Railway*, 5 M. & W. 327; *Zetland v. Glover Incorporation of Perth*, L. R. 2 H. L. Sc. 70; *Wedder-*

*burn v. Paterson*, 2 Sc. Sess. Cas. (3d series) 902; *Foster v. Wright*, 4 C. P. D. 438. See *Hale's Amendments of Lawes*, ch. 4; *Hargrave's Law Tracts*, 277, 278.

<sup>6</sup> *Carlisle v. Graham*, L. R. 4 Ex. 366; *Miller v. Little*, 2 L. R. Ir. 304; 4 id. 302; *Hale, De Jure Maris*, ch. 6; *Hargrave's Law Tracts*, 34; *Rolle Abr.* 390. In this country it would extend to the new channel, navigable waters being those which are navigable in fact. *Ante*, ch. 3; *St. Louis v. Rutz*, 138 U. S. 226; 35 Fed. Rep. 188. In England, it would still seem to depend upon user or the fact that the river was tidal. *Ibid.*

<sup>7</sup> *Ford v. Lacey*, 7 H. & N. 151; 7 Jur. N. S. 684; *Foster v. Wright*, 4 C. P. D. 438; *Carlisle v. Graham*, L. R. 4 Ex. 361; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Gerrish v.*

if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits between the two estates.<sup>1</sup> Where a right of several fishery had been exercised to the thread of a river flowing through an estuary, and the river changed its course, it was held, in an action of trespass for fishing to the thread of the new river, that the middle of the new stream and not of the old was the local limit of the fishery.<sup>2</sup> But where a river which was originally within the lands of one proprietor encroached by gradual and imperceptible degrees upon the land of the defendant, an adjoining proprietor, so that a strip of such land became part of the river bed, it was held that the first proprietor had not lost his property in the bed of the stream by the gradual change of its course, and could maintain an action of trespass against the defendant for fishing at a point in the bed which was the latter's property before the encroachment.<sup>3</sup> When a stream flowing through a person's land is diverted into a new channel, either artificially or by a sudden flood, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream cannot be lawfully returned to its former channel.<sup>4</sup> If a boundary river between States forms a new and distinct channel, the dominion and jurisdiction of the respective States are not affected.<sup>5</sup>

§ 160. **Embanking.**—The owners of lands exposed to the inroads of the sea or of inland waters may erect walls and

Clough, 48 N. H. 9; Niehaus v. Shepherd, 26 Ohio St. 40; Collins v. State, 8 Texas App. 323; Woodbury v. Short, 17 Vt. 387; Browne v. Kennedy, 5 H. & J. 195; Goodsell v. Lawson, 42 Md. 348; 2 Black. Com. 262.

<sup>1</sup> Ibid.; Spigener v. Cooner, 8 Rich. (S. C.) 301; Lynch v. Allen, 4 Dev. & Bat. 62; Dwinel v. Barnard, 28 Maine, 469; Just. Inst. lib. 2, tit. 1, § 23; Bracton, 221.

<sup>2</sup> Miller v. Little, 2 L. R. Ir. 804.

<sup>3</sup> Foster v. Wright, 4 C. P. D. 438.

<sup>4</sup> Ford v. Whitlock, 27 Vt. 265; Woodbury v. Short, 17 Vt. 387. In the last case acquiescence for ten years was held sufficient.

<sup>5</sup> Missouri v. Kentucky, 11 Wall. 895; Indiana v. Kentucky, 136 U. S. 479; Handly v. Anthony, 5 Wheat. 380; Holbrook v. Moore, 4 Neb. 487; Vattel's Law of Nations, lib. 1, ch. 22, §§ 268, 270; 8 Op. Att. Gen. 175; State v. Young, 46 Vt. 565; Moss v.

embankments to prevent the wearing away of the land or to protect it from overflow.<sup>1</sup> It is lawful to embank against the sea, even when the effect may be to cause the water to beat with increased violence against the adjoining land, thereby rendering it necessary for the adjoining land-owner to enlarge or strengthen his defenses.<sup>2</sup> But this rule is not applicable in the case of embankments by the side of a river, whether public or private.<sup>3</sup> A riparian proprietor is not only entitled to have the water flow to him in its natural state, so far as that is a benefit, as, *e. g.*, to turn his mill or water his cattle, but in times of ordinary flood he is bound to receive the water, so far as it is a nuisance by its tendency to flood his land, and cannot exclude the superabundant water to the injury of other proprietors.<sup>4</sup> The owner of land, bounding upon an inland stream, may repair and restore the banks, when broken, but cannot make different ones. So long as his operations tend only to confine the waters within their original channel, he is not responsible for damage to neighboring proprietors,<sup>5</sup> or to a highway;<sup>6</sup> but if he excavates there, and

Gibbs, 10 Heisk. 283; *Collins v. State*, 3 Texas App. 323. See *Kent v. Atlantic De Laine Co.*, 8 R. L. 305.

<sup>1</sup> *Ridge v. Midland Railway*, 53 J. P. 55; *Barnes v. Marshall*, 68 Cal. 569.

<sup>2</sup> *Rex v. Pagham*, 8 B. & C. 355; *Rex v. Trafford*, 1 B. & Ad. 874; 8 Bing. 204; *Hesketh v. Bray*, 21 Q. B. D. 444; *Gerrish v. Clough*, 48 N. H. 9, 13; 97 Am. Dec. 565, note; *Hall on the Seashore* (2d ed.), 167, 168. See *post*, § 213.

<sup>3</sup> *Rex v. Trafford*, *supra*; *Menzies v. Breadalbane*, 3 Wils. & Shaw, 243; 3 Bligh, N. S. 414; *Gerrish v. Clough*, 48 N. H. 9, 13.

<sup>4</sup> *Ibid.*; *Mason v. Shrewsbury Ry. Co.*, L. R. 6 Q. B. 578, 582; *Burwell v. Hobson*, 12 Gratt. 322.

<sup>5</sup> *Menzies v. Breadalbane*, 3 Wils. & Shaw, 235; 3 Bligh, N. S. 414; *Rex v. Commissioners of Sewers*, 2 B. & C. 355; *Rex v. Pagham*, 8 B. & C. 355; *Rex v. Trafford*, 1 B. & Ad. 874; 8

Bing. 204; *Farquharson v. Farquharson*, 3 Bligh, N. S. 421; *Avery v. Empire Woolen Co.*, 82 N. Y. 582; *Jones v. Soulard*, 24 How. 41; *Rix v. Johnson*, 5 N. H. 520; *Gerrish v. Clough*, 48 N. H. 9; *Adams v. Barney*, 25 Vt. 225; *Tuthill v. Scott*, 43 Vt. 525; *Rood v. Johnson*, 26 Vt. 64, 72; *Harding v. Whitney*, 40 Ind. 379; *Blaine v. Brady*, 64 Md. 373; *Wilhelm v. Burleyson*, 106 N. C. 381; *Merritt v. Parker*, Coxe (N. J.), 460; *Pierce v. Kinney*, 59 Barb. 56; *Slater v. Fox*, 5 Hun, 544; *Mailhot v. Pugh*, 30 La. Ann. 1359; *New Orleans v. Henderson*, 5 La. 423; *Barnes v. Marshall*, 68 Cal. 569; *Ross v. Mackey*, 3 N. Zeal. L. R. (S. Ct.) 66; *Dodson v. Parker*, Ollivier, B. & F. (N. Z.) 181.

As to assessment of owners of inner dyke protected by outer dyke needing repairs, see *Wickwire v. Gould*, 3 Russell & Ch. N. S. 469; *s. c.* *Russell & Ch. Eq. N. S. 245*. See, also, *Brown*

<sup>6</sup> *Shelbyville Turnpike Co. v. Green*, 99 Ind. 205.



the sea entering undermines the adjoining land, or percolates into and impregnates a well, he is liable for the injury so caused.<sup>1</sup> The construction and maintenance by a city of a dyke upon the corporate domain, to prevent overflow of a natural stream, raises no obligation to keep up the dyke to prevent damage to adjacent land-owners who purchased and during fifteen years made improvements, relying upon the protection afforded thereby.<sup>2</sup> If the owner of a dam upon a stream, the course of which is changed by an extraordinary flood, does not elect to restore the banks, he is not liable for injuries to others caused by the altered course of the stream and the continuance of his dam.<sup>3</sup> Erections, intended to exclude the water, are illegal, if they cause the diversion of a stream from its accustomed channel, and throw the water upon the land of an opposite or adjoining proprietor;<sup>4</sup> and while mere apprehension of danger is not sufficient to support an action for this cause, yet any operation extending into the stream itself is *prima facie* an encroachment upon the common interest of the other riparian proprietors, and the burden is upon the party doing such act to show that it is not injurious.<sup>5</sup> If a sea-wall or embankment is erected in tide-waters

*v. Windsor Ry. Co.*, 2 Russell & G. N. s. 480.

<sup>1</sup> *Mears v. Dole*, 185 Mass. 508.

<sup>2</sup> *Collins v. Macon*, 69 Ga. 542. See *Hoard v. Des Moines*, 62 Iowa, 826; *Coulson & Forbes on Waters*, 74; *Cushing v. Nantasket Beach Railroad*, 143 Mass. 77.

<sup>3</sup> *Jones v. Turner*, 46 Barb. 527.

<sup>4</sup> *Farquharsen's Case*, cited 8 Wils. & Shaw, 235; *Morr. Dict.* 12, 787; *Attorney General v. Lonsdale*, L. R. 7 Eq. 387; *Bickett v. Morris*, 1 H. L. Sc. 47, affirming *Aberdeen v. Menzies*, *Morr. Dict.* 12, 787; *Blantyre v. Doon*, 10 Dunlop, 542; *Hamilton v. Eddington*, *Morr. Dict.* 12, 826; *Burnis v. Brown*, *Hume's Dict.* 504; *Gellathy's Case*, 1 Macph. 592; *Menzies v. Breadalbane*, 8 Wils. & Shaw, 235; *New Albany R. Co. v. Higman*, 18 Ind. 77; *Railroad Co. v. Carr*, 38 Ohio

St. 448; *Crawford v. Rambo*, 44 id. 279; *Niles Works v. Cincinnati*, 2 Disney (Ohio), 400; *Longstreet v. Harkrader*, 17 Ohio St. 23; *Cincinnati R. Co. v. Ahr*, 2 Sup. Ct. (Ohio) 515; *Ten Eyck v. Delaware Canal Co.*, 8 Harr. (N. J.) 200; *Tinsman v. Delaware R. Co.*, 2 Dutch. 148; *Vernum v. Wheeler*, 85 Hun, 53. Necessity will not justify a defendant, in order to save his own property, in cutting an embankment and thereby destroying the plaintiff's property; *quære*, as to saving life. *Newcomb v. Tisdale*, 62 Cal. 575.

<sup>5</sup> *Bickett v. Morris*, 1 H. L. Sc. 47; *Attorney General v. Lonsdale*, L. R. 7 Eq. 387; *Attorney General v. Terry*, L. R. 9 Ch. 425; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Brownlow v. Metropolitan Board of Works*, 18 C. B. N. s. 768; 16 id. 546; *Cracknell*

beyond the limits of the owner's land, it is doubtless illegal at common law as being a purpresture, since it does not appear that littoral proprietors are authorized, as against the Crown or without its sanction, to erect even defenses against the sea below high-water mark.<sup>1</sup> In this country, it is doubtless a principle of general application, as has been expressly held in Wisconsin, that, as a right of necessity, when water, navigable or not navigable, is by natural causes wearing away and intruding upon the banks, the riparian owner, whether he owns the soil *ad filum aquæ* or not, may, as against the public, intrude into the shoal unnavigable water near the banks so far as may be necessary for the purpose of constructing works essential to the protection of his land against the action of the water.<sup>2</sup> Such structures are public nuisances if they interfere with the navigation.<sup>3</sup>

§ 161. Same.—The owner of the soil of navigable waters is not liable to keep it free from obstructions or to compensate the adjoining owners for damage done by overflow of the water, even when toll is taken for navigating thereon.<sup>4</sup> But liability to cleanse a river may arise from prescription.<sup>5</sup> So, a littoral proprietor may be bound by contract<sup>6</sup> or by pre-

*v. Thetford*, L. R. 4 C. P. 629; *Wishart v. Wyllie*, 1 Macq. 389; *Brown v. Gugsy*, 2 Moo. P. C. 341; *Norbury v. Kitchen*, 15 L. T. N. S. 501; *Norway Plains Co. v. Bradley*, 52 N. H. 86. If the bank of a stream is washed away, and its bed widened by a flood, a corporation which has the franchise of a toll-bridge across the river, and is required by its charter to keep the bridge in repair, is bound to extend the bridge to the new bank. *Commonwealth v. Dearfield*, 6 Allen, 449. In an action to recover damages for taking stones from a river, and thereby causing the plaintiff's land to be washed away, evidence that the removal of stones at another part of the river produced the same effect is not admissible, unless it appears affirmatively that the conditions are the same. *Hawks v. Charlestown*, 110 Mass. 110.

<sup>1</sup> *Coulson & Forbes on Waters*, 83.

<sup>2</sup> *Diedrich v. Northwestern Ry. Co.*, 42 Wis. 248; *Delaphine v. Chicago Ry. Co.*, id. 214; *Boorman v. Sunnuchs*, id. 233; *Olson v. Merrill*, id. 203.

<sup>3</sup> *Bickett v. Morris*, 1 H. L. Sc. 47; *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *Attorney General v. Terry*, L. R. 9 Ch. 425; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Atlee v. Packet Co.*, 21 Wall. 389; 2 Dillon, 479; *Diedrich v. Northwestern Ry. Co.*, 42 Wis. 248.

<sup>4</sup> *Hodgson v. York*, 28 L. T. N. S. 836; *Cracknell v. Thetford*, L. R. 4 C. P. 629; *Parrett Navigation v. Robins*, 10 M. & W. 593; *Bridge's Case*, 10 Rep. 33; *Coulson & Forbes on Waters*, 84. See § 216, *post*.

<sup>5</sup> *Lynn v. Turner*, Cowper, 86.

<sup>6</sup> *Savannah Ry. Co. v. Lawton*, 75 Ga. 192.

scription to maintain and repair a sea wall;<sup>1</sup> but the mere fact that he has always maintained an embankment in front of his own land, and that adjoining proprietors have not, because of its existence, found it necessary to erect walls against their own frontages, is not sufficient evidence to establish this liability;<sup>2</sup> and even a trespasser who partially removes such structure, and lets in the tide, may not be liable to him.<sup>3</sup> The owner of land, upon which exists a natural barrier against the sea, may also be restrained from destroying or removing it,<sup>4</sup> upon proceedings on behalf of the Crown or public, if not of individuals liable to sustain peculiar injury. Riparian proprietors may maintain an action for breaking levees built by them,<sup>5</sup> but are not required to pen in the water by artificial barriers for the benefit of their neighbors.<sup>6</sup> There is no duty resting upon the owner of an artificial canal, analogous to that imposed on the owners of a natural watercourse, not to impede the flow of the water; and, if the overflow of a neighboring river increases the water of the canal to the injury of

<sup>1</sup> *Reg. v. Leigh*, 10 Ad. & El. 398; *Henley v. Lyme*, 2 Cl. & Fin. 331; *Rex v. Commissioners of Sewers*, 8 T. R. 312; *Reg. v. Same*, 14 Q. B. D. 561; *Keighley's Case*, 10 Coke, 139; *Rooke's Case*, 5 Coke, 99; *Case of the Isle of Ely*, 10 Coke, 140; *Wingate v. Waite*, 6 M. & W. 739; *Reg. v. Whar-ton*, 2 B. & S. 719; *Rex v. Commissioners of Sewers*, 1 B. & C. 477; *Griffith's Case*, Moore, 62; *Nitro-Phosphate Co. v. London Docks*, 9 Ch. D. 503, 921; *River Wear Commissioners v. Adamson*, 2 App. Cas. 750, 780; *Reg. v. Baker*, L. R. 2 Q. B. 621; *Rex v. Paul*, 2 M. & R. 307; *Morland v. Cooke*, L. R. 6 Eq. 252; *Collins v. Middle Level Commissioners*, L. R. 4 C. P. 279; *Fobbing Commissioners v. Reg.*, 11 App. Cas. 449; *West Norfolk F. M. Co. v. Archdale*, 16 Q. B. D. 754; 19 L. J. 566; *Callis on Sewers*, 107, 151; *Coulson & Forbes on Waters*, 27-32; *Hunt on Boundaries* (2d ed.), 37. As to the duties of conservancy commissioners, see *Bramlett v. Tees Conserv-*

*ancy Commissioners*, 49 J. P. 214. See *Hesketh v. Bray*, 21 Q. B. D. 444; 58 L. T. N. S. 313.

<sup>2</sup> *Hudson v. Tabor*, 2 Q. B. D. 290; *Attorney General v. Tomline*, 12 Ch. D. 214; *Collins v. Macon*, 69 Ga. 542. See 67 L. T. 314; 20 Ir. L. T. 430; 19 L. J. 566. It seems that a covenant to repair a sea-wall runs with the land, and would therefore bind a purchaser even without notice express or implied. *Morland v. Cooke*, L. R. 6 Eq. 252.

<sup>3</sup> *Koch v. Delaware R. Co. (N. J.)*, 21 Atl. 284.

<sup>4</sup> *Ibid.*; *Attorney General v. Tomline*, 12 Ch. D. 214; *Crompton v. Lea*, L. R. 19 Eq. 115; *Philadelphia v. Scott*, 81 Penn. St. 80, 88; *Commonwealth v. Alger*, 7 Cush. 53, 86; *Crowley v. Copley*, 2 La. Ann. 890; *Watson v. Marshall*, 16 La. Ann. 231; *Leblanc v. Pittman*, 26 La. Ann. 433; *O'Connor v. Stewart*, 19 La. Ann. 127.

<sup>5</sup> *Belcher v. Murphy*, 81 Cal. 89.

<sup>6</sup> *Ibid.* See *Rowland v. Carmichael*, 77 Ga. 350.

his premises adjoining, he may pen up the canal, and thus exclude the water from his premises, and will not be liable to a neighbor whose land he thus causes to be flowed;<sup>1</sup> but this does not apply so as to permit a railroad company, in order to protect its embankment from water accumulated there after an unprecedented rainfall, to cut trenches through which the water is discharged upon private lands.<sup>2</sup>

**§ 162. Alluvion — How apportioned.**— The general rules by which alluvion is apportioned between different riparian owners are analogous to those applied in the division of flats between the proprietors of lands on the sea-shore owning to low-water mark.<sup>3</sup> In all cases, when practicable, every proprietor is entitled to a frontage of the same width on the new shore as on the old shore, and at low-water mark as well as high-water mark,<sup>4</sup> without regard to the side lines of the upland, unless referred to as guides in particular grants,<sup>5</sup> or established as boundaries by the agreement or conduct of the conterminous proprietors,<sup>6</sup> or the acts of public authorities.<sup>7</sup>

<sup>1</sup> *Nield v. London Ry. Co.*, L. R. 10 Ex. 4. See *Delaware & H. Canal Co. v. Goldstein*, 125 Penn. St. 246.

<sup>2</sup> *Whalley v. Lancashire Ry. Co.*, 13 Q. B. D. 131. See *Harrison v. Great Northern Ry. Co.*, 3 H. & N. 231.

<sup>3</sup> *Deerfield v. Arms*, 17 Pick. 41, 44; *Wonson v. Wonson*, 14 Allen, 85; *Thornton v. Grant*, 10 R. L. 477, 489; *Hubbard v. Manwell*, 60 Vt. 235.

<sup>4</sup> *Ibid.*; *Gray v. Deluce*, 5 Cush. 9, 12; *Walker v. Boston & Maine Railroad*, 3 Cush. 23; *Porter v. Sullivan*, 7 Gray, 443; *Attorney General v. Boston*, 12 Gray, 558; *Valentine v. Piper*, 22 Pick. 96; *Wonson v. Wonson*, 14 Allen, 71, 79; *Stone v. Boston Steel & Iron Co.*, *id.* 230; *Knight v. Wilder*, 2 Cush. 209; *Kennebec Ferry Co. v. Bradstreet*, 28 Maine, 374.

<sup>5</sup> *Ibid.*; *Rust v. Boston Mill Corporation*, 6 Pick. 169; *Dawes v. Prentice*, 16 Pick. 435, 442; *Piper v. Richardson*, 9 Met. 158; *Curtis v. Francis*, 9 Cush. 427, 438; 9 Gray, 522; *Win-*

*nisimmet Co. v. Wyman*, 11 Allen, 432; *Stone v. Boston Steel & Iron Co.*, 14 Allen, 230, 234; *Clark v. Campau*, 19 Mich. 325; *Emerson v. Taylor*, 9 Maine, 42. *Cf.* *Hamilton v. Gould*, 24 Q. B. (Can.) 58.

<sup>6</sup> *Ibid.*; *Adams v. Boston Wharf Co.*, 10 Gray, 521; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553, 560; *Stone v. Boston Steel & Iron Co.*, 14 Allen, 230, 234; *Sparhawk v. Bullard*, 1 Met. 95; *Breed v. Breed*, 117 Mass. 593, 596; 110 Mass. 532; *Central Wharf v. India Wharf*, 123 Mass. 561, 567; *Jones v. Boston Mill Co.*, 6 Pick. 148; *Rider v. Thompson*, 23 Maine, 243; *Treat v. Chipman*, 35 Maine, 34; *Thornton v. Foss*, 26 Maine, 405.

<sup>7</sup> *Ibid.*; *Brimmer v. Long Wharf*, 5 Pick. 135; *Valentine v. Piper*, 22 Pick. 95; *Piper v. Richardson*, 9 Met. 163; *Wheeler v. Stone*, 1 Cush. 319; *Commonwealth v. Alger*, 7 Cush. 53, 73; *Drake v. Curtis*, 9 Cush. 447; 9 Gray, 523.

"In general," says Merrick, J.,<sup>1</sup> "where there are no circumstances or peculiarities in the formation of the shore or the course of the channel, the lines of division are to be made to the channel in the most direct course from the lateral boundaries of the several tracts of upland to which the flats are appended." So, also, in the case of unnavigable streams which are the property of the riparian proprietors *usque ad filum aquæ*, the side lines are extended to the center of the stream from the *termini* on the bank at right angles with the general course of the river, unless varied by the terms of the conveyance under which the proprietors hold,<sup>2</sup> or the circumstances of the particular case.<sup>3</sup>

§ 163. Same — Same.—When the general course of the shore or river bank approximates to a straight line, alluvial deposits as well as flats are divided among the conterminous proprietors by lines perpendicular to the general course of the original bank, or of the original high-water mark of the shore.<sup>4</sup> When it curves or bends, two objects are to be kept in view: namely, to give to each proprietor a fair share of the land, and to secure to him convenient access to the water from all parts of his land by giving him a share of the outward line proportioned to the share of the line of high-water mark or original shore owned by him.<sup>5</sup> In such case, the general rule

<sup>1</sup> Attorney General v. Boston Wharf Co., 12 Gray, 553, 558; Ashby v. Eastern R. Co., 5 Met. 368; Walker v. Boston & Maine Railroad, 3 Cush. 1, 23; Morris v. Beardsley, 54 Conn. 338. As to the apportionment of costs of proceedings for division of flats, see King, Petitioner, 129 Mass. 413.

<sup>2</sup> Knight v. Wilder, 2 Cush. 199; Batchelder v. Keniston, 51 N. H. 496; Bay City Gaslight Co. v. Industrial Works, 28 Mich. 182; Clark v. Campau, 19 Mich. 325; Miller v. Hepburn, 8 Bush, 326; Irwin v. Towne, 42 Cal. 326; People v. Schermerhorn, 19 Barb. 540. See Inhabitants of Ipswich, Petitioners, 13 Pick. 431; Au Gres Boom Co. v. Whitney, 26 Mich. 42.

<sup>3</sup> Kreiter v. Bigler, 101 Penn. St. 94; Wood v. Appal, 63 Penn. St. 210.

<sup>4</sup> Note 4 above; Sparhawk v. Bullard, 1 Met. 106; Knight v. Wilder, 2 Cush. 209; Porter v. Sullivan, 7 Gray, 443; Wonson v. Wonson, 14 Allen, 71, 79; Batchelder v. Keniston, 51 N. H. 496, 498; Delaware R. Co. v. Hannon, 37 N. J. L. 276; Miller v. Hepburn, 8 Bush, 326; Rice v. Ruddiman, 10 Mich. 125; Clark v. Campau, 19 Mich. 325; Bay City Gaslight Co. v. The Industrial Works, 28 Mich. 182; Graves v. Fisher, 5 Maine, 69. See Crook v. Seaford, L. R. 6 Ch. 551; L. R. 10 Eq. 678; Newton v. Eddy, 23 Vt. 319; Delord v. New Orleans, 11 La. Ann. 699; Michon v. Gravier, id. 596.

<sup>5</sup> Deerfield v. Arms, 17 Pick. 41, 45; Batchelder v. Keniston, 51 N. H. 496.

is to measure the whole extent of high-water mark or of the ancient line along the shore; to then divide the line of low-water mark, or, in the case of alluvion, the newly formed water line, into equal parts, corresponding in number to the feet or rods ascertained by the above measurement; and, after apportioning to each proprietor as many of these parts as he owned feet or rods on the old line, to draw lines from the original *termini* of the boundaries of the upland to the points of division on the newly formed line, or, in the case of flats, on the line of low-water mark.<sup>1</sup> If, for example, the shore line, before the formation of alluvion, was two hundred rods in length, A's share being one hundred and fifty rods and B's fifty, and the new shore line is but one hundred rods in length, then A would take seventy-five rods and B twenty-five rods of that line; and the division of the land would be completed by running a line from the bound between the parties on the old line to the points thus determined on the new line.<sup>2</sup> If, instead of curving inward towards the land, the course of the shore bends outward, the dividing lines diverge and each proprietor has a correspondingly greater width towards the water than towards the land.<sup>3</sup>

§ 164. Same — Same.—In *Deerfield v. Arms*,<sup>4</sup> Shaw, C. J., in apportioning alluvion by converging lines according to the above rule, remarks that where the shore is elongated by deep indentations or sharp projections, its length should be reduced by an equitable and just estimate to the general available line of the land upon the water. In *Rust v. Boston Mill Corporation*,<sup>5</sup> in Massachusetts, flats were to be divided lying within a

<sup>1</sup> *Deerfield v. Arms*, 17 Pick. 41; *Batchelder v. Keniston*, 51 N. H. 496; *Jones v. Johnson*, 18 How. 150; *Johnson v. Jones*, 1 Black, 209; *Kehr v. Snyder*, 114 Ill. 313.

<sup>2</sup> *Batchelder v. Keniston*, 51 N. H. 496, 498; *Armstrong v. Wheeler*, 52 Conn. 428.

<sup>3</sup> *Gray v. Deluce*, 5 Cush. 9, 12, 13; *Porter v. Sullivan*, 7 Gray, 443; *Emerson v. Taylor*, 9 Maine, 46; *Clark v. Campau*, 19 Mich. 325.

<sup>4</sup> 17 Pick. 41, 46. See *Irwin v. Fowne*, 42 Cal. 326.

<sup>5</sup> *Rust v. Boston Mill Corporation*, 6 Pick. 158. This rule is approved by other courts in *Johnson v. Jones*, 1 Black, 209; *O'Donnell v. Kelsey*, 10 N. Y. 412; 4 Sand. 202; *Miller v. Hepburn*, 8 Barb. 332; *Nott v. Thayer*, 2 Bosw. 10; *Furman v. New York*, 10 N. Y. 567; 5 Sand. 16; *Thornton v. Grant*, 10 R. L. 477, 488; *Aborn v. Smith*, 12 R. L. 370; *Batchelder v. Keniston*, 51 N. H. 496, 499. See, also, *Deerfield v. Arms*, 17 Pick. 45; *Sparhawk v. Bullard*, 1 Met. 107; *Ashby v. Eastern R. Co.*, 5 Met. 369; *Piper*



deep cove, out of which the tide ebbed at low water, and the mouth of which was so narrow that it was impossible to make the division among the several proprietors by parallel lines; and it was made by running converging divisional lines from high-water mark to points upon a base line across the mouth of the cove, the points being fixed by giving to each proprietor a width upon the base line proportional to the width of his shore line. In *Gray v. Deluce*,<sup>1</sup> the shore of a shallow cove formed a long curve, and the flats were divided, as if the line of the shore had been straight, by drawing parallel lines from the ends of the division lines of the upland to low-water mark in such a manner that they intersected at right angles a

*v. Richardson*, 9 Met. 158; *Wheeler v. Stone*, 1 Cush. 315; *Knight v. Wilder*, 2 Cush. 209; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Attorney General v. Boston Wharf Co.*, 12 Gray, 560; *Berry v. Raddin*, 11 Allen, 579; *Boston v. Richardson*, 13 Allen, 151; 105 Mass. 360; *Nichols v. Boston*, 98 Mass. 41; *Charlestown v. Tufts*, 111 Mass. 351; *Tufts v. Charlestown*, 117 Mass. 402; *Eastern Railroad v. Allen*, 135 Mass. 13. In *Walker v. Boston & Maine Railroad*, 3 Cush. 1, 25, it was said that there is probably no reason why, upon the principle of giving an equal division, the lines, after passing the mouth of a narrow and shallow cove, should not widen and spread in proportion to low-water mark. In Maine the following rule of apportionment has been adopted: Draw a base line from one corner of each lot to the other, at the margin of the upland, and run a line from each of these corners, at right angles with such base line, to low-water mark. If the line of the shore is straight, the side lines of the lots thus drawn to low-water mark will be identical; but if, by reason of the curvature of the shore, they diverge from or conflict with each other, the land enclosed or excluded by both lines is to be equally divided between

the adjoining proprietors. *Emerson v. Taylor*, 9 Maine, 42; *Kennebec Ferry Co. v. Bradstreet*, 28 Maine, 374; *Treat v. Chipman*, 35 Maine, 34; *Call v. Lowell*, 40 Maine, 31. This rule, being more difficult of application than that adopted in Massachusetts, has been less favorably received in other States. See *Thornton v. Grant*, 10 R. L. 477, 488, and authorities above cited; *Gray v. Deluce*, 5 Cush. 9, 13.

<sup>1</sup> 5 Cush. 9. The fact that in this case it does not appear whether the low-water line, which in this State is the boundary of the lands adjoining tide waters, under the ordinance of 1647 (*post*, § 169), was in any part within the base line, is not necessarily material. *Stone v. Boston Steel & Iron Co.*, 14 Allen, 230. See, also, *Commonwealth v. Alger*, 7 Cush. 53, 69, 79; *Adams v. Boston Wharf Co.*, 10 Gray, 521, 530; *Attorney General v. Boston Wharf Co.*, 12 Gray, 557; *Wonson v. Wonson*, 14 Allen, 71, 79, 83; *Boston v. Richardson*, 105 Mass. 358; *Stockham v. Browning*, 18 N. J. Eq. 390; *Delaware R. Co. v. Hannon*, 37 N. J. L. 276; *Thornton v. Grant*, 10 R. L. 477; *Aborn v. Smith*, 12 R. L. 370; *Clark v. Campau*, 19 Mich. 325; *Miller v. Hepburn*, 8 Bush, 326.

base line across the mouth of the cove. If there are adjoining coves, the side lines of which would conflict, if so drawn, the line between them is projected at an equal angle to the base line of each cove.<sup>1</sup> These rules may be varied by agreement between the owners of the shore or by long-continued acquiescence in other assumed boundary lines.<sup>2</sup> Lines, for example, which were established by a partition according to other rules, but affirmed by the court and acquiesced in during thirty-five years by the parties, were held to be the true boundaries.<sup>3</sup> If a cove or inlet is so irregular in outline, and so traversed by crooked channels from which the tide does not ebb, that none of the foregoing rules is applicable, the only course is to so divide the flats as to give to each proprietor a fair and equal proportion by as near an approximation to these rules as is practicable.<sup>4</sup>

§ 165. **Same — Same.**— In *Thornton v. Grant*,<sup>5</sup> in Rhode Island, the question was whether the defendants were so constructing a wharf as to encroach upon the plaintiffs' water front. It was not contended that the wharf, if constructed as proposed, would extend across the division line between the plaintiffs' and defendants' lands, if that line were prolonged; but it was claimed that the prolongation of that line was not the proper limit of the plaintiffs' water front, owing to the conformation of the shore. Durfee, J., in delivering the opinion of the court, referred to the foregoing rules, and said: "In the case at bar a solid rock projecting out to the main channel has preserved the shore of the plaintiffs from detrition at that point, but has allowed quite a deep inward curve beyond that point, while the shore of the defendants, having no

<sup>1</sup> *Wonson v. Wonson*, 14 Allen, 71.

<sup>2</sup> *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Valentine v. Piper*, 22 Pick. 85; *Piper v. Richardson*, 9 Met. 155; *Sparhawk v. Bullard*, 1 Met. 195.

<sup>3</sup> *Adams v. Boston Wharf Co.*, 10 Gray, 521; *Winnisimmet Co. v. Wyman*, 11 Allen, 432. If opposite riparian owners agree upon a boundary line as to land under water which they are about to fill, and one of them

fills to this line, the other is estopped to deny that it is the true boundary. *Laverty v. Moore*, 32 Barb. 347.

<sup>4</sup> *Walker v. Boston & Maine R. Co.*, 3 Cush. 1. See *Magee v. St. John*, 23 N. Bruns. 275.

<sup>5</sup> 10 R. I. 477, 489. See *Rush v. Jackson*, 24 Cal. 308; *Arden v. Kermit*, Anth. N. P. 112; *Jones v. Lee*, 77 Mich. 35; *Bond v. Wool* (N. C.), 12 S. E. 281.

such protection, has conformed more to the course of the river. The consequence is, that if we draw a front line from headland to headland, and then draw the division line so as to give to each set of proprietors a length of front line proportionate to the length of their original shore, the division line will pass diagonally across what would ordinarily be regarded as the water front of the defendants' land. This is a result which does not commend itself to us as either reasonable or just. We have decided upon another rule, which to us seems equitable, and which, for our present purposes, in the circumstances of this case, leads to a pretty satisfactory result. The rule is this: Draw a line along the main channel in the direction of the general course of the current in front of the two estates, and from the line so drawn, and at right angles with it, draw a line to meet the original division line on the shore. This rule is not unlike the rule adopted in *Gray v. Deluce*.<sup>1</sup> It will give the plaintiffs as large an extent of water front as we are disposed to allow them; and upon the front so defined we will grant them an injunction to prevent the defendants from encroachments." In *Aborn v. Smith*,<sup>2</sup> in the same State, it was held, in pursuance of the rule laid down in *Gray v. Deluce*<sup>3</sup> and *Thornton v. Grant*,<sup>4</sup> that the boundaries of riparian estates, the proprietors of which are entitled to reclaim a curving shore to a harbor line established by law, are to be determined by running a line from the terminus of the upland

<sup>1</sup> 5 Cush. 9; *ante*, § 164.

<sup>2</sup> 12 R. I. 370; 11 R. I. 594; *ante*, § 138; *Manchester v. Point Street Iron Works*, 13 R. I. 355; *Brown v. Goddard*, *id.* 76. It has been held, that where adjoining proprietors have, by conduct and by deeds of grant and partition, for many years, recognized and acquiesced in a line as separating their inchoate and imperfect rights upon the shore, they are bound by such acknowledgment and acquiescence; and that if the front of the lots has not been filled out, the line thus established will extend to and terminate at a harbor line afterwards established by the

State. *Brown v. Goddard*, 13 R. I. 76; *Stockham v. Browning*, 18 N. J. Eq. 390. As to the jurisdiction of equity in such cases, see *id.* 11 R. I. 594; 1 Story, Eq. Jur. § 610; *Willard v. Magoon*, 30 Mich. 282; *Perry v. Pratt*, 31 Conn. 433.

<sup>3</sup> 5 Cush. 9; *ante*, § 164.

<sup>4</sup> 10 R. I. 477, above cited. In *Bay City Gaslight Company v. Industrial Works*, 28 Mich. 182, it was held that a dock line which was not parallel either with the thread of the stream or with the shore did not interfere with the application of the rule extending boundaries at right angles to the thread of the stream.

boundary perpendicularly to the harbor line. In *Davidson v. Boston & Maine Railroad*,<sup>1</sup> in Massachusetts, it was held that one who owns a tide mill, and is also the proprietor of flats in front of his mill, which are uncovered by the tide, is not entitled, as against adjoining proprietors or the public, to the free flow of the tide over his flats for the use of his mill or for navigation; and that damage caused to him by the obstruction of the flow of tide water, in consequence of the extension of solid structures upon the adjoining flats, which do not wholly cut off the access to his land, is *damnum absque injuria*.

§ 166. **Islands.**—When islands are formed by either the sudden or gradual action of tide waters within the territory of the nation, they belong to the Crown at common law, and in this country to the respective States.<sup>2</sup> The same is true of the navigable fresh waters of this country belonging to the State,<sup>3</sup> except that, when shoals, sandbars, or islands form along the margin of the water, it is a question of fact for the jury whether they are the property of the State or of the riparian owners as accretions.<sup>4</sup> In general, if an island growing out of the water has a fixed channel which separates it from

<sup>1</sup> 3 Cush. 91.

<sup>2</sup> *Ante*, § 6; Hale, *De Jure Maris*, ch. 4; Hargrave's *Law Tracts*, 87; *Middletown v. Sage*, 8 Conn. 221; *Tracy v. Norwich R. Co.*, 39 Conn. 382. In Missouri, unnamed and unsurveyed islands in the Mississippi river are held to belong to the United States and not to the State. *Adams v. St. Louis*, 32 Mo. 25; *Benson v. Morrow*, 61 Mo. 345. This seems, however, contrary to the current of authority. *Pollard v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Peters, 367; *Barney v. Keokuk*, 94 U. S. 324. As to the power of the governors of Mexico to grant islands near the coast, see *United States v. Castillero*, 23 How. 464; *United States v. Osio*, *id.* 273; 1 Hoffm. 100. In Texas, see *State v. Delesdenier*, 7 Texas, 76;

*Tabor v. Commissioner*, 29 Texas, 508; *Cowan v. Hardeman*, 26 Texas, 217. A mussel bed over which the water flows at every tide is not an island, but flats. *King v. Young*, 76 Maine, 76.

<sup>3</sup> *Ibid.*; *ante*, § 77, ch. 3; *Stover v. Jack*, 60 Penn. St. 339; *Hartley v. Crawford*, 81 Penn. St. (pt. 2) 478; *Packer v. Bird*, 71 Cal. 134; 137 U. S. 661; 82 Cent. L. J. 294, 297. If a body of land is surrounded by water in its flow in an ordinary stage, it is an island, although, at some periods of the year, and at extraordinary tides, the water may not pass. *Doe v. Hill*, 2 Allen (N. B.), 587; *Stover v. Jack*, 60 Penn. St. 339.

<sup>4</sup> *Ante*, § 77; *Fulmore v. Jennings*, 78 Cal. 634.

the adjacent land, the owner of such land cannot claim the island as belonging to it by accretion.<sup>1</sup> In the case of un-navigable fresh-water streams, and of navigable fresh rivers where these are held to belong to the riparian proprietors subject to the public right of navigation, the formation, if gradual and imperceptible, is the property of the riparian proprietors, whether this alluvion is added to the shore or bank, or forms in the bed of the river and becomes an island.<sup>2</sup> When an island is so formed in the bed of a private river as to divide the channel and to lie partly on each side of the thread of the stream, if the land on the opposite sides of the river belongs to different proprietors, the island is divided between them in severalty to the extent of their lands in length according to the original thread or medium line between the banks of the river, when the water is in its natural and ordinary stage, without regard to the channel or deepest part of the stream.<sup>3</sup> If it is altogether on one side of the dividing line, it belongs to the owner of the bank on that side.<sup>4</sup> When formed by a sudden change in the course of the river, or by the violent action of the sea, as by encircling a field, or cutting off a point of land or peninsula, it remains the property of the former owner.<sup>5</sup> If an island in a private river has been lawfully appropriated by another person, or reserved in a grant, the thread of the stream midway between the island and the fast

<sup>1</sup> Ibid.; *Dunty v. Williams*, 2 Pugsley (N. B.), 350.

<sup>2</sup> *Deerfield v. Arms*, 17 Pick. 41, 43.

<sup>3</sup> Hale, *De Jure Maris*, ch. 6; *Hargrave's Law Tracts*, 87; 2 Black. Com. 261; 3 Kent Com. 428; *Ingraham v. Wilkinson*, 4 Pick. 268; *Bardwell v. Ames*, 22 Pick. 333; *Hopkins Academy v. Dickinson*, 9 Cush. 544, 552; *Granger v. Avery*, 64 Maine, 292; *Lodge v. Lee*, 6 Cranch, 237; *McCulloch v. Wall*, 4 Rich. (S. C.) 68; *Canal Commissioners v. People*, 5 Wend. 423, 443; *People v. Canal Appraisers*, 13 Wend. 355; *Luce v. Carley*, 24 Wend. 451; *Walton v. Tift*, 14 Barb. 216; *Greenleaf v. Kilton*, 11 N. H. 530; *Nichols v. Suncook Manuf. Co.*, 34 N. H. 345, 349; *Ridgely v. John-*

*son*, 1 Bland, Ch. 316, n.; *Giraud v. Hughes*, 1 Gill & J. 249.

<sup>4</sup> Ibid.; *Ingraham v. Wilkinson*, 4 Pick. 268; *Claremont v. Carlton*, 2 N. H. 369; *Kimball v. Schoff*, 40 N. H. 190, 194; *Cooper's Just. lib. 2, t. 3*; *Schultes' Aquatic Rights*, 119. Where an island divides a stream so that only one-fourth of the water passes on one side, the riparian owner on that side is entitled to use all the water flowing in that channel. *Crooker v. Bragg*, 10 Wend. 260.

<sup>5</sup> *Hopkins Academy v. Dickinson*, 9 Cush. 544; Hale, *De Jure Maris*, ch. 6; *Fleta*, lib. 3, ch. 2, §§ 6, 8; *Woolrych on Waters*, 28, 36; 1 *Swift's Dig.* 111, 112; *Schultes' Aquatic Rights*, 119, 120.

land is the boundary of the adjoining owner's title.<sup>1</sup> A stream, in passing islands, may thus have two or more threads,<sup>2</sup> and where there are two channels, with an intervening island, the middle of the larger is the boundary.<sup>3</sup> "If," says Schultes,<sup>4</sup> "between an island which lies nearest and belongs to a neighboring estate, and the contrary bank of a neighbor, which is on the other side of the stream, another island shall arise, then the admeasurement of property shall be made from the first island, and not from the estate to which it is apportioned by vicinity." In an action brought to recover possession of an island in the Wabash River in Indiana, claimed by the owner of the adjacent land on the south side of the stream as an accretion caused by the partial filling up of the channel on his side of the river, evidence that the defendants were in continuous adverse possession for more than twenty years prior to the commencement of the suit, and had purchased from the

<sup>1</sup> *McCulloch v. Wall*, 4 Rich. (S. C.) 68; *Stolp v. Hoyt*, 44 Ill. 219; *Missouri v. Kentucky*, 11 Wall. 895; *Claremont v. Carlton*, 2 N. H. 369, 373; *Stanford v. Mangin*, 30 Ga. 355; *Penobscot Tribe v. Veazie*, 58 Maine, 402; *Watson v. Peters*, 26 Mich. 508; *Walker v. Board of Public Works*, 16 Ohio, 544; *Branham v. Blencoe Creek Turnpike Co.*, 1 Lea (Tenn.), 704; *Fleta*, lib. 3, ch. 2, §§ 6, 8. As to what boundaries in particular grants include islands, see *Ibid.*; *Lunt v. Holland*, 14 Mass. 151; *Miller v. Mann*, 55 Vt. 475; *People v. Canal Appraisers*, 13 Wend. 855; *Walton v. Tift*, 14 Barb. 216; *Clarke v. Wagner*, 76 N. C. 463; *Claremont v. Carlton*, 2 N. H. 369; *Kimball v. Schoff*, 40 N. H. 190; *Hartley v. Crawford*, 81 Penn. St. (Pt. 2) 478; *Johns v. Davidson*, 16 Penn. St. 512. As between States, see *Handly v. Anthony*, 5 Wheat. 374; *Howard v. Ingersoll*, 13 How. 381; *Missouri v. Iowa*, 7 How. 660; *Missouri v. Kentucky*, 11 Wall. 895. A grant which purported to convey "an island commonly called and known by the name of the Green

Flats," was held to convey the Green Flats, though usually submerged and not strictly an island. *Brink v. Richtmyer*, 14 Johns. 255. A grant of riparian land "and lands adjoining it, being two or three acres, more or less," does not convey a small island in an adjoining stream separated from such land by the main channel. *Miller v. Mann*, 55 Vt. 475. A grant of a "river" does not convey either the river bed or islands formed therefrom. *Jackson v. Halstead*, 5 Cowen, 216; *ante*, § 81.

<sup>2</sup> *Post*, § 202.

<sup>3</sup> *Cessill v. State*, 40 Ark. 501.

<sup>4</sup> *Aquatic Rights*, 119; *Bract* lib. 2, ch. 2; *Fleta*, lib. 3, ch. 2, §§ 6, 8; *Digest*, 41, t. 1, § 56. An act which defines the boundary between adjoining municipalities as the "middle of the main channel," as it deals with territorial and proprietary rights, and not with navigation, may mean the wider channel, through which the largest amount of water passes, and not the deeper or more navigable channel. *Reg. v. Carleton*, 1 Ontario, 277.



United States in 1857, after a survey ordered in 1849 and made in 1850; that, at the time of the plaintiff's purchase in 1837, it had been omitted from the survey, except to designate its location, and that he never had possession or exercised acts of ownership over the same, or asserted title thereto before the action, was held sufficient to support a verdict in favor of the defendants.<sup>1</sup>

§ 167. **Rights in water frontage — Wharfing out.**— When a wharf or building is extended into the water, two questions arise in determining the legality of the structure: First, whether it is a purpresture, which depends upon the ownership of the soil which it covers;<sup>2</sup> second, whether it is a public nuisance, as interfering with the common rights of navigation and fishery. By the common law, as already stated, any encroachment upon the property of the Crown in tide waters below the high-water mark might be seized by the king as an unauthorized addition to his lands, or it might be abated at his discretion without regard to the question whether it was also a public nuisance.<sup>3</sup> By the common law of England there is no general right, as incident to the ownership of the adjoining lands, and in the absence of a grant from the Crown or of prescription, which presupposes a grant, to extend wharves beyond the ordinary high-water mark of tide waters; and there is no authority in England for the position that a simple purpresture is indictable.<sup>4</sup>

§ 168. **Same.**— In this country this rule is subject to reasonable limitations, and the common rights of the people in these waters, both before and since the Revolution, may be said generally to be confined to what is of public use;<sup>5</sup> while

<sup>1</sup> *Bonewits v. Wygant*, 75 Ind. 41; *Attorney General v. Richards*, 2 Anst. Reg. v. McCormick, 18 Q. B. (Can.) 131. 603; *Attorney General v. Johnson*, 2 Wils. Ch. 87; *ante*, § 21.

As to islands omitted from the general survey of the adjacent lands, see *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626. <sup>4</sup> *Ibid.*; *People v. Davidson*, 30 Cal. 379; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Gough v. Bell*, 22 N. J. L. 441, 477.

<sup>2</sup> *Ryan v. Brown*, 18 Mich. 196; *ante*, ch. 1. <sup>5</sup> *Case v. Toftus*, 39 Fed. Rep. 730;

<sup>3</sup> *Hale, De Jure Maris*, chs. 3, 6; *Williamsburg Boom Co. v. Smith*, 84 Hargrave's Law Tracts; *Attorney General v. Parmeter*, 10 Price, 378; Ky. 372; *Burrows v. Gallup*, 32 Conn. 498, 500; *Dutton v. Strong*, 1 Black,

the owners of lands adjoining navigable waters are permitted to enjoy what remains of the rights and privileges in the soil beyond their strict boundary lines, after giving to the public the full enjoyment of their rights.<sup>1</sup> There is no general jurisdiction vested in our courts analogous to that exercised by the English Court of Exchequer in equity. The business department of that court, being divided between equity and law, included upon the equity side the investigation of purprestures in connection with the charge and collection of the public revenues, and the recovery and protection of the Crown lands;<sup>2</sup> while the equity jurisdiction in this country corresponds to that administered by the High Court of Chancery in England, and our courts of equity, being incompetent to ascertain the pleasure of the State whether a naked purpresture should be seized, demolished, or arrented, appear to have rarely attempted the exercise of such power, and it has not, therefore, been always treated as a question of public justice. Upon this ground, the Supreme Court of California decided,<sup>3</sup> that the district courts of that State had not, by virtue of their equity powers, jurisdiction to order the abatement of a naked purpresture, although the State may of its own motion bring ejectment. In New York it is held that purprestures, like public nuisances, may be abated by the courts upon proceedings on behalf of the people,<sup>4</sup> and that the court of chancery may enjoin any such appropriation of public property to private

23, 32; *Commonwealth v. Charlestown*, 1 Pick. 180, 186; *Commonwealth v. Alger*, 7 Cush. 53; *Clement v. Burns*, 43 N. H. 618; *Stevens v. Paterson R. Co.*, 84 N. J. L. 532; *Providence Steam Engine Co. v. Providence Steamboat Co.*, 12 R. I. 348; *Attorney General v. Delaware R. Co.*, 27 N. J. Eq. 1, 631; *Alden v. Pinney*, 12 Fla. 348; *People v. St. Louis*, 5 Gilman, 351.

<sup>1</sup> *Ibid.* Under the civil law one might construct an enclosure by the sea, lower than the high-water mark, or even than the low-water mark, and possess the ground within the limits of the enclosure, because he is able to exercise an exclusive control over it;

but if the water swept away his enclosure, his exclusive control was lost, and with it all his rights of ownership. Hadley's *Int. to Roman Law*, 158; Goudsmit's *Roman Law*, 113, note.

<sup>2</sup> 3 Bl. Com. 44; 4 Inst. ch. 18; *Attorney General v. Richards*, 2 Anst. 606; *Attorney General v. Parmeter*, 10 Price, 878; *Attorney General v. Burridge*, 10 Price, 878; *Attorney General v. Johnson*, 2 Wils. Ch. 101.

<sup>3</sup> *People v. Davidson*, 80 Cal. 379, 392; *Courtwright v. B. R. Co.*, 80 Cal. 585.

<sup>4</sup> *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 38 Barb. 282; *People v. New York Ferry Co.*, 68 N. Y. 71.

uses as will injuriously affect the public interest.<sup>1</sup> The question whether a structure erected upon the shore of a harbor or of any salt waters is a purpresture is thus of less practical importance in this country than in England; while the question whether such structure interferes with the public right of navigation, and is a nuisance, is equally important in the two countries. This change of view results in some States from statute; in others, from usages which have acquired the force of law.

§ 169. **Same — Massachusetts — Maine.**— In Massachusetts the colony ordinance of 1641-7<sup>2</sup> provided that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietors of the adjoining lands should have property to the low-water mark, where the sea does not ebb above one hundred rods, and not more wheresoever it ebbs further; provided that such proprietors should not have power to stop or hinder the passage of boats or other vessels to other men's houses or lands. This ordinance conveyed to the owners of the upland flats which were within the bounds of towns already established, but not those previously granted to individuals or appropriated to public uses.<sup>3</sup> It did not in terms extend to other colonies than that of Massachusetts; but it was a settled rule of property throughout the province of Massachusetts, after the union of the colony of Massachusetts with Plymouth and Maine, and also with Nantucket and Martha's Vineyard.<sup>4</sup> It applies to the open seashore as well as to the creeks and arms of the sea,<sup>5</sup> and to

<sup>1</sup> Ibid.; Attorney General *v.* Cohoes Co., 6 Paige, 133; Delaware Canal Co. *v.* Lawrence, 2 Hun, 168; People *v.* Third Avenue R. Co., 45 Barb. 68; 30 How. Pr. 121; People *v.* St. Louis, 5 Gilman, 351.

<sup>2</sup> Also denominated the ordinance of 1641; 1647 is probably the correct date. Commonwealth *v.* Alger, 7 Cush. 53, 67; Commonwealth *v.* Roxbury, 9 Gray, 451, and note; Ancient Charters, 148, 149.

<sup>3</sup> Boston *v.* Richardson, 105 Mass. 351; Tappan *v.* Burnham, 8 Allen, 65; Porter *v.* Sullivan, 7 Gray, 441;

Commonwealth *v.* Alger, 7 Cush. 70; Berry *v.* Raddin, 11 Allen, 577; Litchfield *v.* Scituate, 186 Mass. 39.

<sup>4</sup> Storer *v.* Freeman, 6 Mass. 435; Codman *v.* Winslow, 10 Mass. 146; Parker *v.* Smith, 17 Mass. 413; Barker *v.* Bates, 13 Pick. 255; Sale *v.* Pratt, 19 Pick. 191; Mayhew *v.* Norton, 17 Pick. 357; Commonwealth *v.* Alger, 7 Cush. 53, 76; Weston *v.* Sampson, 8 Cush. 347, 354; Commonwealth *v.* Roxbury, 9 Gray, 451, and note, 523.

<sup>5</sup> Sale *v.* Pratt, 19 Pick. 191; Barker *v.* Bates, 18 Pick. 255; Commonwealth *v.* Alger, 7 Cush. 53, 76;

islands as well as the main land.<sup>1</sup> It does not apply to fresh waters, except where, being pressed back by the influx of the sea, they rise and fall with the tide.<sup>2</sup> It is the law of Maine,<sup>3</sup> and, as a usage, it has been recognized as applicable in New Hampshire.<sup>4</sup> It did not create a mere easement, privilege, or license, but was a grant of the soil to low-water mark;<sup>5</sup> and the State cannot take the flats of a littoral proprietor above that line, or diminish their value by causing them to be permanently flooded or laid bare, except in the exercise of the right of eminent domain, and by making reasonable compensation.<sup>6</sup> One of its chief purposes was to aid commerce, and to give to littoral proprietors convenient wharf privileges; and it is therefore held in Massachusetts that the low-water

*Brackett v. Persons Unknown*, 53 Maine, 238; *Low v. Knowlton*, 26 Maine, 128.

<sup>1</sup> *Hill v. Lord*, 48 Maine, 83; *Babson v. Tainter*, 79 Maine, 368.

<sup>2</sup> *Lapish v. Bangor Bank*, 8 Maine, 85; *Attorney General v. Woods*, 108 Mass. 436; *ante*, § 44.

<sup>3</sup> *Knox v. Pickering*, 7 Greenl. 106; *Lapish v. Bangor Bank*, 8 Greenl. 85; *Emerson v. Taylor*, 9 Greenl. 42; *Duncan v. Sylvester*, 24 Maine, 482; *Gerrish v. Union Wharf Co.*, 26 Maine, 384; *Thornton v. Foss*, *id.* 402; *Low v. Knowlton*, 26 Maine, 128; *Deering v. Long Wharf*, 25 Maine, 51, 64; *Partridge v. Luce*, 36 Maine, 16; *Moulton v. Libbey*, 37 Maine, 485; *Clancey v. Houdlette*, 39 Maine, 451; *Montgomery v. Reed*, 69 Maine, 510; *Parker v. Cutler Mill Dam Co.*, 20 Maine, 353; *Moore v. Griffin*, 22 Maine, 350; *King v. Young*, 76 Maine, 76; *Parsons v. Clark*, *id.* 476; *Storer v. Freeman*, 6 Mass. 435; *Barrows v. McDermott*, 73 Maine, 441; *Dunlap v. Stetson*, 4 Mason, 349, 366.

<sup>4</sup> *Clement v. Burns*, 43 N. H. 609, 621. See *Nudd v. Hobbs*, 17 N. H. 527; *ante*, § 84.

<sup>5</sup> *Austin v. Carter*, 1 Mass. 231; *Storer v. Freeman*, 6 Mass. 435; *Cod-*

*man v. Winslow*, 10 Mass. 146; *Commonwealth v. Alger*, 7 Cush. 53, 70-81; *Fitchburg Railroad v. Boston & Maine Railroad*, 3 Cush. 58; *Walker v. Boston & Maine R. Co.*, 3 Cush. 121; *Commonwealth v. Boston & Maine R. Co.*, 3 Cush. 43; *Porter v. Sullivan*, 7 Gray, 443; *Commonwealth v. Roxbury*, 9 Gray, 451, 499, and note, p. 518; *Boston v. Lecraw*, 17 How. 432; *Rust v. Boston Mill Corp.*, 6 Pick. 158; *Drake v. Curtis*, 1 Cush. 395, 412; *Gray v. Deluce*, 5 Cush. 9; *Winslow v. Patten*, 34 Maine, 25; *Pike v. Munroe*, 36 Maine, 309; *Parker v. Cutler Mill Dam Co.*, 20 Maine, 353; *Low v. Knowlton*, 26 Maine, 128. A littoral proprietor, authorized by statute to construct wharves to the channel, may maintain trespass for an invasion of his rights. *Hamlin v. Pairpoint Manuf. Co.*, 141 Mass. 51.

<sup>6</sup> *Ibid.*; *Boston and Roxbury Mill Corporation v. Newman*, 12 Pick. 467, 482; *Boston Water Power Co. v. Boston & Worcester R. Co.*, 23 Pick. 360; *Ashby v. Eastern R. Co.*, 5 Met. 368; *Haskell v. New Bedford*, 108 Mass. 208; *Drury v. Midland Railroad*, 127 Mass. 571. See *Walker v. Shepardson*, 4 Wis. 486.

mark referred to in the ordinance is not the line of ordinary low tide, but that of the lowest ebb, to which it is often necessary to extend wharves in order that they may be enjoyed to the best advantage.<sup>1</sup> The State still owns the flats beyond that line, and the soil which is permanently submerged;<sup>2</sup> and the public may use unenclosed flats within that line for navigation,<sup>3</sup> and may there take fish, as well those which are embedded in the soil as those which are moving in the water.<sup>4</sup> Littoral proprietors may, however, exclude navigation from their own flats by building wharves or other structures to low-water mark, if not prohibited from so doing by the legislature, but have no right to erect structures which materially interfere with the passage of vessels or boats, or cut off the access to the neighboring houses or lands.<sup>5</sup> By reclaiming flats, or by fixing stakes or weirs upon them, they may also exclude the public from exercising the privileges of fishing and fowling, and of digging for shell-fish in the space so occu-

<sup>1</sup> *Sparhawk v. Bullard*, 1 Met. 95, 108; *Storer v. Freeman*, 6 Mass. 435; 438; *Commonwealth v. Charlestown*, 1 Pick. 180, 183; *Commonwealth v. Boston & Maine R. Co.*, 3 Cush. 1; *Walker v. Boston & Maine R. Co.*, 3 Cush. 24; *Commonwealth v. Roxbury*, 9 Gray, 451, 491, and note; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553, 558; *Wonson v. Wonson*, 14 Allen, 71, 82; *Attorney General v. Wood*, 108 Mass. 436, 440; *Sewall & Day Cordage Co. v. Boston Water Power Co.*, 147 Mass. 61. In Maine the limit under this ordinance is the ordinary low-water mark, as at common law., *Gerrish v. Union Wharf*, 26 Maine, 384.

<sup>2</sup> *Gray v. Bartlett*, 20 Pick. 186; *Boston Mill Co. v. Newman*, 12 Pick. 476; *Sparhawk v. Bullard*, 1 Met. 95; *Garey v. Ellis*, 1 Cush. 406; *Commonwealth v. Roxbury*, 9 Gray, 451, 490.

<sup>3</sup> *Boston Steamboat Co. v. Munson*, 117 Mass. 34; *Henshaw v. Hunting*, 1 Gray, 203; *Commonwealth v. Charlestown*, 1 Pick. 180; *Drake v. Curtis*, 1 Cush. 395, 413; *Boston v. Lecraw*, 17

*How.* 426; *Richardson v. Boston*, 19 How. 263; 24 How. 188; *State v. Wilton*, 42 Maine, 9; *Montgomery v. Reed*, 69 Maine, 510. In the last case, it was held that the public right of navigation over unenclosed flats is not an incumbrance within the common covenant against incumbrances. See, also, *Ballard v. Child*, 46 Maine, 152. A grant of flats by the State, although by warranty deed with a covenant against incumbrances, to a person who agrees to fill them within a certain time, does not extinguish the public right of navigation until the flats are filled. *Boston Steamboat Co. v. Munson*, 117 Mass. 34.

<sup>4</sup> *Proctor v. Wells*, 103 Mass. 216; *Lakeman v. Burnham*, 7 Gray, 437; *Packard v. Rider*, 144 Mass. 440.

<sup>5</sup> *Boston v. Richardson*, 105 Mass. 365; *Kean v. Stetson*, 5 Pick. 495; *Commonwealth v. Charlestown*, 1 Pick. 180; *Barker v. Bates*, 13 Pick. 255; *Deering v. Long Wharf*, 25 Maine, 51; *Davidson v. Boston & Maine Railroad*, 3 Cush. 91.

ped.<sup>1</sup> A littoral owner takes the adjoining flats as land and not as an incorporeal right,<sup>2</sup> and his widow is entitled to dower in his flats which are unimproved at his decease.<sup>3</sup> And an owner of flats who fills them up, and thereby prevents the ebb and flow of the tide, which is valuable for drainage to adjoining uplands not accessible by navigation from the sea, is not liable therefor in damages.<sup>4</sup> As land does not pass as appurtenant to land,<sup>5</sup> it is established under this ordinance: first, that a writ of entry lies for flats, though unenclosed, when the owner is disseized;<sup>6</sup> second, that trespass *quare clausum fregit* lies for an injury to the owner's possession of flats;<sup>7</sup> third, that the owner may convey the flats, or any part of them, without the upland, or the upland without the flats, the question of intention depending upon the terms of the conveyance.<sup>8</sup> If the grant is expressly bounded by the high-water mark, the grantee is not entitled to the benefit of the ordinance.<sup>9</sup> But proof of title to the upland is *prima facie* evidence of title to the flats, and the latter are presumed to pass by a grant of the former if the conveyance does not disclose a contrary intent.<sup>10</sup> The public may pass over such parts of the shore as are bare and unimproved, without hindrance or liabil-

<sup>1</sup> *Locke v. Motley*, 2 Gray, 265; *Ipswich Proprietors v. Herrick*, 9 Gray, 529; *Low v. Knowlton*, 26 Maine, 128; *Matthews v. Treat*, 75 Maine, 594.

<sup>2</sup> *Storer v. Freeman*, 6 Mass. 435; *Commonwealth v. Alger*, 7 Cush. 77.

<sup>3</sup> *Brackett v. Persons-Unknown*, 53 Maine, 238.

<sup>4</sup> *Henry v. Newburyport*, 149 Mass. 582.

<sup>5</sup> *Doane v. Broad Street Association*, 6 Mass. 332; *Commonwealth v. Alger*, 7 Cush. 53, 80; *Valentine v. Piper*, 22 Pick. 85; *Piper v. Richardson*, 9 Met. 155.

<sup>6</sup> *Commonwealth v. Alger*, 7 Cush. 53, 80.

<sup>7</sup> *Ibid.*; *Austin v. Carter*, 1 Mass. 231.

<sup>8</sup> *Lufkin v. Haskell*, 3 Pick. 356; *Mayhew v. Norton*, 17 Pick. 413; *Drake v. Curtis*, 1 Cush. 395, 413;

*Porter v. Sullivan*, 7 Gray, 447; *Lapish v. Bangor Bank*, 8 Greenl. 85; *Deering v. Long Wharf*, 25 Maine, 64; *Treat v. Strickland*, 23 Maine, 234; *Pike v. Munroe*, 36 Maine, 309; *Ers- kine v. Moulton*, 66 Maine, 276; *Stone v. Augusta*, 46 Maine, 137; *Knox v. Pickering*, 7 Maine, 106. Upon a petition for the partition of land, described as bounded on the sea, the flats as well as the upland are to be divided. *Partridge v. Luce*, 36 Maine, 16.

<sup>9</sup> *Lapish v. Bangor Bank*, 8 Greenl. 85.

<sup>10</sup> *Valentine v. Piper*, 22 Pick. 85; *Drake v. Curtis*, 1 Cush. 395; 2 Dane Abr. 691, 699; 9 Gray, 524; *Charlestown v. Tufts*, 111 Mass. 348; *Moore v. Griffin*, 22 Maine, 350; *Nickerson v. Crawford*, 16 Maine, 245; *Winslow v. Patten*, 34 Maine, 25; *Pike v. Munroe*, 36 Maine, 309.



ity for damages to the littoral proprietors;<sup>1</sup> and the public right of fishery in tide waters includes, as above stated, the right to take fish upon the shore to high-water mark.<sup>2</sup> The State, as representing its citizens, or otherwise, has not such an easement or interest in flats appurtenant to or parcel of the upland, and owned by individuals, as requires a jury, in assessing damages for taking the same for a railroad, to deduct its interest from the ascertained value.<sup>3</sup> It is not settled whether the ordinance was a recognition of a previously existing usage. In Massachusetts, a grant upon the seashore from the colonial government prior to the ordinance did not extend beyond high-water mark without express words.<sup>4</sup> In Maine it has been held that private conveyances of flats before the ordinance are valid.<sup>5</sup>

§ 170. **Same—Connecticut.**—In Connecticut the privileges of the littoral proprietors, with respect to the shore, depend upon usage, unaided by ancient statutory provisions. The title of such proprietors extends only to the high-water mark, but they have the exclusive right to construct wharves upon the soil below it, and to reclaim the shore, if they conform to such regulations as the State may impose, and do not obstruct the navigation.<sup>6</sup> They have a right of access to the sea, and the exclusive right of embarkation from their own land, and no other person can lawfully enter upon their lands for this or any other purpose without their permission.<sup>7</sup> This right of reclamation and wharfage, while unexercised, is a franchise

<sup>1</sup> *State v. Wilson*, 42 Maine, 9.

<sup>2</sup> *Moulton v. Libbey*, 37 Maine, 472; *Weston v. Sampson*, 8 Cush. 347.

<sup>3</sup> *Walker v. Boston & Maine Railroad*, 3 Cush. 1.

<sup>4</sup> *Commonwealth v. Roxbury*, 9 Gray, 451, and note; *Boston v. Richardson*, 105 Mass. 351.

<sup>5</sup> *Hill v. Lord*, 48 Maine, 83.

<sup>6</sup> *Mather v. Chapman*, 40 Conn. 382; *State v. Sargent*, 45 Conn. 358; *Nichols v. Lewis*, 15 Conn. 137, 143; *Peck v. Lockwood*, 5 Day, 22; *East Haven v. Hemingway*, 7 Conn. 186; *Chapman v. Kimball*, 9 Conn. 38, 41;

*Frink v. Lawrence*, 20 Conn. 117;

*Groton v. Hurlburt*, 22 Conn. 178;

*Simons v. French*, 25 Conn. 346;

*Burroughs v. Gallup*, 32 Conn. 493;

*Church v. Meeker*, 34 Conn. 421;

*Lockwood v. New York R. Co.*, 37

Conn. 387; *Union Wharf Co. v.*

*Starin*, 45 Conn. 585; *Seeley v. Brush*,

35 Conn. 423; *Ladies' Seamen's*

*Friend Society v. Halstead*, 58 Conn.

144; *New Haven S. Co. v. Sargent*,

50 Conn. 199.

<sup>7</sup> *Ibid.*; *State v. Sargent*, 45 Conn. 358, 373.

alienable by the owner, and, although it originates in and is derived from the ownership of the adjoining upland, it is not so inseparably attached thereto that a grant of the upland necessarily conveys the franchise,<sup>1</sup> although it may pass by implication.<sup>2</sup> When the right has been exercised by reclaiming the shore, the reclaimed portions in general become integral parts of the owner's adjoining land.<sup>3</sup>

§ 171. *Same — New Jersey.*— Similar privileges are accorded to littoral proprietors by the established usages of New Jersey. In this State the legislature may grant any portion of the unenclosed soil of its navigable waters, including the shore, without making compensation to the owners of the adjoining lands.<sup>4</sup> The latter may reclaim the shore to low-water mark, when this can be done without interfering with the navigation,<sup>5</sup> but this is a mere license which the legislature may revoke at any time before it is executed.<sup>6</sup> The littoral

<sup>1</sup> *Simons v. French*, 25 Conn. 346, 352; *Lockwood v. New York R. Co.*, 37 Conn. 387.

<sup>2</sup> *New Haven S. Co. v. Sargent*, 50 Conn. 199.

<sup>3</sup> *Lockwood v. New York R. Co.*, 37 Conn. 387, 391.

<sup>4</sup> *Stevens v. Paterson R. Co.*, 34 N. J. L. 532; 20 N. J. Eq. 126, 129; *State v. Jersey City*, 25 id. 525, 530; *New York R. Co. v. Yard*, 43 N. J. L. 121, 632; *American Dock Co. v. Trustees*, 39 N. J. Eq. 409, 446; *Hoboken v. Penn. Ry. Co.*, 124 U. S. 656; *Easton R. Co. v. Central R. Co.*, 52 N. J. L. 267; *Boon v. Kent*, 42 N. J. Eq. 131; *New Jersey Zinc Co. v. Morris Canal Co.*, 44 id. 398; *Point Breeze Ferry Co. v. Bragaw* (N. J.), 20 Atl. 967; *Stockton v. Baltimore R. Co.*, 32 Fed. Rep. 9; *Hoboken v. Pennsylvania R. Co.*, 16 id. 816; 7 N. J. L. J. 298.

<sup>5</sup> *Arnold v. Mundy*, 1 Halst. 1, 10, 13; *Bell v. Gough*, 21 N. J. L. 156; 23 id. 141; 23 id. 624, 669; *Stevens v. Paterson R. Co.*, 34 N. J. L. 532.

<sup>6</sup> *Stevens v. Paterson R. Co.*, 34 N.

J. L. 532; *State v. Brown*, 27 id. 13, 648; *Fitzgerald v. Faunce*, 46 N. J. L. 536, 595, 599; *State v. Jersey City*, 1 Dutch. 525; *Stewart v. Fitch*, 31 id. 17; *Keyport Steamboat Co. v. Farmers' Transportation Co.*, 18 N. J. Eq. 13, 511; *State v. Carragan*, 37 N. J. L. 264, 267; *Pennsylvania R. Co. v. New York R. Co.*, 23 N. J. Eq. 157; *Townsend v. Brown*, 24 N. J. L. 80; *State v. Jersey City*, 42 N. J. L. 349; *Cooper v. Bloodgood*, 32 N. J. Eq. 209; *United New Jersey R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 123; *post*, § 456. See *Rundle v. Delaware Canal Co.*, 14 How. 80. A privilege conferred by the legislature upon certain associates to build docks, wharves and piers in the Hudson river, and when so built to appropriate them to their own use, was held not to be assignable in *Morris Canal Co. v. Central R. Co.*, 1 C. E. Green, 419. Adjacency to tide waters, and the enhanced value given to land by reason of its frontage thereon, are circumstances which enter into its taxable valuation. *New York R. Co. v. Yard*, 43 N. J. L. 632;

proprietors have not a legal title to unimproved flats, and cannot, therefore, maintain ejectment therefor,<sup>1</sup> although they may be protected in equity against an unauthorized encroachment upon them by a stranger, which interferes with their access to the water.<sup>2</sup> When the shore is reclaimed, it becomes the property of the littoral proprietor, and cannot be taken for public uses, or granted by the State to other persons, without compensation.<sup>3</sup> If a structure erected by a littoral proprietor upon the shores of this State does not interfere with the navigation, it is not abatable as a nuisance or purpresture.<sup>4</sup> It seems that the common understanding in this State carries the right even below low-water mark, provided there is no obstruction to the navigation.<sup>5</sup> The rights of the littoral proprietor with respect to the land under water are mere incidents of the ownership of the shore, and, as such, pass with a grant of the upland.<sup>6</sup>

§ 172. **Same — Rhode Island.**— In Rhode Island, the right to build wharves in tide waters, not obstructing the channel,

*State v. Carragan*, 37 N. J. L. 264; *State v. Jersey City*, 25 N. J. L. 530. So where the privilege of reclaiming submerged lands is given by statute. *New York R. Co. v. Hughes*, 46 N. J. L. 67; *State v. Yard*, 43 id. 121. Nor are lands wholly below high-water mark subject to taxation. *Winants v. Jersey City*, 42 N. J. L. 880; *Colket v. Rightmire*, 46 N. J. L. 841. See *Galveston County v. Galveston Wharf Co.*, 72 Texas, 557. But a separate assessment cannot be made on land below high-water mark where such land and the adjacent upland belong to the same person. *State v. Jersey City*, 25 N. J. L. 525; *State v. Collector*, 24 N. J. L. 108.

<sup>1</sup> *Ibid.* See *Gerrish v. Union Wharf*, 26 Maine, 384; *Coburn v. Ames*, 52 Cal. 385; *Nichols v. Lewis*, 15 Conn. 143; *Aborn v. Smith*, 11 R. L. 594; 12 R. L. 370.

<sup>2</sup> *Ibid.*; *Stockham v. Browning*, 18 N. J. Eq. 390; *State v. Brown*, 27 N. J. L. 13, 648; *Brown v. Morris Canal*

*Co.*, id. 648; *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540, 550; *Coburn v. Ames*, 52 Cal. 385; *Aborn v. Smith*, 11 R. L. 594; 12 R. L. 370; *Thornton v. Grant*, 10 R. L. 477; *O'Donnell v. Kelsey*, 10 N. Y. 412, 415.

<sup>3</sup> *Bell v. Gough*, 21 N. J. L. 156; 22 N. J. L. 441; 23 id. 624, 678; *State v. Jersey City*, 25 id. 525; *Keyport Steamboat Co. v. Farmers' Transportation Co.*, 18 N. J. Eq. 511, 13; *O'Neill v. Annett*, 3 Dutch. 290, 293.

<sup>4</sup> *Attorney General v. Delaware R. Co.*, 27 N. J. Eq. 1, 631.

<sup>5</sup> *Elmer, J.*, in *Bell v. Gough*, 3 Zab. 658. See *Townsend v. Brown*, 24 N. J. L. 80, 85; *Associates v. Jersey City*, 4 Hal. Ch. 715; *American Dock Co. v. Trustees*, 39 N. J. Eq. 409. See *Hagan v. Gaskill*, 42 id. 215. See, also, upon this point, the early Massachusetts case of *Commonwealth v. Crowninshield*, 2 Dane, Abr. 691.

<sup>6</sup> *State v. Brown*, 27 N. J. L. 13; *American Dock Co. v. Trustees*, 39

appears to have been conceded by an unpublished ordinance passed in 1707.<sup>1</sup> Whether it originated in this ordinance or in usage, the right of the littoral proprietor to wharf or embank against his land, without license from the State, provided he does not interfere with the navigation, appears to have been long recognized, and is supported by recent decisions in that State.<sup>2</sup> But a lessee of flats from a riparian owner is not entitled to compensation from the State when it carries a bridge over the flats.<sup>3</sup>

**§ 173. Same — Pennsylvania.**— In Pennsylvania, tidal rivers and the larger fresh streams are alike public property.<sup>4</sup> In *Tinicum Fishing Co. v. Carter*,<sup>5</sup> the right of the defendant in error to throw out nets in the Delaware River, and to draw them in on the shore, was obstructed by a pier built out by the plaintiffs in error into the river under license from the board of wardens of the port of Philadelphia, who were empowered to grant such licenses in the interests of navigation. Sharswood, J., thus defines the right to extend wharves under the laws of that State: "The title of the riparian owner, derived by grant from the State, extends to low-water mark, not absolutely indeed in tidal streams, but subject to the public right of passage when the tide is high."<sup>6</sup> He has no right

N. J. Eq. 409. See *Hagan v. Gaskill*, 42 id. 215.

<sup>1</sup> See Angell on Tide Waters (2d ed.), 237.

<sup>2</sup> *Providence Steam Engine Co. v. Providence Steamboat Co.*, 12 R. L. 348, 363; *Thornton v. Grant*, 10 R. L. 477; *Clark v. Peckham*, 10 R. L. 35, 38; *Brown v. Goddard*, 13 R. L. 76; *Folsom v. Freeborn*, id. 200, 204; *State v. Burdick*, 15 R. L. 239.

<sup>3</sup> *Gerhard v. Seekonk River Bridge Com'rs*, 15 R. L. 334.

<sup>4</sup> *Ante*, § 65.

<sup>5</sup> 61 Penn. St. 21, 30. See, also, *Hart v. Hill*, 1 Whart. 124, 131, 137; *Commonwealth v. Shaw*, 14 Serg. & R. 9, 13; *Shrunk v. Schuylkill Navigation Co.*, id. 81; *Naglee v. Ingersoll*, 7 Penn. St. 185; *Zug v. Common-*

*wealth*, 70 Penn. St. 138; *Philadelphia v. Scott*, 81 Penn. St. 80; *Simpson v. Neill*, 89 Penn. St. 183; *Purcell v. Stover*, 110 Penn. St. 43; *Commonwealth v. Fisher*, 1 Penn. 462; *Klingensmith v. Ground*, 5 Watts, 458; *Lehigh Valley R. Co. v. Trone*, 28 Penn. St. 206; *Commonwealth v. Church*, 1 Penn. St. 105; *Chess v. Mantown*, 3 Watts, 219; *Cooper v. Smith*, 9 Serg. & R. 26; *Freytag v. Powell*, 1 Whart. 536; *Jones v. Janney*, 8 W. & S. 436; *Frankford v. Lennig*, 7 Phila. 403; *Philadelphia R. Co. v. Morris*, id. 286; *Re Cramp*, 13 Phila. 16; *Hoboken v. Penn. R. Co.*, 16 Fed. Rep. 816; 124 U. S. 656.

<sup>6</sup> Citing *Ball v. Slack*, 2 Whart. 508.

to make any erection between high and low-water mark without express authority from the State; nor, of course, beyond low-water mark, into the bed and channel. The State can grant authority to make such erection, either to the riparian owner or to others, so long as the riparian owner is not thereby deprived of access to and use of the river as a public highway, which is implied, if not expressed, in the grant to him of land bounded on the stream. Under this first and necessary restriction, the right of the Commonwealth to make any erections in the river for the improvement of its use as a public highway, or to promote in any way the business and prosperity of the people, is undoubted and unlimited.”<sup>1</sup>

§ 174. **Same — California.**— In California the owner of land bordering upon the seashore holds presumably only to ordinary high-water mark, and the shore itself is presumed to remain the property of the State,<sup>2</sup> while the right to wharf out appears to be conceded.<sup>3</sup> Where, however, no question of riparian rights intervenes, the State may maintain ejectment for a wharf constructed without authority of law in navigable tide waters below low-water mark,<sup>4</sup> and a patent which describes a corner as “beginning on the seashore,” places such corner at ordinary high-water mark.<sup>5</sup> Land lying below high-water mark and within the ebb and flow of the tide cannot be purchased as swamp and overflowed land; and no right to obstruct navigation passes to the purchaser under the laws for the sale of such land.<sup>6</sup> So lands within the flow of ordinary

<sup>1</sup> *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9.

<sup>2</sup> *Long Beach L. & W. Co. v. Richardson*, 70 Cal. 206. Under a patent for land upon an unnavigable stream in which the tide ebbs and flows, the high-water mark is *prima facie* the boundary. *Wright v. Seymour*, 69 Cal. 122.

<sup>3</sup> *Coburn v. Ames*, 52 Cal. 385; *People v. Davidson*, 30 Cal. 379; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *People v. Broadway Wharf Co.*, *id.* 33; *San Francisco v. Calderwood*,

*id.* 585; *Rondell v. Fay*, 32 Cal. 354; *Gunter v. Geary*, 1 Cal. 462; *Guy v. Hernance*, 5 Cal. 73; *Teschemacher v. Thompson*, 18 Cal. 11; *United Land Association v. Knight*, 85 Cal. 448; *Upham v. Hosking*, 62 Cal. 250; *Fisher v. Police Court*, 86 Cal. 158.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Jones v. Martin*, 85 Fed. Rep. 348.

<sup>6</sup> *People v. Morrill*, 26 Cal. 336; *Taylor v. Underhill*, 40 Cal. 471. In *San Francisco v. Ellis*, 54 Cal. 72, a State statute authorizing the board of supervisors of the city and county of San Francisco to sell at public auction certain tide lands, the property

tides, the cost of reclaiming which would greatly exceed their value when reclaimed for any agricultural purpose, are not acquirable under a statute authorizing the sale of reclaimable lands.<sup>1</sup>

§ 175. **Same—New York.**—In New York the general right to build, without authority from the legislature, wharves in tide waters, upon the soil owned by the State, is more strictly limited, and is regulated by statute.<sup>2</sup> In this State the owner of land adjoining a navigable river has no right of property in the shore between high and low-water mark, and is not entitled to compensation when a railroad is constructed along the water front of his premises.<sup>3</sup> The courts of New York have no jurisdiction to restrain the erection of structures extending from the New Jersey shore into the Hudson River or the Bay of New York, even though they constitute a common nuisance.<sup>4</sup> But the city and county of New York include the

of the State, except so much thereof as might be required for a street and sewer, and providing that the deed of the mayor should vest the title in the purchasers, was held not to operate as a grant to the city and county.

<sup>1</sup> *People v. Cowell*, 60 Cal. 400. In this State irrigation districts are public corporations as well as reclamation districts. *Central Ir. District v. De Lappe*, 79 Cal. 351.

<sup>2</sup> *Breen v. Locke*, 46 Hun, 291; *Hall v. Whitehall W. P. Co.*, 103 N. Y. 129; *Bedlow v. New York Dock Co.*, 44 Hun, 378. As to grants under statutes, see *ante*, § 82, note.

<sup>3</sup> *Gould v. Hudson River R. Co.*, 6 N. Y. 522; 12 Barb. 616; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *People v. Tibbetts*, 19 N. Y. 523, 528; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 245; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384; *People v. New York Ferry Co.*, 68 N. Y. 71, 78; 7 Hun, 105; *People v. Vanderbilt*, 26 N. Y. 287; *Fort Plain Bridge Co. v. Smith*, 80 N. Y. 44; *People v. Canal Appraisers*,

33 N. Y. 461, 467; *People v. New York*, 8 Abb. Pr. 7, 12; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233; 7 Rob. 523; *Hudson River R. Co. v. Loeb*, 7 Rob. 418; *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70, 96; *Getty v. Hudson River R. Co.*, 21 Barb. 617. See *ante*, § 151; *Van Dolsen v. New York*, 21 Blatch. 454. In *Delaware Canal Co. v. Lawrence*, 2 Hun, 163; 56 N. Y. 612, the defendant had title, under patents from the State, to the soil under water on which the wharf was erected, and it was held that the only question was whether the wharf interfered with the navigation. See *Blakslee Manuf. Co. v. Blakslee's Sons' Irons Works*, 13 N. Y. S. 493.

<sup>4</sup> *People v. Central R. Co.*, 42 N. Y. 283; 48 Barb. 478; *State v. Babcock*, 30 N. J. L. 29. See *The Argo*, 7 Ben. 304; *The L. W. Eaton*, 9 Ben. 289; *Re Devoe Manuf. Co.*, 108 U. S. 401; 14 Fed. Rep. 183 and note; *Atlantic Dredging Co. v. Bergen Neck Ry. Co.*, 44 Fed. Rep. 208; *Euberweg v. La Compagnie Generale*, 35 id. 428; *The*



whole of the river and harbor adjacent to the city to actual low-water mark on the opposite shores, whether such water mark is formed by natural or artificial means.<sup>1</sup> The wharves and docks erected in Brooklyn, and extending beyond the natural low-water mark, are within the jurisdiction of that city;<sup>2</sup> but the vessels which lie beyond, though fastened to such wharves or docks, are within the jurisdiction of New York.<sup>3</sup> By acts of the legislature passed in 1848 and 1850, the owners of real estate fronting on the water in the city of Brooklyn were given the right to erect bulkheads and wharves in front of their respective lands as far as the permanent water line established by statute in 1836.<sup>4</sup> The corporation of New York, under its ancient charters, which are confirmed by the Constitution of the State, owns in fee the land under the waters of the East and North rivers to the distance of four hundred feet beyond the line of low-water mark, as it existed at the date of the charters.<sup>5</sup> It may construct piers and

Norma, 32 id. 411; *The Sarah E. Kennedy*, 25 id. 569. Under United States Revised Statutes, section 541, declaring that the Southern district of New York includes "the residue of said State, with the waters thereof," the United States reservation at West Point is included, although not strictly a part of the State. *Beekman v. West Shore R. Co.*, 85 Fed. Rep. 8.

<sup>1</sup> *Udall v. Brooklyn*, 19 Johns. 175; *Stryker v. New York*, 19 Johns. 179; *In re Furman Street*, 17 Wend. 649; *Orr v. Brooklyn*, 36 N. Y. 661; *Atlantic Dock Co. v. Brooklyn*, 3 Keyes, 444; 1 Abb. Dec. 24; *Livingston v. Ogden*, 4 Johns. Ch. 48; *Ex parte Vanderbilt*, id. 57; *Luke v. Brooklyn*, 43 Barb. 54; *Mayor v. Hart*, 16 Hun, 380; 95 N. Y. 443; *Furman v. New York*, 5 Sand. 16; *People v. Colgate*, 9 Hun, 708; 67 N. Y. 512; *Re Wells Avenue*, 4 N. Y. S. 301.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*; *Devato v. Eight Hundred Twenty-three Barrels of Plumbago*, 20 Fed. Rep. 510; *The Craigendoran*, 31

id. 87. Since colonial times the Brooklyn landing place of Fulton Ferry has been owned by New York City, and is exempt from taxation. *People v. Brooklyn Assessors*, 47 Hun, 383.

<sup>4</sup> *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 78; *People v. Kelsey*, 38 Barb. 269; 14 Abb. Pr. 372; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384. See *Kingsland v. New York*, 45 Hun, 198; *Williams v. New York*, 105 N. Y. 419.

<sup>5</sup> See cases in next note; also, *Towle v. Palmer*, 1 Rob. 437; 1 Abb. Pr. N. S. 81; *Towle v. Smith*, 2 Rob. 489; *Towle v. Remsen*, 70 N. Y. 303; *Schermerhorn v. New York*, 3 Edw. Ch. 119; *Verplanck v. New York*, 2 Edw. Ch. 220; *New York v. Scott*, 1 Caines, 543; *Dickinson v. Codwise*, 1 Sand. Ch. 214; *Roosevelt v. Frost*, 1 Edw. Ch. 579; *Furman v. New York*, 10 N. Y. 567; 5 Sand. 16; *Nott v. Thayer*, 2 Bosw. 10; *Hecker v. New York Balance Dock Co.*, 24 Barb. 215, 217; *Vanderbilt v. New York*, 2 Sand. 258; *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90; *New York v. Law*, 6

wharves at the public expense, and take the profits, when it owns the adjoining lots.<sup>1</sup> It may lease the public wharves so erected.<sup>2</sup> Since the charter of 1730, at least, the city has the right to convey this land, even below low-water mark, with the privilege of building wharves thereon, and receiving wharfage therefrom,<sup>3</sup> subject to the power of the city to impose in the grant or by ordinance such conditions with respect to streets and wharves as are consistent with the laws of the State,<sup>4</sup> and subject, also, to the control of the State in the es-

N. Y. S. 628. The statute of 1875, chapter 249, is constitutional. *People v. Baltimore R. Co.*, 117 N. Y. 150.

<sup>1</sup> *Ibid.*; *Marshall v. Guion*, 11 N. Y. 461 (overruling s. c. 4 Denio, 581, and *Marshall v. Vultee*, 1 E. D. Smith, 294); *Thompson v. New York*, 11 N. Y. 115; 3 Sand. 487; *Furman v. New York*, 10 N. Y. 567; *Beach v. New York*, 45 How. Pr. 357; *New York v. Whitney*, 7 Barb. 485; *New York v. Scott*, 1 Caines, 543; *Murray v. Sharp*, 1 Bosw. 539; *Mayor v. Whitney*, 7 Barb. 485; *Mayor v. Rice*, 4 E. D. Smith, 604. Under the charter of 1708, the city of New York acquired the vested right to maintain ferries and to take tolls therefrom forever between the city and Long Island. *Benson v. New York*, 10 Barb. 223; *People v. New York*, 32 Barb. 102; *Darlington v. New York*, 31 N. Y. 202. See *Starin v. Staten Island R. Co.*, 112 N. Y. 206; *People v. Assessors*, 111 N. Y. 505; *Cunard S. Co. v. Voorhies*, 50 N. Y. Super. Ct. 253; *Barge No. 6*, 27 Fed. Rep. 472.

<sup>2</sup> *Commissioners v. Clark*, 33 N. Y. 251; *Swords v. Edgar*, 59 N. Y. 28; *Clancy v. Byre*, 56 N. Y. 129; *Radway v. Briggs*, 37 N. Y. 256; *Hartford Steamboat Co. v. New York*, 78 N. Y. 1; 12 Hun, 550; *New York v. Price*, 5 Sand. 542; *Taylor v. Atlantic Ins. Co.*, 37 N. Y. 275; 9 Bosw. 369; 2 Bosw. 106; *New York v. Hill*, 13 How. Pr. 280; *Taylor v. Beebe*, 3 Rob. 262; *Farmers' Loan Co. v. New York*,

4 Bosw. 80; *New York v. Huntington*, 114 N. Y. 631. As to the powers of the commissioners of pilots, of the department of public docks and the harbor masters of New York, and formerly of the dock-master, see *Commissioners v. Vanderbilt*, 31 N. Y. 265; 2 Rob. 367; *Commissioners v. Clark*, 33 N. Y. 251; *Commissioners v. Erie Ry. Co.*, 41 N. Y. 619; 5 Rob. 366; *New York v. Tucker*, 1 Daly, 107; *Adams v. Farmer*, 1 E. D. Smith, 588; *New York v. Rice*, 4 E. D. Smith, 604; *New York v. Ryan*, 2 E. D. Smith, 368; *Hoelt v. Seaman*, 46 How. Pr. 24; 6 J. & Sp. 62; *Moore v. Commissioners*, 32 How. Pr. 184; *People v. Mallory*, 2 Sup. Ct. 76; 4 id. 567; 46 How. Pr. 281; 2 Hun, 381; *Commissioners v. Frost*, 4 Daly, 353; *People v. Deming*, 1 Hilt. 271; 13 How. Pr. 441; *Langdon v. New York*, 6 Abb. N. C. 314; 28 Hun, 158; 93 N. Y. 129; *Hecker v. New York Balance Dock Co.*, 24 Barb. 215; 13 How. Pr. 549.

<sup>3</sup> *Van Zandt v. New York*, 8 Bosw. 375; *Commissioners v. Clark*, 33 N. Y. 251; *New York v. Starin*, 42 Hun, 549; 115 U. S. 248; 106 N. Y. 1; *New York v. New Jersey S. Nav. Co.*, id. 28; *New York v. Hill*, 13 How. Pr. 280; *Coddington v. White*, 2 Duer, 390; *Murray v. New York*, 1 Bosw. 539; *Stevens v. Rhinelanders*, 5 Rob. 285; *Borell v. New York*, 2 Sand. 560; *Philadelphia Coal & Iron Co. v. Mayor*, 21 Fed. Rep. 97.

<sup>4</sup> *Ross v. New York*, 3 Wend. 333;

tablishment of harbor lines.<sup>1</sup> In *People v. Vanderbilt*, it was held that a pier or crib erected beyond the water line established by law, under a permission from the authorities of the city, is abatable as a purpresture, even though it produces no injury to public rights.<sup>2</sup>

§ 176. **Same — Maryland.**—In Maryland, the right of extending improvements in the harbor of Baltimore was secured to the owners of the lands adjacent by the colonial act of 1745 and by a statute passed in 1784. The act of 1745 did not preclude the State from granting to a person other than the riparian owner the unoccupied soil of a navigable stream over which such proprietor might otherwise have been entitled, under this act, to make improvements.<sup>3</sup> Without such authority a stranger could not improve in front of land belonging to

*Duryea v. New York*, 2 Hun, 293; 4 Sup. Ct. 512; *Vandewater v. New York*, 2 Sand. 258; *Bedlow v. New York Floating Drydock Co.*, 112 N. Y. 263.

<sup>1</sup> *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 38 Barb. 282; 25 How. Pr. 140; *People v. New York Ferry Co.*, 68 N. Y. 71; 7 Hun, 105; *Hart v. Albany*, 3 Paige, 559; *People v. Cunningham*, 1 Denio, 524; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384; *Walsh v. New York Dry Dock Co.*, 77 N. Y. 448; *Duryee v. Mayor*, 96 N. Y. 477; 62 N. Y. 592; *People v. B. & O. R. Co.*, 50 Hun, 192; *People v. Bostwick*, 5 N. Y. S. 79.

<sup>2</sup> *Ibid.* Land under the waters of the Hudson River, either within or without the water-front, may be condemned for the uses of a railroad terminus. *In re New York Central R. Co.*, 77 N. Y. 248. As to the wharves on Blackwell's Island, see *Philadelphia R. Co. v. New York*, 38 Fed. Rep. 159.

<sup>3</sup> *Casey v. Inloes*, 1 Gill, 430; *Wilson v. Ingloes*, 11 Gill & J. 351; 6 Gill, 121, 152; *Baltimore R. Co. v. Chase*,

43 Md. 23, 36; *Baltimore v. McKim*, 3 Bland Ch. 453. See, generally, *Giraud v. Hughes*, 19 Gill & J. 24; *Smith v. Yates*, 2 H. & McHen. 244; *Dugan v. Baltimore*, 5 Gill & J. 357; *Harrison v. Sterrett*, 4 H. & McHen. 540; *Baltimore v. White*, 2 Gill, 444; *Hammond v. Ingloes*, 4 Md. 138; *Day v. Day*, 22 Md. 530; *Patterson v. Gels-ton*, 23 Md. 432; *The Wharf Case*, 3 Bland, 361; *Baltimore v. McKim*, *id.* 453; *Browne v. Kennedy*, 5 H. & J. 195; *George's Creek Coal Co. v. Detmold*, 1 Md. 225; *Young v. Frost*, *id.* 377; *Spindler v. Atkinson*, 3 Md. 422; *Hoye v. Swan*, 5 Md. 248; *Armstrong v. Ristean*, 5 Md. 256, 276; *Mitchell v. Mitchell*, 6 Md. 234; *Page v. Baltimore*, 34 Md. 558; *Williams v. Baker*, 41 Md. 523; *Hazlehurst v. Baltimore*, 37 Md. 199, 214; *Baltimore v. St. Agnes Hospital*, 48 Md. 419; *Howard v. Moale*, 2 H. & J. 249; *Cockey v. Smith*, 3 H. & J. 20; *Delaware R. Co. v. Stump*, 8 G. & J. 479; *Peterkin v. Ingloes*, 4 Md. 175; *Day v. Day*, *id.* 262; *Raab v. State*, 7 Md. 483. As to the act of 1796, see *Horner v. Pleasants*, 66 Md. 475.

another without the latter's consent.<sup>1</sup> In 1862 the legislature enacted that the proprietor of land bounding on any navigable waters in the State should be entitled to the exclusive right of making improvements in the water in front of his lands. Under this statute no patent can be issued for land covered by navigable waters in front of the property of a riparian proprietor, so as to interfere with its prospective enjoyment by him.<sup>2</sup>

**§ 177. Same — Florida — Oregon.**— In Florida the title of the State to the shores of tide waters is divested by statute in favor of the littoral owners, who have the right to extend wharves to the channel, leaving space for the requirements of commerce.<sup>3</sup> In this State navigation is subordinate to commerce, and, upon a general allegation that a wharf is being constructed in navigable waters, such wharf is presumed to be not a nuisance or injurious to commerce.<sup>4</sup> Similar rights are secured to the littoral proprietors by the statutes of Oregon, under which the right to build out a wharf is held to be severable from the ownership of the adjoining land.<sup>5</sup> Where the grantor of land bounded by tide water reserved all privileges around the land, he was held to retain the right of wharfing.<sup>6</sup>

<sup>1</sup> *Ibid.*; *Baltimore v. St. Agnes Hospital*, 48 Md. 419. See 19 A. G. Op. 149.

<sup>2</sup> *Chapman v. Hoskins*, 2 Md. Ch. 485; *Day v. Day*, 22 Md. 530; *Patterson v. Gelston*, 23 Md. 432; *Goodsell v. Lawson*, 42 Md. 348; *Garitee v. Baltimore*, 53 Md. 422; *ante*, § 175. See *Hawkins Point Light House*, 39 Fed. Rep. 77; *Hill v. United States*, id. 172. A land-office patent conveys no title to tide lands. *Chapman v. Hoskins*, 2 Md. Ch. 485.

<sup>3</sup> *Geiger v. Filor*, 8 Fla. 325, 339; *Alden v. Pinney*, 12 Fla. 348. Where the title to submerged land from low-water mark to the channel of a river was given to riparian owners by statute, to benefit commerce, a conveyance by such an owner by metes and bounds, without reference to the river

as a boundary, the owner retaining possession of structures on the submerged land and the grantee understanding that he got no title thereto, passes no title to such submerged land as an "appurtenance." *Rivas v. Solary*, 18 Fla. 122. The Florida act of 1856, authorizing wharves on submerged lands, does not apply in the case of a public park. *Ruge v. Apalachicola Oyster Co.*, 25 Fla. 656.

<sup>4</sup> *Sullivan v. Moreno*, 19 Fla. 200.

<sup>5</sup> *Parker v. Taylor*, 7 Oregon, 435, 445; *Olney v. Moore*, 13 id. 238; *Johnson v. Knott*, id. 308; *Wilson v. Welch*, 12 id. 353; *Parker v. West Coast P. Co.*, 17 id. 510; *Shively v. Welch*, 10 Sawyer, 136.

<sup>6</sup> *Parker v. Rogers*, 8 Oregon, 183; *De Force v. Welch*, 10 id. 507.

§ 178. *Same*—*Virginia*.—In Virginia it was early provided by statute<sup>1</sup> that the limits or bounds of lands lying on the Atlantic Ocean, the Chesapeake Bay, and the rivers and creeks thereof within the State, should extend over the shore, and that the owners of such lands should possess exclusive rights and privileges to and along the shore to ordinary low-water mark.<sup>2</sup> By a later statute, any person owning land upon a watercourse may erect a wharf, pier, or bulkhead in such watercourse, if the navigation is not obstructed thereby and the private rights of other persons are not injured.<sup>3</sup> Subject to these conditions, a wharf may, in this State, be extended beyond low-water mark.<sup>4</sup> In North Carolina the State can only grant land under navigable water for wharf purposes;<sup>5</sup> but for this purpose the owners of lands upon navigable water may “make entries of the land covered by water adjacent to their own, as far as deep water,”<sup>6</sup> and thereby acquire an absolute instead of a qualified property.<sup>7</sup> The State of South Carolina owns the land under navigable waters according to the common law.<sup>8</sup>

§ 179. *Same*—*In fresh waters*.—Riparian owners upon navigable *fresh* rivers and lakes may construct, in the shoal water in front of their land, wharves, piers, landings, and booms in aid of and not obstructing the navigation.<sup>9</sup> This is

<sup>1</sup> 1 Rev. Code of 1819, ch. 87, p. 841; *French v. Bankhead*, 11 Gratt. 136, 159. In 1705, when Norfolk was made a town, it was enacted that those who built out into the water before their own lots in the town, for the better conveniency of landing and shipping off goods, should have the whole benefit of such buildings, and the land so built upon should be reckoned as part of their lots. 8 Hen. Stat. at L. p. 412, ch. 42; *Hardy v. McCullough*, 28 Gratt. 251, 262.

<sup>2</sup> See *Garrison v. Hall*, 75 Va. 150, holding that the act of 1780, in view of its preamble, was intended, in exempting from location and grants unappropriated shores and lands adjoining, to reserve only the shores

and lands necessary for the common enjoyment of the privilege of fishing. See, also, *Byrd v. Ludlow*, 77 Va. 483.

<sup>3</sup> Code 1873, sec. 59, ch. 52; *Norfolk City v. Cooke*, 27 Gratt. 430; *Alexandria Ry. Co. v. Faunce*, 31 Gratt. 761, 764; *United States v. Bain*, 3 Hughes, 593.

<sup>4</sup> *Norfolk City v. Cooke*, 27 Gratt. 430, 438.

<sup>5</sup> *Gregory v. Forbes*, 96 N. C. 77.

<sup>6</sup> N. C. Code, § 2751.

<sup>7</sup> *Bond v. Wool* (N. C.), 12 S. E. 281.

<sup>8</sup> *State v. Pacific Guano Co.*, 22 S. C. 50; *State v. Pinkney*, id. 484.

<sup>9</sup> *Dutton v. Strong*, 1 Black, 1, 23; *Railroad Co. v. Schurmeir*, 7 Wall. 272; 10 Minn. 82; *Yates v. Milwaukee*, 10 Wall. 497; *Atlee v. Packet Co.*, 21

a riparian right, being dependent upon title to the bank and not upon title to the river bed.<sup>1</sup> Its exercise may be regulated or prohibited by the State; but so long as it is not prohibited, it is a private right derived from a passive or implied license by the public.<sup>2</sup> As it does not depend upon title to the soil under water, it is equally valid in those States in which the river beds are held to be public property and in those in which they are held to belong to the riparian proprietors *usque ad filum aquæ*.<sup>3</sup> This right is a mere franchise, in those localities where navigable fresh waters are public property; and if land is made by a stranger by filling in earth in front of land bounding upon such waters, the riparian owner, while entitled to damages for any interference with his access to the water, cannot maintain ejectment for the land so made.<sup>4</sup> But the riparian owner may, as against the public, reclaim the marshy land lying in front of his estate, if he does not obstruct the navigation, and conforms to the regulations of the State.<sup>5</sup> He

Wall. 389; 2 Dillon, 479; St. Louis v. Myers, 113 U. S. 566; Leigh v. Holt, 5 Biss. 338; Illinois v. Illinois Central R. Co., 33 Fed. Rep. 730; Shaw v. Susquehanna Boom Co., 125 Penn. St. 324; Williamsburg Boom Co. v. Smith, 84 Ky. 372; Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61; Delaphine v. Chicago Ry. Co., 42 Wis. 214; Boorman v. Sunnuchs, id. 233; Diedrich v. Northwestern Ry. Co., id. 248; Stevens Point Boom Co. v. Reilly, 46 Wis. 237; 44 Wis. 295; Cohn v. Wausau Boom Co., 47 Wis. 314, 322; Walker v. Shepardson, 4 Wis. 486; Grant v. Davenport, 18 Iowa, 179; Haight v. Keokuk, 4 Iowa, 199; Musser v. Hershey, 42 Iowa, 356; Ryan v. Brown, 18 Mich. 196; Jones v. Lee, 77 Mich. 35; Austin v. Rutland R. Co., 45 Vt. 215; Sloan v. Bie-miller, 34 Ohio St. 492, 513; Blanchard v. Porter, 11 Ohio, 138; Rippe v. Chicago R. Co., 23 Minn. 18; Brisbane v. St. Paul R. Co., id. 114; Morrill v. St. Anthony Falls Co., 26 Minn. 222; Hanford v. St. Paul R. Co., 43 Minn. 104; Ensminger v. People, 47 Ill. 384;

Chicago v. Laffin, 49 Ill. 172; Meyers v. St. Louis, 8 Mo. App. 266; Bainbridge v. Sherlock, 29 Ind. 364; Sherlock v. Bainbridge, 41 Ind. 35; Laughlin v. Lamasco City, 6 Ind. 223; Thurman v. Morrison, 14 B. Mon. 867; Morrison v. Thurman, 17 id. 257; Norfolk City v. Cooke, 27 Gratt. 430, 434; Alexandria Ry. Co. v. Faunce, 31 Gratt. 761, 764. The dock, when erected, is an appurtenance of the real estate. Tuck v. Olds, 29 Fed. Rep. 738.

<sup>1</sup> Ibid.; Cohn v. Wausau Boom Co., 47 Wis. 314, 322; Diedrich v. Northwestern Ry. Co., 42 Wis. 248; Stevens Point Boom Co. v. Reilly, 44 Wis. 295, 304; 46 Wis. 237.

<sup>2</sup> Ibid.; Lincoln v. Davis, 53 Mich. 375.

<sup>3</sup> Ibid.

<sup>4</sup> Austin v. Rutland R. Co., 45 Vt. 215; 21 Blatch. 358; Stockham v. Browning, 18 N. J. Eq. 390; Coburn v. Ames, 52 Cal. 385. But see Nichols v. Lewis, 15 Conn. 137, 143.

<sup>5</sup> Railroad Co. v. Schurmeir, 7 Wall. 272; 10 Minn. 82; Grant v. Davenport,



may, also, under the same restrictions, intrude upon the water as far as low-water mark, and erect embankments there for the purpose of protecting his land, when by natural causes the water is wearing away the banks.<sup>1</sup> But if, without authority, he erects structures below low-water in navigable waters which belong to the State, he loses all title to the property so placed.<sup>2</sup> The riparian right of reclamation below low-water mark may be conveyed separately from the riparian estate.<sup>3</sup>

§ 180. **Same — In general.**— The exercise of this right to build out into navigable waters, wharves, piers, and docks, tends to aid navigation and commerce. The legislature may authorize the extension of such structures beyond low-water mark;<sup>4</sup> but if not sanctioned by the legislature, they are illegal so far as they interfere with or limit the right of navigation.<sup>5</sup> The public right of fishery, however, is subordinate to the right of navigation, and wharves and buildings upon flats which are consistent with the latter right will not be declared unlawful for want of legislative sanction because they exclude the public from taking shell-fish or floating fish in the space covered by the structure.<sup>6</sup>

§ 181. **Same — To what distance.**— In determining the distance from the bank to which a wharf or other similar structure may thus be extended, the rule, as generally stated, is that these structures must not pass the point of navigability.<sup>7</sup> This rule is somewhat indefinite, and, as wharves, piers, booms, and the like, are valuable aids to navigation and commerce, the limits would be so narrow as to make these structures practically useless, if the point of navigability is fixed at the line beyond which a boat, raft, or log could not float. In the case of encroachments upon tide waters, the question of nuisance or

18 Iowa, 179; *Musser v. Hershey*, 42 Iowa, 356; *ante*, § 161.

<sup>1</sup> *Diedrich v. Northwestern Ry. Co.*, 42 Wis. 248; *Larson v. Furlong*, 50 Wis. 681, 691; 63 Wis. 323.

<sup>2</sup> *Ibid.*; *Gray v. Bartlett*, 20 Pick. 186.

<sup>3</sup> *Hanford v. St. Paul R. Co.*, 43 Minn. 104.

<sup>4</sup> *Ante*, § 140.

<sup>5</sup> *Ante*, § 134.

<sup>6</sup> *Moulton v. Libbey*, 37 Maine, 472; *Clement v. Burns*, 43 N. H. 609; *ante*, §§ 87, 169.

<sup>7</sup> *Dutton v. Strong*, 1 Black, 1, 23; *Atlee v. Packet Co.*, 2 Dillon, 479, 485; 21 Wall. 389; *Diedrich v. Northwestern Ry. Co.*, 42 Wis. 248; *Rippe v. Chicago R. Co.*, 23 Minn. 18; *Brisbine v. St. Paul R. Co.*, *id.* 114, 130.

not nuisance is one of fact.<sup>1</sup> With respect to encroachments, the correct rule seems to be indicated in the following remarks of Ryan, C. J.:<sup>2</sup> "A pier upon Lake Michigan, to aid navigation, must go into water deep enough to be accessible to vessels navigating the lake. A boom on a logging stream, to aid such navigation, must go into water deep enough to be accessible to floating logs; must be so constructed as to receive and discharge floating logs. In either case, to reach navigable water reasonably implies reaching it with effect to accomplish the purpose; the word often signifying some penetration of the thing reached. One is not understood to stop outside the limits of a place when he is said to reach it. He is understood to enter it, as far as may be necessary for his purpose. A structure in aid of navigation, which would be a reasonable intrusion into the waters of Lake Michigan, would probably be an obstruction of navigation in any navigable river within the State. A logging boom which would be a reasonable intrusion into the waters of the Mississippi would probably be an obstruction of navigation in most or all the logging streams within the State. The width of a river may justify a liberal exercise of the right of intrusion, or may exclude it altogether. Its extent is purely a relative question." It was accordingly held in this case that the erection of booms extending through shoal water only so far as was necessary to reach the navigable part of the river was not within the prohibition of a statute forbidding the obstruction of navigable rivers without authority from the legislature. With respect to the side lines, it is held that if the lateral boundaries in a conveyance of flats are definite, the right to wharf out is confined to the area embraced within them or their extension, although they form an acute angle with the shore boundary.<sup>3</sup>

§ 182. Fisheries — Fresh waters.— Riparian proprietors upon fresh-water streams have the exclusive right of fishing in the water opposite their lands, and this right extends to

<sup>1</sup> *Ante*, § 98.

<sup>2</sup> *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237, 244; 44 Wis. 295; *Union Depot Co. v. Brunswick*, 31 Minn. 297; *Atlee v. Packet Co.*, 21 Wall. 389, 893; *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 322. See, also, *Buszard v. Capel*, 4 Bing. 137, 140; 12 Moore, 339; *The Wharf Case*, 3 Bland, Ch. 381, 389.

<sup>3</sup> *Ladies' Seamen's Friend Society v. Halstead*, 53 Conn. 144.

navigable fresh rivers as well as those which are unnavigable, where the soil of the former is held to be private property.<sup>1</sup> Riparian proprietors upon all such streams, whose title extends *ad filum aquæ*, can maintain an action of trespass against those who draw a seine between the centre of the stream and the bank of his land.<sup>2</sup> This exclusive right exists, also, in the case of private lakes and ponds.<sup>3</sup> In those States in which the soil of navigable fresh streams or lakes is held to be public property, the right of fishing in them is a common right, as in the case of tide waters.<sup>4</sup> In the British provinces and colonies it seems that, when the bed of a non-tidal river is reserved and remains the property of the Crown, the public have the same common right of fishery that they have in tide waters.<sup>5</sup> Under the Massachusetts colony ordinance of 1641-47, a littoral proprietor, owning to low-water mark, may, by seines, weirs or stakes erected on his own flats, for the purpose of catching fish, exclude the public from there exercising the general privilege, and this private right may be conveyed by the owner with or without the upland, and with such limitations and qualifications as he sees fit.<sup>6</sup>

<sup>1</sup> Hale, *De Jure Maris*, ch. 1, 5; Hargrave's Law Tracts, 2, 56; 3 Kent Com. 409, 417; Royal Fishery of the Banne, Davies, 149; Freary v. Cooke, 14 Mass. 488; Commonwealth v. Chapin, 5 Pick. 199; Vinton v. Welsh, 9 Pick. 87; Waters v. Lilley, 4 Pick. 145; Commonwealth v. Alger, 7 Cush. 53, 97; McFarlin v. Essex Co., 10 Cush. 304; Commissioners v. Holyoke Water Power Co., 104 Mass. 446; Commonwealth v. Vincent, 108 Mass. 441; People v. Platt, 17 Johns. 195; Hooker v. Cummings, 20 Johns. 90; Trustees v. Strong, 60 N. Y. 56; Gould v. James, 5 Cowen, 369; Adams v. Pease, 2 Conn. 481; Smith v. Miller, 5 Mason, 191; Cobb v. Davenport, 32 N. J. L. 369; Browne v. Kennedy, 5 H. & J. 195; Beckman v. Kraemer, 43 Ill. 447; Lewis v. Keeling, 1 Jones (N. C.), 299; Ingram v. Threadgill, 3 Dev. 59; Robertson v. Steadman, 3 Pugsley, 621.

<sup>2</sup> Adams v. Pease, 2 Conn. 483; *ante*, § 100.

<sup>3</sup> Ibid.; Woolrych on Waters, 96; Cobb v. Davenport, 32 N. J. L. 369; 33 N. J. L. 223; *ante*, §§ 79-85.

<sup>4</sup> Carson v. Blazer, 2 Binney, 475; Shrunk v. Schuylkill Navigation Co., 14 S. & R. 71; Hart v. Hill, 1 Whart. 124; Tinicum Fishing Co. v. Carter, 61 Penn. St. 21; West Roxbury v. Stoddard, 7 Allen, 158; State v. Franklin Falls Co., 49 N. H. 240; Sloan v. Biemiller, 34 Ohio St. 492; Lincoln v. Davis, 53 Mich. 375; Cates v. Wadlington, 1 McCord, 580; Collins v. Benbury, 5 Ired. 118; 3 id. 277; Wilson v. Forbes, 2 Dev. 30; Ingram v. Threadgill, 3 Dev. 59; State v. Glen, 7 Jones, 321; Boatwright v. Bookman, Rice (N. C.), 447.

<sup>5</sup> Robertson v. Steadman, 3 Pugsley (N. B.), 621.

<sup>6</sup> Matthews v. Treat, 75 Maine, 594; Wyman v. Oliver, id. 421; *ante*, § 169.

§ 183. **Same — Kinds of.**—The authorities refer to four kinds of fishery: First, a several fishery, where he who hath the exclusive right of fishery is presumably the owner of the soil;<sup>1</sup> second, a free fishery, which is an exclusive franchise existing by grant or prescription in public navigable waters in the hands of a subject who hath a property in the fish, and may bring a possessory action for them without making any title to the soil;<sup>2</sup> third, a common of fishery, which resembles the case of other common, and is a right or liberty of taking fish in common with certain others in waters flowing through another man's land;<sup>3</sup> fourth, a common fishery, which may be for all mankind, as in the sea, and not merely in common with certain other persons in a particular stream.<sup>4</sup> Much confusion exists, however, respecting the distinctions between these classes. By the apparent weight of authority a several

<sup>1</sup> *Pollexfen v. Crispin*, 1 Vent. 122; *Smith v. Kemp*, 2 Salk. 637; *Holt*, 322; *Somerset v. Fogwell*, 5 B. & C. 875; *Co. Litt.* 122a; *Marshall v. Ulleswater Steam Navigation Co.*, 3 B. & S. 732, 744, 747; *Anon.*, Loft. 864; *Partheriche v. Mason*, 2 Chitty, 658; *Holford v. Bailey*, 13 Q. B. 426, 444; 8 Q. B. 1000; *Rex v. Old Alresford*, 1 T. R. 358; *Seymour v. Courtenay*, 5 Burr. 2814; *Alderman v. Hastings*, 2 Sid. 8; *Carlisle v. Graham*, L. R. 4 Ex. 361; *Mannall v. Fisher*, 5 C. B. N. s. 856; *Pearce v. Scotcher*, 9 Q. B. D. 162; *Pery v. Thornton*, 23 L. R. Ir. 402; *Miller v. Little*, L. R. 2 Ir. 304; *Northumberland v. Houghton*, L. R. 5 Ex. 127; *Queen v. Steer*, 3 Salk. 291; *Malcomson v. O'Dea*, 10 H. L. Cas. 618; *Moulton v. Libbey*, 37 Maine, 489; *Preble v. Brown*, 47 Maine, 284; *Caswell v. Johnson*, 58 Maine, 164; *Freary v. Cooke*, 14 Mass. 488; *Stoughton v. Baker*, 4 Mass. 522; *Melvin v. Whiting*, 5 Pick. 79; 10 Pick. 295; 13 Pick. 184; *McFarlin v. Essex Co.*, 10 Cush. 304; *Chalker v. Dickinson*, 1 Conn. 382, 510; *Munson v. Baldwin*, 7 Conn. 168; *Trustees v. Strong*, 60 N. Y. 56; *Skinner*

*v. Hetrick*, 73 N. C. 53; *Williamson v. Yingling*, 93 Ind. 42. A several fishery does not merge upon its being resumed by the Crown. *Northumberland v. Houghton*, L. R. 5 Ex. 127. User for forty-five years of certain engines for catching salmon, without evidence of previous user, does not raise a conclusive presumption of law that the engines had been used from time immemorial, and were not of recent origin. *Holford v. George*, L. R. 3 Q. B. 639. The presumption is against the existence of a several fishery in tide waters, and the burden of proof is upon him who claims the exclusive right. *Fitzwalter's Case*, 1 Mod. 105; *Crichton v. Collery, Jr.* R. 4 C. L. 508.

<sup>2</sup> *Smith v. Kemp*, 2 Salk. 637; 2 Black. Com. 34; 3 Kent Com. 409; *Upton v. Dawkin*, 3 Mod. 97; *Child v. Greenhill*, Cro. Car. 553; *Alderman v. Hastings*, 2 Sid. 8; 1 Swift's Dig. 110.

<sup>3</sup> *Smith v. Kemp*, 2 Salk. 637.

<sup>4</sup> *Benett v. Costar*, 8 Taunt. 183; 2 Moore, 83; *Lord Fitzwalter's Case*, 1 Mod. 105.

fishery may exist independently of the ownership of the soil beneath the water,<sup>1</sup> and the land-owner may grant the banks of a river with reservation of the river-bed and fishery.<sup>2</sup> It has also been held<sup>3</sup> that a free fishery is not an exclusive right, but the same as a common of fishery. "The more easy and intelligible arrangement of the subject," says Kent, "would seem to be, to divide the right of fishing into a right common to all, and a right vested exclusively in one or a few individuals."<sup>4</sup>

§ 184. Same — Profit a prendre.— A right of fishery in another's stream is not a mere easement, or right of user without derogation of the property, but is a *profit à prendre*, a taking

<sup>1</sup> *Marshall v. Ulleswater Steam Navigation Co.*, 3 B. & S. 732, 747; *Reg. v. Ellis*, 1 M. & S. 652; *Holford v. Bailey*, 8 Q. B. 1000; 13 Q. B. 427; *Somerset v. Fogwell*, 5 B. & C. 875; *Co. Litt.* 4 b, 122 a; 1 *Inst.* 46, 56; 2 *Black. Com.* 39; *Royal Fishery of the Banne*, Davies, 149; *Partheriche v. Mason*, 2 Chitty, 658; *Bridges v. Highton*, 11 L. T. N. S. 653; *Cobb v. Davenport*, 32 N. J. L. 369; 33 N. J. L. 223; *Yard v. Carman*, Penn. (N. J.) 936; *Rogers v. Jones*, 1 Wend. 237; *Collins v. Benbury*, 3 Ired. 283; 5 Ired. 118; *Skinner v. Hettrick*, 73 N. C. 53; *Hale, De Jure Maris*, pp. 18, 19; *Woolrych on Waters*, 88, 91; *Paterson's Fishery Laws*, 65; *Chitty on Fisheries*, 295. The devise of a "fishing place" passes no interest in the soil, but merely an easement for the purpose of the fishery. *Hart v. Hill*, 1 Whart. 124; *Lakeman v. Butler*, 17 Pick. 436.

<sup>2</sup> *Devonshire v. Pattinson*, 20 Q. B. D. 263.

<sup>3</sup> *Melvin v. Whiting*, 7 Pick. 79; 13 Pick. 184; 1 *Inst.* 122; *Woolrych on Waters*, 92; *Schultes on Aquatic Rights*, 67; *Carter v. Murcot*, 4 Burr. 2162; *Seymour v. Courtenay*, 5 Burr. 2816; 3 Salk. 290, 860; *Kinnersley v. Orpe*, Dougl. 56; *Rex v. Ellis*, 1 M. &

S. 652; *Johnson v. Bloomfield*, 1 R. 8 C. L. 68. In *Gibbs v. Woolicot*, Holt, 323, Holt, C. J., said that by the grant of a fishery the soil passes.

<sup>4</sup> 3 Kent Com. 411. *Woolrych* (on *Waters*, 87) says: "A right of any kind means, in strict legal language, a profit or easement which is enjoyed in the soil of another; and thus, when we speak of a right of fishery, we mean the liberty of fishing in the water of another; and it has been so defined. 4 Com. Dig. 365. When, therefore, we discover that the soil over which the stream runs, and the water itself, belong to the same person, we do not say correctly, that such an individual has a right of fishery, because the land and its profits are so completely identified as his inheritance that they cannot be separated. If any description be applied to it, it should be that of territorial fishery (*Schultes*, 87), because the party has the dominion over the territory or land itself. And hence it follows, that those who maintain the opinion that the owner of a several fishery must necessarily have the soil as incident to the enjoyment, will consider this territorial possession as the several fishery so frequently mentioned in our books."

or diminution *pro tanto* of the property itself. So a grant of the exclusive right to take wild fowl on the grantor's lakes, sloughs, and waters, with the privilege of ingress and egress for the purpose, is a grant of a *profit à prendre* and not a mere license revocable at pleasure.<sup>1</sup> A custom thus to take anything from another's land is not a lawful custom, and, if available at all, must be set up not by an indefinite class,<sup>2</sup> but by prescription as belonging to some estate, and is to be pleaded with a *que* estate.<sup>3</sup> "Where," says Huddleston, B.,<sup>4</sup> "a river is navigable and tidal, the public have a right to fish; but where it is navigable and not tidal, not only have the public no right, but they can have no right to fish." The owner of a privilege of fishery is not disseised thereof by the annual temporary use of the privilege by another,<sup>5</sup> and in New York, at least, long possession and user of an oyster-bed do not establish an exclusive right in behalf of a non-resident.<sup>6</sup>

§ 185. Same — Remedies.— A fishery may be leased,<sup>7</sup> and is so far real estate that it is subject to dower.<sup>8</sup> Trespass lies

<sup>1</sup> Bingham v. Salene, 15 Oregon, 208. See Sterling v. Jackson, 69 Mich. 488; 13 Am. State Rep. 416, note.

<sup>2</sup> Tilbury v. Silver, 45 Ch. D. 98.

<sup>3</sup> Gatewood's Case, 6 Co. 60; Grimstead v. Marlowe, 4 T. R. 718; Bland v. Lipscombe, 4 E. & B. 714, n.; Lloyd v. Jones, 6 C. B. 81; Race v. Ward, id. 702; 7 id. 884; Hudson v. McRae, 4 B. & S. 585; Hargreaves v. Didams, L. R. 10 Q. B. 582; Mills v. Colchester, L. R. 2 C. P. 476; Mussett v. Burch, 35 L. T. N. S. 486; Murphy v. Ryan, Ir. R. 2 C. L. 143; Wickham v. Walker, 7 M. & W. 63; Neill v. Devonshire, 8 App. Cas. 135; 2 L. R. Ir. 132; Waters v. Lilley, 4 Pick. 145; McFarlin v. Essex Co., 10 Cush. 304; Codman v. Evans, 5 Allen, 308, 310; Cobb v. Davenport, 32 N. J. L. 369; 33 N. J. L. 223; Tinicum Fishing Co.

v. Carter, 61 Penn. St. 21. See Goodman v. Saltash, 7 App. Cas. 633 (see post, § 331); Johnson v. Barnes, 27 L. T. N. S. 152; Warrick v. Queen's College, 25 id. 254; Northumberland v. Houghton, 22 id. 491; Chilton v. London, 38 id. 498; 7 Ch. D. 785; Abbott of Strada Marcella's Case, 9 Co. Rep. 24 a; Bryant v. Foot, L. R. 2 Q. B. 161; Willingale v. Maitland, L. R. 3 Eq. 103.

<sup>4</sup> Pearce v. Scotcher, 46 L. J. N. S. 842; 9 Q. B. D. 162.

<sup>5</sup> Nickerson v. Brackett, 10 Mass. 217; McFarlin v. Essex Co., 10 Cush. 304.

<sup>6</sup> Trustees v. Lowndes, 40 Fed. Rep. 625; People v. Lowndes, 55 Hun, 469.

<sup>7</sup> Holford v. Pritchard, 3 Exch. 793; Rex v. Old Arlesford, 1 T. R. 858; Cooper v. Phibbs, L. R. 2 H. L. 149; Swanwick v. Varney, 30 W. R. 79;

<sup>8</sup> Russell v. Russell, 15 Gray, 159; Wyman v. Oliver, 75 Maine, 421; Bacon's Abr. Dower; Park on Dower,

252. In Greyes' Case, Owen, 20, it was held that fish in a pond pass to the heir and not to the executor.



for the disturbance of an exclusive right of fishing attached to the soil,<sup>1</sup> and apparently an action of ejectment may be maintained for a fishery,<sup>2</sup> but it has been held that the action of forcible entry and detainer will not lie.<sup>3</sup> An injunction may be granted, on the ground of irreparable injury, to restrain such pollution of fresh waters<sup>4</sup> or such unlawful exclusion of tide waters<sup>5</sup> as tends to destroy a private right of fishing; and by statute the protection of private fisheries may be secured with penalties.<sup>6</sup>

*State v. Sutton*, 2 R. L. 434; *State v. Cozzens*, 2 R. L. 561; *New England Oyster Co. v. McGarvey*, 12 R. L. 385; *State v. Burdick*, 15 R. L. 239; *Watertown v. White*, 13 Mass. 477; *Belch v. Miller*, 32 Mo. App. 387; *Eastham v. Anderson*, 119 Mass. 526. In the last case it was held that a person who has taken a parol lease of a fishery from a town is liable for the stipulated rent, if he has enjoyed the premises, notwithstanding the statute of frauds. It seems that a tenant at will in possession of land on a fresh river is entitled to be treated as a riparian owner with respect to the right of fishing. *Phair v. Venning*, 22 N. Bruns. 362.

<sup>1</sup> *Child v. Greenhill*, Cro. Car. 553; *Smith v. Kemp*, 2 Salk. 637; *Holford v. Bailey*, 13 Q. B. 426; *Russell v. Stocking*, 8 Conn. 236; *Cobb v. Davenport*, 32 N. J. L. 369, 384; 33 N. J. L. 223; *Hart v. Hill*, 1 Whart. 124; *Collins v. Benbury*, 5 Ired. 118; *Adams v. Pease*, 2 Conn. 483; *Woolrych on Waters*, 92. Overflowing or drawing out of a fishery is a trespass. *Courtney v. Collet*, 1 Ld. Raym. 272.

<sup>2</sup> *Molineaux v. Molineaux*, Cro. Jac. 146; *Rex v. Old Arlesford*, 1 T. R. 358, 361; *Waddy v. Newton*, 8 Mod. 276; *Woolrych on Waters*, 92. See *post*, § 471, note; *Sheppard's Touchstone*, 96.

<sup>3</sup> *Van Auken v. Decker*, Pen. (N. J.) 108, 110.

<sup>4</sup> *Aldred's Case*, 9 Rep. 59a; *Attorney General v. Birmingham*, 4 K. & J. 528; *Oldaker v. Hunt*, 31 Eng. L. & Eq. 503; *Seaman v. Lee*, 10 Hun. 607.

<sup>5</sup> *Bridges v. Highton*, 11 L. T. N. S. 653; *Stannard v. Hubbard*, 34 Conn. 370; *Britton v. Hill*, 27 N. J. Eq. 389.

<sup>6</sup> 24 & 25 Vict. ch. 96, § 24; 5 & 6 Vict. ch. 106, § 114; *Caygill v. Thwaite*, 33 W. R. 581; *Greenbank v. Sanderson*, 49 J. P. 40; *Blower v. Ellis*, 50 J. P. 326; *Wood v. Venton*, 54 J. P. 662; *Pidler v. Berry*, 53 J. P. 6; *Anderson v. Hamlin*, 25 Q. B. D. 221; *Briggs v. Swanwick*, 10 id. 510; *Belfast Ropeworks Co. v. Boyd*, 21 L. R. Ir. 560, 574; *Jones v. Clancy*, 26 id. 161; *Wilson v. May Fishery Co.*, 19 id. 270; *Massy v. Cassidy*, 13 id. 97; *Reg. v. Justices*, 20 id. 69; *Reg. v. Inspectors*, id. 155; *Doran v. Cunningham*, id. 544; *State v. Bennett*, 79 Maine, 55; *Thompson v. Smith*, id. 160; *Clinton v. Buell*, 55 Conn. 263; *Abrams v. Hempstead Auditors*, 45 Hun, 272; *Sutter v. Van Derveer*, 47 Hun, 366. As to State regulation of such nets or traps, see *State v. Blount*, 85 Mo. 543; *Purinton v. Ladd*, 58 N. H. 596; *Lawton v. Steele*, 119 N. Y. 226. See Mich. Acts of 1889, p. 123; S. C. Acts of 1889, p. 354. An action will not lie for erecting a fish weir between high and low-water mark in an arm of the sea, whereby fish which would otherwise be caught in the plaintiff's weir, were caught by the

§ 186. **Same — How exercised.**— The privilege of fishing must be so used as not to injure others. As the right of navigation in public waters is of a higher character than a fishery, the latter cannot be exercised in derogation of commerce.<sup>1</sup> So the nets or traps which may be lawfully used in a private fishery must be such as will not injure the rights of other persons.<sup>2</sup> “Upon most occasions,” says Woolrych,<sup>3</sup> “a man may use any nets, according to his pleasure, in his several fishery which he appropriates exclusively to himself,<sup>4</sup> but if he allow another to participate in his property, he cannot be justified in taking the fish with such engines as would leave none for his grantee; because the principle is *sic utere tuo ut alienum non lædas*. Then, with respect to a common of fishery, the user of nets must be regulated according to the custom of the manor.”

§ 187. **Same — Restrictions.**— In *Weld v. Hornby*,<sup>5</sup> it was held that the enlarging of an ancient weir, so as to stop the passage of fish up a river to the plaintiff's fishery, was an actionable injury. And in the Irish case of *Hamilton v. Donegall*,<sup>6</sup> the proprietor of a several fishery in the upper part of a river was permitted to maintain an action against the owner of a fishery in the lower part of the same river for maintaining structures which prevented fish from coming to his fishery. In *Leconfield v. Lonsdale*,<sup>7</sup> it was held that the provisions of

defendant. *Cheney v. Guptill*, 2 Hannay (N. B.), 379.

<sup>1</sup> *Ante*, § 87; *Anon.* 1 Camp. 517, n.

<sup>2</sup> *Warren v. Matthews*, 1 Salk. 357; 6 Mod. 73; *Rawstrone v. Backhouse*, L. R. 3 C. P. 67; *Moulton v. Wilby*, 32 L. J. M. C. 164; *Wilson v. Hill*, 45 N. J. Eq. 367; *State v. Conner* (N. C.), 11 S. E. 992; *Commonwealth v. Ruggles*, 10 Mass. 319; *Commonwealth v. Chapin*, 5 Pick. 199; *Commonwealth v. Pease*, 137 Mass. 576; *Boatwright v. Bookman*, Rice (S. C.), 447, 451; *Jackson v. Lewis*, Cheves (S. C.), 259; *Pitkin v. Olmstead*, 1 Root, 217.

<sup>3</sup> *On Waters*, 131.

<sup>4</sup> *Ibid.* See *State v. Skolfield*, 63 Maine, 266.

<sup>5</sup> 7 East, 195; 3 Smith, 244; 2 Roll. Abr. 142; 28 Law Mag. 823.

<sup>6</sup> 3 Ridgeway, 267; Woolrych on Waters, 189.

<sup>7</sup> L. R. 5 C. P. 657; *Rolle v. Whyte*, L. R. 3 Q. B. 286; *Callis on Sewers*, 258; *Vin. Abr. Nuisance*, 3; *Hale, De Jure Maris*, chs. 3, 5; 2 Inst. 38; *Case of Chester Mill*, 10 Co. Rep. 138. A remedy by statute, which provides a penalty against those who obstruct the passage of fish, is merely cumulative, and does not prevent an action on the case by the owner of a fishery. *Barden v. Crocker*, 10 Pick. 383.

Magna Charta and other early English statutes, making weirs public nuisances, applied only to navigable rivers. The maintenance of dams without fish-ways in an unnavigable stream, which is the outlet of a public lake, whereby the passage of migratory fish from the sea to the lake is prevented, is held, in New Hampshire, to be an indictable offense at common law,<sup>1</sup> and the right to maintain such structures cannot be acquired by prescription.<sup>2</sup> In Massachusetts, the right to have migratory fish pass up the rivers and streams to their headwaters is a public right, and the riparian proprietors hold their right to fish subject to the control of the legislature; but the subject has been so long regulated by legislation that the only remedy for obstructing the passage of fish is held to be that provided by statute.<sup>3</sup> The rule is the same in Maine<sup>4</sup> and New York;<sup>5</sup> and in Massachusetts, at least, the legislature

<sup>1</sup> *State v. Franklin Falls Co.*, 49 N. H. 240; *State v. Roberts*, 59 N. H. 256, 484; *Chase v. Baker*, id. 347.

<sup>2</sup> *Ibid.*; *Cottrill v. Myrick*, 12 Maine, 222.

<sup>3</sup> *Stoughton v. Baker*, 4 Mass. 522; *Randolph v. Braintree*, 4 Mass. 315; *Burnham v. Webster*, 5 Mass. 266; *Commonwealth v. McCurdy*, 5 Mass. 324; *Commonwealth v. Ruggles*, 10 Mass. 391; *Waters v. Lilley*, 4 Pick. 145; *Watertown v. Draper*, 4 Pick. 166; *Commonwealth v. Chapin*, 5 Pick. 199; *Vinton v. Welsh*, 9 Pick. 87; *Nickerson v. Brackett*, 10 Pick. 212; *Barden v. Crocker*, 10 Pick. 383; *Atwood v. Caswell*, 19 Pick. 498; *Hyde v. Russell*, 2 Cush. 251; *Commonwealth v. Alger*, 7 Cush. 98; *McFarlin v. Essex Co.*, 10 Cush. 309, 310; *Commonwealth v. Essex Co.*, 13 Gray, 239; *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 450; *Commonwealth v. Vincent*, 108 Mass. 446; *Commonwealth v. Tiffany*, 119 Mass. 800; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500; *State v. Roberts*, 59 N. H. 265, 484.

<sup>4</sup> *Cottrill v. Myrick*, 12 Maine, 222; *Fuller v. Spear*, 14 Maine, 417; *Lunt*

*v. Hunter*, 16 Maine, 9; *Hancock v. Eastern River Lock Co.*, id. 303; *Baker v. Wentworth*, 17 Maine, 344; *Peables v. Hannaford*, 18 Maine, 106; *Parker v. Cutler Milldam Co.*, 20 Maine, 353; *Moulton v. Libbey*, 37 Maine, 472; *State v. Skolfield*, 63 Maine, 266; *Yarmouth v. Skillings*, 45 Maine, 133; *Penobscot Co. v. Treat*, 16 Maine, 378; *Hancock Co. v. Eastern Co.*, id. 303; 20 Maine, 72; *State v. Dodge*, 81 Maine, 391; *State v. Beal*, 75 Maine, 289. See *Bristol v. Ousatic Water Co.*, 42 Conn. 403; *State v. Griffin*, 89 Mo. 49; *State v. Goodwin*, 20 Atl. (Vt.) 824.

<sup>5</sup> *Shaw v. Crawford*, 10 Johns. 236; *People v. Platt*, 17 Johns. 195; *Hooker v. Cummings*, 20 Johns. 90, 96; *People v. Canal Appraisers*, 33 N. Y. 461; *People v. Reed*, 47 Barb. 235. See in other States, *Hayden v. Noyes*, 5 Conn. 397; *Hart v. Hill*, 1 Whart. 132; *Criswell v. Clugh*, 3 Watts, 330; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Budd v. Sip*, 13 N. J. L. 348; *Eubank v. Pence*, 5 Litt. (Ky.) 338. In New Jersey and Vermont, the legislature may provide for the protection of fish in unnavigable

may authorize such a use of an unnavigable stream as will wholly destroy a public fishery.<sup>1</sup> A statutory provision, that passage-ways for fish shall be made in all dams upon a river, is not necessarily repealed by a subsequent statute authorizing dams without qualification.<sup>2</sup> In *Woolever v. Stewart*,<sup>3</sup> in Ohio, a statute requiring the owner of a dam constructed across an unnavigable stream, which had been maintained adversely for twenty-one years, to construct and maintain at his own expense a chute or passage-way for fish over the same, was held to be unconstitutional, but the question was left open whether the act was valid where the adverse use is for a less period than twenty-one years.

§ 188. Same — Control by towns.— By the common law, a town has no right of property in the fisheries within its limits;<sup>4</sup> but the Crown or the State may grant to a town the right of fishery within its borders.<sup>5</sup> By the local law of Massachusetts, a town may appropriate the fish in contiguous tide waters, if not appropriated by the legislature,<sup>6</sup> and, in both Massachusetts and Maine, towns have immemorially regulated the right of fishing, for the common benefit, even in unnavigable streams.<sup>7</sup> One who has purchased from a town a privilege of fishing may maintain an action at common law against those who obstruct the passage of the fish, although it is provided by a statute, which prohibits such obstruction, that a certain penalty may be recovered by any one therefor in a *quæ*

waters. *Weller v. Snover*, 42 N. J. L. 841; *Haney v. Compton*, 36 N. J. L. 507.

<sup>1</sup> *Howes v. Grush*, 131 Mass. 207.

<sup>2</sup> *Vinton v. Welsh*, 9 Pick. 87.

<sup>3</sup> 36 Ohio St. 146.

<sup>4</sup> *Randolph v. Braintree*, 4 Mass. 815; *Coolidge v. Williams*, 4 Mass. 140.

<sup>5</sup> *Brookhaven v. Strong*, 60 N. Y. 56; *Robins v. Ackerly*, 91 N. Y. 98; *Paul v. Hazleton*, 37 N. J. L. 106; *Wooley v. Campbell*, id. 163.

<sup>6</sup> *Commonwealth v. Chapin*, 5 Pick. 199; *Dill v. Wareham*, 7 Met. 438, 446.

<sup>7</sup> *Ibid.*; *Nickerson v. Brackett*, 10

Mass. 212; *Briggs v. Murdock*, 13 Pick. 305; *Vinton v. Welsh*, 9 Pick. 87; *Waters v. Lilly*, 4 Pick. 145; *Allen v. Marion*, 11 Allen, 108; *Eastham v. Anderson*, 119 Mass. 526; *Watertown v. White*, 13 Mass. 477; *Taunton v. Caswell*, 4 Pick. 275; *Weston v. Sampson*, 8 Cush. 347; *Proctor v. Wells*, 103 Mass. 216; *Robinson v. Wareham*, 2 Gray, 315; *Cottrill v. Myrick*, 12 Maine, 222; *Peables v. Hannaford*, 18 Maine, 106; *Fossett v. Bearce*, 27 Maine, 117; 34 Maine, 575; *Spear v. Robinson*, 29 Maine, 531. See *State v. Smith*, 61 Vt. 346; *Kane v. State*, 70 Md. 546.

*tam* action.<sup>1</sup> In Connecticut, towns may regulate the taking of shell-fish; but a town by-law, prohibiting all persons, except inhabitants of the town, from taking shell-fish in a navigable river in the town, is void, being against common right.<sup>2</sup> In other States, it is held that, if the legislature has not regulated private rights of fishery, a riparian owner upon an unnavigable stream cannot, under the pretext of regulation, be required without compensation to remove a dam which obstructs the passage of fish.<sup>3</sup>

§ 189. **Same — Statutory regulations.**— The legislature of a State has power to regulate the time and manner of taking floating or shell-fish in the public navigable waters within its limits,<sup>4</sup> or to exclude the citizens of other States from the enjoyment of this privilege,<sup>5</sup> and may doubtless grant exclusive

<sup>1</sup> *Barden v. Crocker*, 10 Pick. 383; *Commonwealth v. Chapin*, 5 Pick. 199; *Sutter v. Van Derveer*, 47 Hun, 366. If two or more take fish unlawfully, judgment and satisfaction in debt *qui tam* against one is a bar to a like action against the others. *Boutelle v. Nourse*, 4 Mass. 431.

<sup>2</sup> *Hayden v. Noyes*, 5 Conn. 391; *White v. Petty*, 57 Conn. 576. In *Rowe v. Smith*, 48 Ct. 444, 447, *Pardee, J.*, said: "At the revolution the title to the shores of the sea passed from the corporate freemen of the colony to the people of the State, and in them remains the proprietorship of fisheries, shell and floating, in its navigable waters. Towns have no ownership in or control over them. The legislature alone can create an individual proprietorship in them."

<sup>3</sup> *Woolever v. Stewart*, 36 Ohio St. 146; *State v. Glen*, 7 Jones (N. C.), 321; *Cornelius v. Glen*, *id.* 512; *Bristol v. Water Co.*, 42 Conn. 403; *Boatwright v. Bookman*, *Rice* (S. C.), 447.

<sup>4</sup> *Commonwealth v. Vincent*, 108 Mass. 447; *Commonwealth v. Bailey*, 13 Allen, 541; *Burnham v. Webster*, 5 Mass. 266; *Nickerson v. Brackett*,

10 Mass. 212; *Boutelle v. Nourse*, 4 Mass. 431; *Moulton v. Libbey*, 37 Maine, 472; *Parker v. Cutler Mill-dam Co.*, 20 Maine, 353; *Lowndes v. Dickenson*, 34 Barb. 586; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Kean v. Rice*, 12 S. & R. 203; *Bickel v. Polk*, 5 Harr. (Del.) 325; *Skinner v. Hettrick*, 73 N. C. 53; *Hettrick v. Page*, 82 N. C. 65; *Gentile v. State*, 29 Ind. 409; *State v. Boone*, 30 Ind. 225; *Stuttsman v. State*, 57 Ind. 119; *Drew v. Hilliker*, 56 Vt. 641; *State v. Norton*, 45 Vt. 258; *State v. Hockett*, *id.* 302; *Budd v. Sip*, 13 N. J. L. 348; *Shoemaker v. State*, *Spencer* (N. J.), 153; *Yard v. Carman*, *Pen.* (N. J.) 943; *Eastham v. Anderson*, 119 Mass. 526. See *Pidler v. Berry*, 59 L. T. N. S. 230; *State v. Insley*, 64 Md. 28.

<sup>5</sup> *Ibid.*; *McCready v. Virginia*, 94 U. S. 391; *Smith v. Maryland*, 18 How. 71; *Corfield v. Coryell*, 4 Wash. 371; *Bennett v. Boggs*, *Bald.* 60; *Martin v. Waddell*, 16 Peters, 367, 410, 423; *Dunham v. Lamphere*, 3 Gray, 268; *ante*, § 38; *Moulton v. Libbey*, 37 Maine, 472; *Haney v. Compton*, 36 N. J. L. 507; *McCandlish v. Commonwealth*, 76 Va. 1002.

rights of fishing at particular places in them.<sup>1</sup> In those waters, at least, which, whether fresh or salt, are not navigable from the sea for any useful purpose, there is no restriction upon the authority of a State to regulate rights of fishing, or to make any grants of exclusive rights which do not impair private rights already vested.<sup>2</sup> Laws for the regulation of fishing are public statutes, of which the courts take judicial notice.<sup>3</sup> A statute is constitutional which provides that waste materials injurious to fish shall not be cast into streams,<sup>4</sup> and the legislature may prohibit, with penalties, the taking of fish with nets or seines, or in the spawning season.<sup>5</sup> An individual may plant oysters in navigable waters, and retain such exclusive property therein, if in a clearly defined bed, as to entitle him to maintain a bill for an injunction<sup>6</sup> or an action of trespass for their disturbance<sup>7</sup> or asportation,<sup>8</sup> and an indictment lies

<sup>1</sup> *Ibid.*; *Commonwealth v. Vincent*, 108 Mass. 447; *Burnham v. Webster*, 5 Mass. 266; *Hallock v. Dominy*, 7 Hun, 52; 69 N. Y. 238; *Paul v. Hazleton*, 37 N. J. L. 106, 107; *Woolley v. Campbell*, *id.* 163; *Gough v. Bell*, 21 N. J. L. 157; *Bell v. Gough*, 22 N. J. L. 441; *Stevens v. Paterson R. Co.*, 34 N. J. L. 532; *Power v. Tazewells*, 25 Gratt. 786; *Gulf Pond Oyster Co. v. Baldwin*, 42 Conn. 255; *Gallup v. Tracy*, 25 Conn. 10.

<sup>2</sup> *Commonwealth v. Vincent*, 108 Mass. 447; *Commonwealth v. Weatherhead*, 110 Mass. 175; *Nickerson v. Brackett*, 10 Mass. 212; *Cleaveland v. Norton*, 6 Cush. 380; *Russell v. Russell*, 15 Gray, 159; *Commonwealth v. Tiffany*, 119 Mass. 300; *Commonwealth v. Perley*, 130 Mass. 469; *Howes v. Grush*, 131 Mass. 207; *Maney v. State*, 6 Lea (Tenn.), 218; *Commonwealth v. Bender*, 7 Penn. Co. Ct. 620; *Steadman v. Robertson*, 2 Pugs. & B. (N. B.) 580; *Swanwick v. Varney*, 30 W. R. 79.

<sup>3</sup> *Burnham v. Webster*, 5 Mass. 266; *Commonwealth v. McCurdy*, *id.* 324. Such laws, though applicable only to the water and not to the land, are not

repugnant to a constitutional provision that no general law shall embrace any provision of a private, special, or local character. *Doughty v. Conover*, 42 N. J. L. 193. See *State v. Stunkle*, 31 Kansas, 456.

<sup>4</sup> *Blydenburgh v. Miles*, 39 Conn. 484, 497; *Oberich v. Gilman*, 31 Wis. 495; *Cartwright v. Canandaigua G. L. Co.*, 32 Hun, 403.

<sup>5</sup> *Commonwealth v. Look*, 108 Mass. 452; *Same v. Prescott*, 152 Mass. 000; *Smith v. Look*, 108 Mass. 139; *Commonwealth v. Vincent*, 108 Mass. 441; *Watertown v. Draper*, 4 Pick. 165; *Hyde v. Russell*, 2 Cush. 251; *Atwood v. Caswell*, 19 Pick. 493; *Cleaveland v. Norton*, 6 Cush. 381; *Locke v. Motley*, 2 Gray, 265; *Hanscomb v. Russell*, 15 Gray, 162, 166; *Hathaway v. Thomas*, 16 Gray, 290; *Lawton v. Steele*, 119 N. Y. 226; *Summers v. People*, 29 Ill. App. 170.

<sup>6</sup> *Britton v. Hill*, 27 N. J. Eq. 389.

<sup>7</sup> *People v. Decker*, 10 N. Y. S. 686.

<sup>8</sup> *Colchester v. Brooke*, 7 Q. B. 339; *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592; *Lowndes v. Dickerson*, 34 Barb. 586; *Brinckhoff v. Starkins*, 11 Barb. 248; *Shep-*



against those who steal oysters so planted.<sup>1</sup> Private persons may, it seems, acquire exclusive rights of fishery in navigable waters by prescription as well as by grant from the State,<sup>2</sup> although at common law a grant of such right from the Crown without the assent of Parliament is invalid, if made within the time of memory, or, indeed, according to numerous

ard v. Leveson, 1 Penn. (N. J.) 891; State v. Taylor, 27 N. J. L. 117; Haney v. Compton, 36 N. J. L. 507; Metzger v. Post, 44 N. J. L. 74; Britton v. Hill, 27 N. J. Eq. 389; Arnold v. Mundy, 1 Hal. 1; Power v. Tazewells, 25 Gratt. 786; Phipps v. State, 22 Md. 380; McKenzie v. Hulet, N. C. Term Rep. 181. See, as to construction of statutes relating to oyster fisheries, Bigler v. Morgan, 77 N. Y. 312; State v. Mister, 5 Md. 11; Willing v. Bozman, 52 Md. 44; Gallup v. Tracy, 25 Conn. 10; Averill v. Hull, 37 Conn. 320; Birdsall v. Rose, 46 N. J. L. 361.

<sup>1</sup>State v. Taylor, 27 N. J. L. 117; State v. Taylor, 13 R. L. 541.

<sup>2</sup>Oxford v. Richardson, 4 T. R. 437; 2 H. Bl. 182; Carter v. Murcot, 4 Burr. 2164; Ward v. Creswell, Willes, 265; Fitzwalter's Case, 1 Mod. 105; Anon., 6 Mod. 73; Warren v. Mathews, 1 Salk. 357; Scratton v. Brown, 4 B. & C. 485; Royal Fishery of the Banne, Davies, 149; Lowe v. Govett, 3 B. & Ad. 863; King v. Montague, 4 B. & C. 598; Somerset v. Fogwell, 5 B. & C. 884; Blundell v. Catterall, 5 B. & Ald. 268; Malcomson v. O'Dea, 10 H. L. Cas. 593; Carlisle v. Graham, L. R. 4 Ex. 361; Murphy v. Ryan, Ir. R. 2 C. L. 143; Rogers v. Allen, 1 Camp. 309; Warrant v. Mackintosh, 15 App. Cas. 52; Allen v. Donnelly, 5 Ir. C. L. 132; O'Neill v. Allen, 9 Ir. C. L. 132; Whitstable Free Fishers v. Gann, 19 C. B. N. s. 803, 810; Devonshire v. Hodnett, 1 Hud. & Br. (Ir.) 322; Hayes v. Bridges, 1 Ridg. L. & S. 390; Brew v. Haren, Ir. R. 11 C. L. 199; Richard-

son v. Gray, 3 App. Cas. 1; Hale, De Jure Maris, chs. 5, 6; Goodman v. Saltash, 7 App. Cas. 633 (see § 31, *post*); Northumberland v. Houghton, L. R. 5 Ex. 127. *Contra* in Pennsylvania, Tinicum Fishing Co. v. Carter, 61 Penn. St. 21. See Rogers v. Jones, 1 Wend. 237; Jacobson v. Fountain, 2 Johns. 170; Gould v. James, 6 Cowen, 369; Palmer v. Hicks, 6 Johns. 138; Brookhaven v. Strong, 60 N. Y. 56; Robins v. Ackerly, 91 N. Y. 98; Bennett v. Boggs, Bald. 60; Lay v. King, 5 Day, 72; Peck v. Lockwood, 5 Day, 22; Chalker v. Dickinson, 1 Conn. 382, 510; Church v. Meeker, 34 Conn. 421; State v. Sutton, 2 R. L. 434; State v. Medbury, 3 R. L. 138; Yard v. Carman, 3 N. J. L. 986; Paul v. Hazleton, 37 N. J. L. 106; Wooley v. Campbell, 37 N. J. L. 163; Browne v. Kennedy, 5 H. & J. 203; Day v. Day, 4 Md. 262; Delaware R. Co. v. Stump, 8 Gill & J. 479; Chapman v. Hoskins, 2 Md. Ch. 485; Parker v. Cutler Milldam Co., 20 Maine, 253; Moulton v. Libbey, 37 Maine, 472; Preble v. Brown, 47 Maine, 284; Clement v. Burns, 43 N. H. 621; Weston v. Sampson, 8 Cush. 347; 2 Dane Abr. 690; Commonwealth v. Bailey, 13 Allen, 543; Lakeman v. Burnham, 7 Gray, 440; Proctor v. Wells, 103 Mass. 216; Commonwealth v. Vincent, 108 Mass. 446; Hittinger v. Eames, 121 Mass. 539, 546; Paine v. Woods, 108 Mass. 169; Gough v. Bell, 21 N. J. L. 156; Delaware Canal Co. v. Raritan R. Co., 16 N. J. Eq. 321, 366; Collins v. Benbury, 3 Ired. 277; 5 Ired. 118; State

authorities, if made since Magna Charta.<sup>1</sup> In *Rogers v. Allen*,<sup>2</sup> which was an action of trespass for breaking and entering the plaintiff's several fishery in the river Burnham by dredging for oysters, the question was as to the extent of a prescriptive right of fishery as appurtenant to a manor, the evidence being that the public had been accustomed to fish in the river for floating fish only. The fishery was held to be divisible, Heath, J., saying: "Part of a fishery may be abandoned and another part of more value may be preserved. The public may be entitled to catch floating fish in the river Burnham, but it by no means follows that they are justified in dredging for oysters, which may still remain private property."

§ 190. Same — Oysters.— In *Fleet v. Hegeman*,<sup>3</sup> an action of trespass was brought for taking away a quantity of oysters which the plaintiff had gathered two years before, when they were small, and planted in tide water, about fifteen rods from the shore, in a space enclosed by stakes. In reversing a judgment for the defendant in the lower court, the Supreme Court said: "That a qualified property in the oysters was acquired by the plaintiff is admitted. But it is contended that the planting them in the bay where a common right of taking them existed was an abandonment of them to the public use.

*v. Glen*, 7 Jones, 321; *Jackson v. Lewis*, Cheves (S. C.), 259, 262; *Woolrych on Waters*, 80.

<sup>1</sup> *Ibid.* When ungranted lands in a British province are in the Crown for the benefit of the people, the exclusive right to fish follows as an incident. *Queen v. Robertson*, 6 Can. Sup. Ct. 52.

<sup>2</sup> 1 Camp. 309, 313. As to setting off a fishery in partition, see *Howell v. Robb*, 3 Hal. Ch. 17.

<sup>3</sup> 14 Wend. 42. In an action of trespass for taking oysters from the plaintiff's oyster-bed, the defendant cannot, under the general issue, show that the *locus in quo* is a public river from which the public have a right to take oysters. *Shreves v. Liveson*, 1 Penn. 247. See *Mitchell v. Hart*,

182 Mass. 297; *Rollins v. Breed*, 54 Hun, 485; *People v. Hazen*, 121 N. Y. 813; *People v. Thompson*, 30 Hun, 457; *Post v. Kreischer*, 32 Hun, 49. "Natural oyster-bed" defined in *State v. Willis*, 104 N. C. 764. As to rights in oyster-beds under State statutes, etc., see *Hess v. Muir*, 65 Md. 586; *State v. Insley*, 64 Md. 28; *Post v. Kreischer*, 108 N. Y. 110; 14 Abb. N. Cas. 38; *Housman v. Weir*, 15 id. 415; *Mitchell v. Hart*, 132 Mass. 297; *Holt v. Follett*, 65 Texas, 550; *Rowe v. Luddington*, 51 Conn. 184; *Re Clinton Oyster Ground*, 52 Conn. 5; *Re Darien Oyster Ground*, id. 61; *Birdsall v. Rose*, 46 N. J. L. 361; *Johnson v. Loper*, id. 321. See *Re Bourne's Estate*, 15 L. R. Ir. 574.

If so, it must be by force of law, for the case fully discloses that no such intent in point of fact existed. On the contrary, they were deposited there by the owner to improve, or rather give value to them, and with reference to an ulterior use. It is contended they fall within the rules of law applicable to animals denominated *feræ naturæ*, the same as deer in the forest, pigeons in the air, or fish in public waters or the ocean. A qualified property is acquired in these by reclaiming and taming them, or by so confining them within the immediate power of the owner as to prevent their escape and the use of their natural liberty. The right of the plaintiff to the oysters is within the reason of these principles. They have been reclaimed, and are as entirely within his possession and control as his swans or other water fowl that may float habitually in the bay."

§ 191. Ice — Right of harvesting.— The privilege of gathering ice upon waters which are public property is a common right. It is so held with respect to great ponds in Massachusetts and Maine.<sup>1</sup> The remedy for an unreasonable or excessive use of the liberty of cutting ice on the great ponds of these States is by indictment;<sup>2</sup> and although the owner or lessee of an ice-house and land upon the shore of such a pond has the same right as others to cut and take ice which is the natural product of the pond, he cannot, to the exclusion of other public uses, occupy any part of the pond for the purpose of increasing the thickness of the ice by artificial means, or maintain an action against those who come upon the pond lawfully and there cut holes in the ice in the exercise of the public right of fishery.<sup>3</sup> So, the owners of lands bordering upon navigable streams, in those States where they are held to be public property, have no title to the ice which forms on such streams, as incident to their ownership of the banks, but

<sup>1</sup> *Hittinger v. Eames*, 121 Mass. 539; *Anc. Chart.* 148; *Cummings v. Allen*, 164; *Brastow v. Rockport Ice Co.*, 77 Maine, 100.

*v. Stoddard*, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160; *Commonwealth v. Vincent*, 108 Mass. 441; <sup>2</sup> *West Roxbury v. Stoddard*, 7 Allen, 158.

*Fay v. Salem Aqueduct*, 111 Mass. 27; <sup>3</sup> *Hittinger v. Eames*, 121 Mass. 539; *Rowell v. Doyle*, 181 Mass. 474.  
*Gage v. Steinkrauss*, 181 Mass. 222;

the ice belongs to the first appropriator.<sup>1</sup> It has been held that an appropriation of the ice upon these streams is made by surveying, marking and staking off the ice, if unappropriated by others, and expending money to preserve it, and that by these acts a sufficient possession is acquired to support an action of trespass;<sup>2</sup> but the authorities are not in harmony upon this question.<sup>3</sup> Ice forming on a navigable fresh-water stream, the bed of which belongs to the riparian proprietors, is considered part of the realty, as an accretion, and a person who appropriates it for his own gain cannot justify the trespass on the ground that its removal was advantageous to the public easement of navigation.<sup>4</sup> The fact that the business of harvesting ice is an important industry does not justify the erection of a dam, without the authority of the legislature, across an arm of the sea which is of small importance for navigation, for the purpose of excluding the salt water and creating a fresh-water pond for the formation of ice, and the right to maintain such a dam cannot be acquired by prescription.<sup>5</sup> It has also been held that the fee of a street of an incorporated village, extending along the Mississippi river, and being the property of the corporation to its centre, the town authorities may interpose to prevent a stranger removing ice formed upon such street.<sup>6</sup> The pollution of a creek, impairing the quality of the ice in the plaintiff's pond below, is ground for an injunction;<sup>7</sup> and if a mill-owner unnecessarily and maliciously draws off the water of the pond formed by his dam, and thus destroys an ice-field, he is liable therefor to the owner of the soil under the pond.<sup>8</sup> Ice forming upon private fresh-water streams and ponds belongs exclusively to the riparian proprietors, who may prevent its removal by others or maintain trespass against those who cut it without license.<sup>9</sup> The owner

<sup>1</sup> *Wood v. Fowler*, 26 Kansas, 682; 101 Ill. 46; 21 Am. L. Reg. N. S. 313  
*Hickey v. Hazard*, 3 Mo. App. 480; and notes.

*Woodman v. Pitman*, 79 Maine, 456;  
 1 Am. State Rep. 352.

<sup>2</sup> *Ibid.*

<sup>3</sup> See *People's Ice Co. v. Davenport*,  
 149 Mass. 322; *Rowell v. Doyle*, 181  
 Mass. 474; *Woodman v. Pitman*, 79  
 Maine, 456.

<sup>4</sup> *Washington Ice Co. v. Shortall*,

<sup>5</sup> *Dyer v. Curtis*, 72 Maine, 181.

<sup>6</sup> *Brooklyn v. Smith*, 104 Ill. 429.

<sup>7</sup> *Finger v. Kingston*, 9 N. Y. S. 175;

*Olsson v. Topeka*, 42 Kansas, 709.

<sup>8</sup> *Stevens v. Kelley*, 78 Maine, 445.

<sup>9</sup> *Mill River Manuf. Co. v. Smith*,  
 34 Conn. 462; *Edgerton v. Huff*, 26

Ind. 35; *State v. Pottmeyer*, 30 Ind.

of an artificial mill-pond, who is entitled to the water of the pond, is also entitled, as against the riparian owners, to have the ice which forms thereon remain, if its removal will appreciably diminish the head of water at his dam;<sup>1</sup> and a grant of the right to flow land by damming a stream has been held to give to the grantee the exclusive right to gather the ice which forms on the pond so made.<sup>2</sup> In Massachusetts, the owner of a mill-dam, by proceedings under the mill act, acquires merely a right to raise the water by his dam, and the owner of land thereby flowed may remove the water when formed into ice, for use or sale, provided he does not lessen the water-power.<sup>3</sup> When the State appropriates the fee of land for the construction of canals, the former owner has no right to take ice therefrom;<sup>4</sup> but if the canal is simply a servitude, the owner of the fee is entitled to take the ice when its removal does not interfere with the navigation or the use of the water for hydraulic purposes.<sup>5</sup> So, a railroad company, by the acquisition of an easement for the construction of its road across another's land, gains no right to ice forming within the boundaries of its right of way.<sup>6</sup> In Indiana and Illinois, ice forming upon private waters is held to be real estate.<sup>7</sup> In Michigan it is held that, as the ephemeral character of ice renders it in-

287; 33 Ind. 402; *Bates v. State*, 31 Ind. 72; *Lorman v. Benson*, 8 Mich. 18. See 30 Cent. L. J. 6; 3 Alb. L. J. 386; 51 L. T. 23. When riparian estates are taken by right of eminent domain, the value of ice privileges connected therewith may form an element of the damages. *Ham v. Salem*, 100 Mass. 350; *Paine v. Woods*, 108 Mass. 173; *Bosworth v. Norton*, 14 R. L. 521; *Hyde Park v. Washington Ice Co.*, 117 Ill. 233.

<sup>1</sup> *Mill River Woollen Manuf. Co. v. Smith*, 34 Conn. 462; *Seeley v. Brush*, 35 Conn. 419; *Cummings v. Barrett*, 10 Cush. 186; *Paine v. Woods*, 108 Mass. 160, 173; *Myer v. Whitaker*, 55 How. Pr. 376; *Marshall v. Peters*, 12 How. Pr. 218; *Julien v. Woodsmall*, 82 Ind. 568.

<sup>2</sup> *Myer v. Whitaker*, 5 Abb. N. C.

172. The case was criticised in a later decision in New York. *Dodge v. Berr*, 26 Hun, 246. As to the right to take ice passing as an easement annexed to the lot conveyed, see *Huntington v. Asher*, 96 N. Y. 604; 26 Hun, 496; *Knickerbocker Ice Co. v. Shultz*, 41 Hun, 458.

<sup>3</sup> *Cummings v. Barrett*, 10 Cush. 186; *Paine v. Woods*, 108 Mass. 173.

<sup>4</sup> *Indianapolis Water Works Co. v. Burkhardt*, 41 Ind. 364; *Cromie v. Board of Trustees*, 71 Ind. 208. See *Card v. McCaleb*, 69 Ill. 314.

<sup>5</sup> *Edgerton v. Huff*, 26 Ind. 35; *Brookville Hydraulic Co. v. Butler*, 91 Ind. 134.

<sup>6</sup> *Julien v. Woodsmall*, 82 Ind. 568.

<sup>7</sup> *State v. Pottmeyer*, 33 Ind. 402; 30 Ind. 287; *Washington Ice Co. v. Shortall*, 101 Ill. 46.

capable of any permanent or beneficial use as part of the soil, it is unlike crops or emblements, and that any sale of ice actually formed is a sale of personalty.<sup>1</sup> The measure of damages for a wrongful taking of ice from another's waters, like that of an unauthorized taking of coal from another's mine, is the value of the ice when converted into a chattel and ready for removal and sale.<sup>2</sup> If wantonly destroyed while in the process of formation, the value of the ice that would probably have been saved for market, less the expense of storing it, is the measure of damages.<sup>3</sup> An unexecuted license to take ice from a pond passes no title to the ice.<sup>4</sup>

§ 192. **Wrecks — Waifs.**— By the common law, as stated by Lord Mansfield, and approved by Chancellor Kent,<sup>5</sup> vessels or goods cast ashore by the sea, and technically known as wreck, became the property of the Crown after the lapse of a year and a day; and during that period they were placed in the custody of the admiralty for the benefit of the owners, who might reclaim them, though no living creature escaped from the shipwrecked vessel. The owner of land on which wreck is cast is under no duty to preserve it for the owner.<sup>6</sup>

<sup>1</sup> *Higgins v. Kustener*, 41 Mich. 318; *Bigelow v. Shaw*, 65 Mich. 341. Stored ice may pass as a fixture upon a sale of the ice-house. *Hill v. Munday* (Ky.), 11 S. W. 956. As ice is not a manufactured product, an ice company is not a "manufacturing" company. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181; 32 Hun, 475; *Hittinger v. Westford*, 185 Mass. 258. *Contra*, *Attorney General v. Lorman*, 59 Mich. 157 (Champlin, J., doubting).

<sup>2</sup> *Washington Ice Co. v. Shortall*, 101 Ill. 46.

<sup>3</sup> *People's Ice Co. v. The Excelsior*, 44 Mich. 229; 38 Am. Rep. 255, note.

<sup>4</sup> *Balcom v. McQuestien* (N. H.), 17 Atl. 638. See *Richards v. Gauffret*, 145 Mass. 486.

<sup>5</sup> *Hamilton v. Davis*, 2 Burr. 2732; 2 Kent Com. 322, 359; 3 Dane Abr. 134, 144; *Proctor v. Adams*, 113 Mass. 376; *Wonson v. Sayward*, 13 Pick.

402; *The Augusta*, 1 Hagg. Adm. 16, 18, 20; *Rex v. Property Derelict*, 1 Hagg. Adm. 383; *Rex v. Forty-nine Casks of Brandy*, 3 Hagg. Adm. 270; *Rex v. Two Casks of Tallow*, 3 Hagg. Adm. 294; *The Pauline*, 2 Rob. Adm. 358; Bracton, fol. 120, § 5; *Woodward v. Fox*, 2 Vent. 188; *Sir Henry Constable's Case*, 5 Co. 108; *Talbot v. Lewis*, 6 C. & P. 606; *Dickens v. Shaw*, reported in Hall on the Seashore, App. 45; *Alcock v. Cooke*, 5 Bing. 340; *Stackpoole v. Queen, Jr.*, R. 9 Eq. 119; *Clark v. Chamberlain*, 2 M. & W. 78; *Legge v. Boyd*, 1 C. B. 92; *Palmer v. Rouse*, 8 H. & N. 505; 1 Black. Com. 291; 2 id. 14; 3 id. 106; 4 id. 235; Hale, De Jure Maris, ch. 7.

<sup>6</sup> *Sutton v. Buck*, 2 Taunt. 302, 312; *Proctor v. Adams*, 113 Mass. 377; *Forster v. Juniata Bridge Co.*, 16 Penn. St. 393; *Woodward v. Carl*, 3 Luz. L. Reg. (Penn.) 227.



He has no right to it against the owner, but has a title to it, if not reclaimed, sufficient to entitle him to an action against strangers who enter upon his land and take away the wreck.<sup>1</sup> If the property is in danger of being swept away by the sea, any person may enter upon the land without license for the purpose of saving it;<sup>2</sup> and if there is a right to take wreck, there is a right by virtue of necessity to enter on land for that purpose.<sup>3</sup> The original owner has also the right to enter on the land upon which his property is cast for the purpose of removing it, and if prevented from so doing he may maintain an action of trover for the conversion of his property.<sup>4</sup>

In the case of waifs and drift-wood floating down private streams, the riparian proprietors have an exclusive right to such property, when carried upon their lands, against all but the true owner; but they have no title to it until reduced to possession, and if others seize it before it reaches their land they cannot complain.<sup>5</sup> As against the owner, such proprietors are entitled to just compensation, in the nature of salvage, for the labor and expense of saving the property;<sup>6</sup> and, if they see fit to remove it from their premises, they are bound to do so with as little injury as possible.<sup>7</sup> If the former owner elects to reclaim his property, he may do so upon payment of

<sup>1</sup> *Dunwick v. Sterry*, 1 B. & Ad. 881; *Barker v. Bates*, 13 Pick. 255; *Proctor v. Adams*, 113 Mass. 376. Goods found derelict at sea, and brought into port, are not the property of the finders, who are, however, entitled to salvage. *Whitwell v. Wells*, 24 Pick. 30; *Ellery v. Cunningham*, 1 Met. 112.

<sup>2</sup> *Proctor v. Adams*, 113 Mass. 377; 21 Hen. VII. 27, 28, pl. 5; Bro. Abr. Trespass, 213; Vin. Abr. Trespass, H. a. 4, pl. 24; K. a. pl. 3; *Hetfield v. Baum*, 13 Ired. 394, 399.

<sup>3</sup> *Anon.*, 6 Mod. 149; *Hetfield v. Baum*, 13 Ired. 394.

<sup>4</sup> *Ibid.*; *Forster v. Juniata Bridge Co.*, 16 Penn. St. 393; *Etter v. Edwards*, 4 Watts, 63.

<sup>5</sup> *Barrett v. Bangor*, 70 Maine, 335. In *Rogers v. Judd*, 5 Vt. 223, a riparian owner was held to have no prop-

erty in timber floating over his land, but to have an exclusive right to convert to his own use such timber, moving in an eddy over his land, unless reclaimed by the owner in a reasonable time. See *Watson v. Knowles*, 13 R. I. 639.

<sup>6</sup> *Tome v. Dubois*, 6 Wall. 548; *Winslow v. Walker*, 1 Hay. (N. C.) 193. See *Tome v. Four Cribs of Lumber*, Taney, 533; *Gentry v. Madden*, 3 Ark. 127. As to rights under statutes for saving waifs, see *State v. Adams*, 16 Maine, 67; *Flanders v. Locke*, 53 Cal. 21; *Wilson v. Wentworth*, 25 N. H. 245; *Scott v. Willston*, 3 N. H. 321; *Ethelridge v. Jones*, 8 Ired. 100; *Collard v. Eddy*, 17 Mo. 354.

<sup>7</sup> *Berry v. Carle*, 3 Maine, 269.

such damages as it may have caused to the riparian proprietor, and the necessary expenses of keeping and repairing it; but if he chooses to abandon it, he is not liable for such damages and expenses.<sup>1</sup> The lessee of a farm adjoining a river is entitled to drift-wood which he takes therefrom as against his lessor, unless otherwise provided in the lease.<sup>2</sup> Where one riparian proprietor planted a row of trees along the line between his land and that of an adjoining proprietor who brought suit against him for thus causing drift-wood to be lodged upon his land during freshets, it was held that no action would lie for such obstruction.<sup>3</sup>

§ 193. *Ferries.*—The privilege of maintaining a ferry has been named among riparian rights.<sup>4</sup> But the right to maintain a ferry, which, in its very nature, implies the taking of tolls,<sup>5</sup> is a franchise, and a fixed toll cannot be demanded for the transportation of passengers or merchandise by this means without the consent of the legislature.<sup>6</sup> It is not essential to the validity of the franchise that the owner of the ferry should have the property in the soil on either side of the river.<sup>7</sup> Preference is frequently given by statute, in granting this privilege, to the owners of the banks of waters across which the ferry is to be maintained, upon their making application and complying with the prescribed statutory conditions.<sup>8</sup> But the

<sup>1</sup> *Sheldon v. Sherman*, 42 N. Y. 484; *Chase v. Corcoran*, 106 Mass. 286.

<sup>2</sup> *Dyer v. Haley*, 29 Maine, 277.

<sup>3</sup> *Taylor v. Fickas*, 64 Ind. 167.

<sup>4</sup> *Bowman v. Wathen*, 2 McLean, 876; *Bell v. Gough*, 23 N. J. L. 624, 676; *Golconda v. Field*, 108 Ind. 419; *Hanger v. Little Rock Ry. Co.* (Ark.) 11 S. W. 965.

<sup>5</sup> *Gray, C. J.*, in *Attorney General v. Boston*, 123 Mass. 460, 468, citing *Hale, De Jure Maris*, ch. 2; *Hargrave's Law Tracts*, 6; *Woolrych on Ways*, 217; *North and South Shields Ferry v. Barker*, 2 Exch. 136, 149; 2 *Dane Abr.* 683, 684; *Fay, Petitioner*, 15 *Pick.* 243, 249, 250; *Newburgh Turnpike v. Miller*, 5 *Johns. Ch.* 101, 112; *Aiken v. Western Railroad*, 20 N. Y. 370, 379, 386.

<sup>6</sup> *Ante*, § 142; 1 *Black. Com.* 87, 88; *Mills v. St. Clair Co.*, 8 *How.* 581; *Conway v. Taylor*, 1 *Black.* 603; *Mills v. Commissioners*, 8 *Scam.* 53; *Trustees v. Tatman*, 18 *Ill.* 27; *Hudson v. Cuero Land Co.*, 47 *Texas*, 58; *Williams v. Davidson*, 48 *Texas*, 1; *Nashville Bridge Co. v. Shelby*, 10 *Yerger*, 280; *McRoberts v. Washburne*, 10 *Minn.* 23.

<sup>7</sup> *Peter v. Kendal*, 6 *B. & C.* 703; *Newton v. Cubitt*, 12 *C. B. N. s.* 32; *Gant v. Drew*, 1 *Oregon*, 35; *Mills v. Learn*, 2 *id.* 215.

<sup>8</sup> *Mullis v. Cavins*, 5 *Blackf.* 77; *Gant v. Drew*, 1 *Oregon*, 35; *Mills v. Learn*, 2 *id.* 215; *Knott v. Frush*, *id.* 237; *Beckley v. Learn*, 8 *Oregon*, 544, 470; *Knott v. Jefferson Street Ferry Co.*, 9 *Oregon*, 530; *Dunlap v. Yoakum*,

legislature may repeal at pleasure the statute giving this preference;<sup>1</sup> and if full jurisdiction is given by a constitution to boards of police or supervisors over roads, ferries and bridges, it is to be exercised in conformity with the legislative enactments, and such boards cannot create an indefeasible right of property in the ferry franchises granted by them.<sup>2</sup> When a ferry franchise is granted to one who is not a riparian proprietor, compensation must be provided if the public good requires the taking of the land upon the banks for the purposes of the ferry, as for landings.<sup>3</sup> A ferry franchise may, however, be acquired by prescription,<sup>4</sup> and so, it would seem, may the right to use the river banks as a landing;<sup>5</sup> but the opening of a lane to a ferry, and public user thereof for twenty-one years in connection with the ferry, do not establish a public right in the lane by prescription.<sup>6</sup>

18 Texas, 582; *Haynes v. Wells*, 26 Ark. 464; *Lindsay v. Lindley*, 20 Ark. 573; *Willard v. Forsythe*, 2 Mich. N. P. 190.

<sup>1</sup> *Hudson v. Cuero Land Co.*, 47 Texas, 58; *Bass v. Fontleroy*, 11 Texas, 698.

<sup>2</sup> *Seal v. Donnelly*, 60 Miss. 658; *Sullivan v. Supervisors*, 58 Miss. 790; *Paxton v. Barrow*, 59 Miss. 531; *Montjoy v. Pillow*, 64 Miss. 705; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639.

<sup>3</sup> *Ibid.*; *Peter v. Kendal*, 6 B. & C. 703; *Doty v. Gorham*, 5 Pick. 487; *Prosser v. Wapello County*, 18 Iowa, 327; *Averett v. Brady*, 20 Ga. 523; *New York v. New York Ferry Co.*, 40 N. Y. Sup. Ct. 232, 245; *Thomas v. St. Louis R. Co.*, 37 Fed. Rep. 839; *Pittsburgh R. Co. v. Jones*, 111 Penn. St. 204.

<sup>4</sup> *Supervisors v. McFadden*, 57 Miss. 618; *Williams v. Turner*, 7 Ga. 348; *Laredo v. Martin*, 52 Texas, 548; *Bowman v. Wathen*, 2 McLean, 376. The limits of the ferry, when ascertained and fixed by user or otherwise, are

confined to one line of travel. *Newton v. Cubitt*, 12 C. B. N. S. 32; 13 id. 864; *Yard v. Ford*, 2 Wms. Saund. 174, n. (a); *Price v. Knott*, 8 Oregon, 438. See next note. The right may be granted to operate the ferry in one direction only across the stream (*Power v. Athens*, 99 N. Y. 592); or from one side of a river. *Power v. Athens*, 99 N. Y. 592. A corporation may become a joint owner of a ferry. *Hackett v. Multnomah Ry. Co.*, 12 Oregon, 124. See *Montgomery v. Savage*, 11 id. 344.

<sup>5</sup> *Bird v. Smith*, 8 Watts, 434; *ante*, § 105. The owner of an ancient ferry, or of one that is authorized by the legislature, may maintain an action on the case for a nuisance, or a bill in equity for an injunction, against one who, without public authority, sets up a ferry near by and injures his business. *Letton v. Goodden*, L. R. 2 Eq. 183; 3 Black. Com. 219; *Vin. Abr. Nuisance*, G.; *Huzzey v. Field*, 2 C. M. & R. 432; *Ipswich v. Browne*, Saville, 14; *Jellett v. Anderson*, 27 Grant, Ch. (Can.) 411; 7 Ontario App.

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<sup>6</sup> *Root v. Commonwealth*, 98 Penn. St. 170.

§ 194. **Boundaries upon waters.**— A stream of water is a safe boundary of real estate;<sup>1</sup> and when called for as a boundary in the description of a deed, will control courses, distances,

341; 27 Ch. (Can.) 420; Midland Terminal & Ferry Co. v. Wilson, 28 N. J. Eq. 537; East Hartford v. Hartford Bridge Co., 10 How. 541; Stark v. McGowen, 1 Nott & McCord, 387; Long v. Beard, 3 Murph. (N. C.) 57; 2 id. 337; Taylor v. Wilmington R. Co., 4 Jones (N. C.), 277; Smith v. Harkins, 3 Ired. Eq. 618; Long v. Merrill, N. C. Term R. 112. But the owner of a public ferry cannot maintain an action against those who use their own boats merely for their own passage, or the transportation of their own property, or that of their customers without charging a fee. Trent v. Carterville Bridge Co., 11 Leigh, 521; Greer v. Haugabrook, 47 Ga. 282; Hanson v. Webb, 3 Cal. 237; Californian Telegraph Co. v. Alta Telegraph Co., 22 Cal. 423; Hunter v. Moore, 44 Ark. 184; Enfield Toll Bridge Co. v. Hartford Railroad Co., 17 Conn. 64. If a statute, conferring an exclusive right of ferry, provides a penalty for its violation, no action lies at common law for a disturbance of the right, but the remedy is by an action for the penalty. Almy v. Harris, 5 Johns. 175. See Rohn v. Harris, 130 Ill. 525; 22 N. E. 587; Hickey v. Gildersleeve, 10 C. P. (Can.) 460. The keeper of a public ferry is a common carrier, and is as much bound to furnish a safe landing as to furnish a safe vessel. Walker v. Jackson, 11 M. & W. 161; Willoughby v. Horridge, 12 C. B. 742, 749; Le Barron v. East Boston Ferry Co., 11 Allen, 312; White v. Winnisimmet Co., 7 Cush. 155; Wyckoff v.

Queen's County Ferry Co., 52 N. Y. 32; Clark v. Union Ferry Co., 35 N. Y. 485; Hazman v. Hoboken Land Co., 50 N. Y. 53; Dudley v. Camden Ferry Co., 45 N. J. L. 368; Fisher v. Clisbee, 12 Ill. 344; Yerkes v. Sabin, 97 Ind. 141; Harvey v. Rose, 26 Ark. 3; Whitmore v. Bowman, 4 G. Greene, 148; Dudley v. Camden R. Co., 42 N. J. L. 25; Blakeley v. Le Duc, 19 Minn. 187; Wilson v. Sulkin, 6 Jones (N. C.), 375; Babcock v. Herbert, 3 Ala. 392; McLean v. Burbank, 11 Minn. 277; Wilson v. Hamilton, 4 Ohio St. 722; Richards v. Fuqua, 28 Miss. 792; Powell v. Mills, 37 Miss. 691; May v. Hanson, 5 Cal. 360; Johnson v. Erskine, 9 Texas, 1; Albright v. Penn, 14 Texas, 290. But a mill-owner who keeps a ferry merely for his own use and the convenience of his customers, and who charges no ferriage, is only bound to ordinary diligence. Self v. Dunn, 42 Ga. 528. A ferry franchise may be sold, transferred, or inherited. Lewis v. Gainesville, 7 Ala. 85; Greer v. Haugabrook, 47 Ga. 282. See The Maverick, 1 Sprague, 23. A lease of a ferry (in N. B.) in May "for the season of 1855" is not a lease for a year, but terminates either at the closing of the river by ice or on December 31, 1855. Frazer v. Drynan, 4 Allen (N. B.), 74. But it cannot everywhere be acquired by prescription. Bird v. Smith, 8 Watts, 434; Sullivan v. Supervisors, 58 Miss. 790. See Scott v. Wilson (Ky.), 15 S. W. 303. *Contra*, Davis v. Police Jury, 19 La. 533. Being an incorporeal hereditament, it can only be transferred by deed.

<sup>1</sup> Robeson v. Hornbaker, 2 Green Ch. 60, 64; Hartshorn v. Wright, 1 Peters, C. C. 64; Beahan v. Stapleton,

13 Gray, 427; Davis v. Rainsford, 17 Mass. 207.

the designated quantity,<sup>1</sup> or the corners, monuments, and meander lines of a survey.<sup>2</sup> A survey which is described as running on the bank of a navigable river, is to be so run that none of the lines shall cross the river, and courses and distances crossing the river will be disregarded so far as they are interfered with by the river.<sup>3</sup> The side lines of land which is

*Mississippi River Bridge Co. v. Loneragan*, 91 Ill. 508. It may be appurtenant to land, or in gross. In the former case, a conveyance of the land "with the appurtenances" passes the ferry. *Reg. v. Great Northern Ry. Co.*, 14 Q. B. 25; *State v. Willis*, Bush (N. C.) 223; *Biggs v. Ferrall*, 12 Ired. 1; *Haithcock v. Swift Island Manuf. Co.*, 72 N. C. 410. In the latter case it does not. *Haithcock v. Swift Island Manuf. Co.*, 72 N. C. 410. The forfeiture of a turnpike franchise, to which a ferry is an incident, forfeits the privilege of maintaining a ferry. *Darnell v. State*, 48 Ark. 321. The ferry franchise may be lost by non-user. *Greer v. Haugabrook*, 47 Ga. 282; *Smith v. Harkins*, 3 Ired. Eq. 613; *Jeffersonville v. The John Shallcross*, 35 Ind. 19; *Brearily v. Norris*, 23 Ark. 514; *Commonwealth v. Hulings* (Penn.), 18 Atl. 138. If the government grants a right of ferry to A. and A. leases it by unsealed writing to B., the right to sue is in A. only. *Higgins v. Hogan*, 7 Q. B. (Can.) 401. A ferry is not a "street" or "public road" or "bridge." *Cooper v. Athens*, 53 Ga. 638; *Supervisors v. McFadden*, 57 Miss. 618; *Chick v. Newberry County*, 27 S. C. 419. But may be "land" within the meaning of a statute. *Queen v. Cambrian Ry. Co.*, L. R. 6 Q. B. 422; L. R. 4 Q. B. 320.

<sup>1</sup> *Ibid.*; *Ayers v. Watson*, 113 U. S. 594; *Newsom v. Pryor*, 7 Wheat. 7; *Preston v. Bowman*, 6 Wheat. 582; *Jackson v. Camp*, 1 Cowen, 605; 8 id. 30; *Greenleaf v. Brooklyn Ry. Co.*, 3 N. Y. Sup. 222; *Graves v. Fisher*, 5

*Maine*, 69; *Bowman v. Farmer*, 8 N. H. 402; *Martin v. Carlin*, 19 Wis. 454; *Davis v. Du Pont*, 30 Wis. 170; *Slade v. Neal*, 2 Dev. & Bat. 61; *President v. Clark*, 9 Ired. 58; *Campbell v. Branch*, 4 Jones, 313; *Bishop v. Morgan*, 82 Ill. 352; *Haughton v. Roscoe*, 3 Hawks, 21; *Harramond v. McGlaughan*, Taylor (N. C.), 196; *Spring v. Hewston*, 52 Cal. 442; *Lewis v. Lewis*, 4 Oregon, 177; *Disney v. Coal Creek Mining Co.*, 11 Lea (Tenn.), 607; *Bailey v. McConnell* (Ky.), 14 S. W. 337; *Shepherd v. Nave* (Ind.), 25 N. E. 220; *Horton v. Chevington Coal Co.*, 2 Penny. (Pa.) 25; *Myers v. St. Louis*, 82 Mo. 367. Where the description, in a grant of land, was "thence along shore to a point due north of a small pond six chains from an old fort," and the pond, when the distance was measured shortly before trial, was, at its easterly end, *nine*, and at its westerly end, *eleven* chains from the fort, it was held that the actual position of the pond, being a natural monument, should control and correct the description in the deed. *Archibald v. Morrison*, 1 Nova Scotia, 272.

<sup>2</sup> *Shelton v. Maupin*, 16 Mo. 124; *Doe v. Hildreth*, 2 Ind. 274, 284; *Singleton v. Whiteside*, 5 Yerger, 18; *Meigs*, 207; *Overton v. Cannon*, 2 Humph. 264; *Simmons v. Baker*, Cooke (Tenn.), 146; *Verplank v. Hall*, 27 Mich. 79; *Galveston Co. v. Tankersley*, 39 Texas, 651; *Sphung v. Moore*, 120 Ind. 352.

<sup>3</sup> *Phillips v. Ayres*, 45 Texas, 601; *Goldsmith v. White*, 68 Ga. 334. See *Smith v. Dean*, 15 Neb. 432.

bounded by a river are to be continued to the stream in a straight line, if not otherwise defined in the deed,<sup>1</sup> and the specified length of such lines may be disregarded.<sup>2</sup> When a deed, or survey and patent, shows a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract,<sup>3</sup> and all the riparian rights incident to the ownership of the shore or bank pass to the grantee, unless clearly reserved.<sup>4</sup> Where land conveyed was described in the deed as extending to a fresh stream and thence along the bank, reserving the right to use the river in front for a specified time, the grantee's riparian rights extend to the middle of the stream, and he may maintain ejectment against one who, without right, does acts which exclude the plaintiff from the use of the stream.<sup>5</sup> In case of ambiguity, parol evidence is admissible to determine the identical boundary referred to in a conveyance.<sup>6</sup> If, for example, land upon a creek is con-

<sup>1</sup> *Howard v. Moale*, 2 H. & Johns. 249; *Buckley v. Gilmore*, 12 Ohio, 68; *Hastings v. Stevenson*, 2 Ohio, 8; *Patterson v. Trask*, 30 Maine, 28; *Klingensmith v. Ground*, 5 Watts, 458; *Swisher v. Grumbles*, 18 Texas, 164; *Wood v. Ramsey*, 71 Md. 9; 17 Atl. 563; *Harris v. Oakley*, 7 N. Y. S. 232; *Hamlin v. Pairpoint Manuf. Co.*, 141 Mass. 51; *Menasha Wooden-ware Co. v. Dawson*, 70 Wis. 600. See *Bellows v. Jewell*, 60 N. H. 420; *Foster v. Foss*, 77 Maine, 279.

<sup>2</sup> *Graves v. Fisher*, 5 Maine, 69; *Pollock v. Harris*, 1 Hay. (N. C.) 252; *Carraway v. Witherington*, N. C. Term Rep. 275. Where a grant called for a certain number of poles, "to a stake, crossing the river," it was held that the line must cross the river, though the distance terminated before reaching it. *Whiteside v. Singleton*, Meigs (Tenn.), 207.

<sup>3</sup> *County of St. Clair v. Lovington*, 23 Wall. 46, 63; *Churchill v. Grundy*, 5 Dana, 100; *Trustees v. Wagon*, 1 A. K. Marsh. 243; *Bruce v. Taylor*, 2

*J. J. Marsh.* 160; *Reid v. Langford*, 8 id. 420; *Walker v. Orr*, Hughes (Ky.), 88; *Smith v. Evans*, id. 169; *Bradford v. McClelland*, id. 195; *Cockrell v. McQuinn*, 4 Mon. 62; *Bruce v. Morgan*, 1 B. Mon. 26; *French v. Bankhead*, 11 Gratt. 136, 157; *Brown v. Huger*, 21 How. 305; *Posey v. James*, 7 Lea (Tenn.), 98; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372.

<sup>4</sup> *Ibid.*; *Richardson v. Prentiss*, 48 Mich. 88.

<sup>5</sup> *Ibid.*; *Cole v. Wells*, 49 Mich. 450; *Nichols v. Howland*, 52 Hun, 287.

<sup>6</sup> *Moses v. Morse*, 74 Maine, 472. See *Small v. Wright*, id. 428; *Shore v. Miller*, 80 Ga. 93; *Dorgan v. Weeks*, 86 Ala. 329; *Bullock v. Smith*, 72 Texas, 545; *Radford v. Edwards*, 88 N. C. 347; *Jennings v. Athens Bank*, 74 Ga. 782; *Wills v. Leverich* (Oregon), 25 Pac. 898; *Scull v. Pruden*, 92 N. C. 168; *Mack v. Bensley*, 63 Wis. 80. See *Whitney v. Detroit Lumber Co.* (Wis.), 47 N. W. 425; *Nostrand v. Knight*, 123 N. Y. 614, 619; *Flagg v. Mason*, 141 Mass. 64; *Hall v. Eaton*,



veyed and bounded "down the east bank of said creek to the ford below the mill," it would be for the jury to say, if there were two or more banks on the east side of the creek, which was intended as the boundary; but if the vendor has at the time, upon his other land opposite, a mill privilege which is not intended to be conveyed or relinquished, the court may decide, as matter of law, that the top of the bank above the ford, and not the low-water line, is the boundary, the intervening space being more appropriate for the use of the mill.<sup>1</sup> It is not essential that the granted premises, if capable of identification, should be described by boundaries, courses, distances, or monuments. Where the granted premises were described in the deed as "Pelican beach, near Barren island," and it appeared, in an action of ejectment, that the name Pelican beach was originally applied to the salt meadows, marsh and beach on the westerly end of Barren island; that an inlet, subsequently opened across the beach, separated the greater portion thereof from the island, and the grantee's title to the beach was undisputed, it was held that the deed was not void for uncertainty, but conveyed the part of the beach cut off from the island by the inlet.<sup>2</sup> A plan referred to in the conveyance becomes a part thereof, and has the same effect as if its details of courses, distances, and monuments were incorporated in the instrument.<sup>3</sup> Where the shore and a plan re-

139 Mass. 217; *Moran v. Lezotte*, 54 Mich. 88; *Combs v. Scott*, 76 Wis. 662; 45 N. W. 532. What are boundaries is a question of law for the court; where the boundaries are upon the ground is a question of fact upon the evidence. *Farley v. Deslonde*, 58 Texas, 588; *Hawkins v. Nye*, 59 id. 97. See *Maguire v. Sturtevant*, 140 Mass. 258. Evidence of a custom among Mexicans that bends in a river belong to the land on which they abut, is inadmissible, in an action to try title, if the parties claim under deeds. *Tucker v. Smith*, 68 Texas, 473; *Peck v. Clark*, 142 Mass. 436.

<sup>1</sup> *Jenkins v. Cooper*, 50 Ala. 419; *Hunt v. Raplee*, 44 Hun, 149; *post*, § 318a.

<sup>2</sup> *Coleman v. Manhattan Beach*

*Imp. Co.*, 94 N. Y. 229; *Radford v. Edwards*, 88 N. C. 347; *Todd v. Lunt*, 148 Mass. 322. *Cf.* *Snyder v. Proudfoot*, 15 Q. B. (Can.) 532; *Hook v. McQueen*, 2 Grant Ch. (Can.) 490.

<sup>3</sup> *Lincoln v. Wilder*, 29 Maine, 169; *Erskine v. Moulton*, 66 Maine, 276; *Wellington v. Murdough*, 41 Maine, 281; *Whitman v. Boston & Maine Railroad*, 3 Allen, 133; *McIver v. Walker*, 4 Wheat. 444; 9 Cranch, 173; *Blaney v. Rice*, 20 Pick. 62; *Magoun v. Lapham*, 21 Pick. 135; *Shufeldt v. Spaulding*, 37 Wis. 662; *Loring v. Norton*, 8 Maine, 61; *Proprietors v. Tiffany*, 1 Maine, 210; *Eaton v. Knapp*, 29 Maine, 20; *Walker v. Boynton*, 120 Mass. 349; *Lunt v. Holland*, 14 Mass. 149; *Davis v. Rainsford*, 17 Mass. 207; *Boston Water*

ferred to in a deed were incompatible, the plan was considered the more certain and controlled.<sup>1</sup> But if a grant calls for a natural boundary, like a lake, which is not laid down upon a plat annexed thereto, the plat does not control the calls of the grant.<sup>2</sup> A description which is so uncertain that it cannot be identified is void. If a boundary line is described in a deed as running from a creek which is several thousand feet in length, without other designation of the starting-point, and the description will be satisfied if the line starts from any point on the creek, the deed is indefinite and inoperative.<sup>3</sup> But a deed conveying all the grantor's real estate, water rights, and property of every description, real and personal, in the State," is sufficient to pass the title, and the property may be identified by parol evidence.<sup>4</sup> When a tract of land extends along a river, the exterior lines are to be run so that every point in them shall be at the given distance from the nearest point on the stream,<sup>5</sup> unless particular courses are given for the exterior lines.<sup>6</sup> A contract for land "lying on both sides

*Power Co. v. Boston*, 127 Mass. 376; *Williams v. Boston Water Power Co.*, 134 Mass. 406; *Attorney General v. Whitney*, 137 Mass. 450.

<sup>1</sup> *Lincoln v. Wilder*, 29 Maine, 169; *Birmingham v. Anderson*, 48 Penn. St. 253; *Schenley v. Pittsburgh*, 104 Penn. St. 472; *Commonwealth v. McDonald*, 16 S. & R. 390.

<sup>2</sup> *President v. Clark*, 9 Ired. 58; *Jamison v. Cornell*, 3 Hun. 557. See *Clamorgan v. Hornsby*, 13 Mo. App. 550.

<sup>3</sup> *Le Franc v. Richmond*, 5 Sawyer, 601; *Fuller v. Williams*, Busb. Eq. 162; *Horton v. Cook*, 1 Jones Eq. 270; *McDiarmid v. McMillan*, 5 Jones Eq. 29; *Hinchey v. Nichols*, 72 N. C. 66; *Speed v. Wilson*, Sneed (Ky.) 78; *Donnebaum v. Tinsley*, 54 Texas, 362; *Shipp v. Miller*, 2 Wheat. 316; *Swanton v. Crooker*, 52 Maine, 415; *Martin v. Boon*, 2 Ohio, 238; *Miles v. Knott*, 12 Gill & J. 442. Greater certainty in describing the land is required in a legal process, like a petition for

partition, than would suffice in a conveyance. *Miller v. Miller*, 16 Pick. 215. Calls for waters, such as springs, ponds, and streams, in a mere chamber survey, are but slight evidence of their existence. *Pruner v. Brisbin*, 98 Penn. St. 202. See *Maguire v. Sturtevant*, 140 Mass. 258. As to the effect of a plat upon an alleged right of way through a canal, which does not appear upon that plat, but does upon others, see *Charleston Rice Milling Co. v. Bennett*, 18 S. C. 254. See *Horne v. Munro*, 7 C. P. (Can.) 433.

<sup>4</sup> *Brown v. Warren*, 16 Nev. 228.

<sup>5</sup> *Winthrop v. Curtis*, 3 Maine, 110; *Dunn v. Hayes*, 21 Maine, 76; *Jackson v. Lunt*, 2 Caines, 363; *Van Gordon v. Jackson*, 5 Johns. 440; *Williams v. Jackson*, id. 489; *Jackson v. Joy*, 9 Johns. 102.

<sup>6</sup> *Keith v. Reynolds*, 3 Maine, 393; *Donaldson v. Lucett*, 2 Caines, 363; *Nicholl v. Huntington*, 1 Johns. Ch. 166.

of Cold River," to be paid for at the rate of one hundred dollars per acre, does not bind the purchaser to pay for the river bed, although that passes by the deed.<sup>1</sup> In *Holbert v. Edens*,<sup>2</sup> in Tennessee, it was held that the purchaser, at a stipulated price per acre, of land which is bounded by the meanders of a river is only required to pay for the land bounded by a line running with the ordinary low-water mark, and any islands which may be between that line and the thread of the stream, and not for the river bed. Where land, described as grass land bounded by a drain, and containing by estimation twenty-three acres, or thereabouts, "but to be surveyed," was purchased at a specified price per acre, and measured about twenty-one acres to the edge of the drain, and about twenty-three acres to its centre, the purchaser was required to pay the stipulated price for the land to the middle of the stream.<sup>3</sup>

§ 195. Same — Presumptions.— When riparian estates are conveyed, the owner may reserve the land under water, but the general presumption is that the purchaser's title extends as far as the grantor owns in both tidal<sup>4</sup> and fresh waters.<sup>5</sup> The legal effect of the conveyance is determined by the terms employed, and cannot be controlled by parol testimony,<sup>6</sup> unless there is a latent ambiguity, or the description itself is rejected as false,<sup>7</sup> or the identical boundary referred to in the conveyance is in dispute.<sup>8</sup> If land is bounded by Broad River,

<sup>1</sup> *Daniels v. Cheshire R. Co.*, 20 N. H. 85.

<sup>2</sup> 5 Lea, 204; *Greer v. Johnston*, 82 Q. B. (Can.) 77.

<sup>3</sup> *Re Popple*, 25 W. R. 248. See *Higinbotham v. Stoddard*, 72 N. Y. 94; 9 Hun, 1; *Ardery v. Rowles*, 71 Penn. St. 369; *Shand v. Triplett*, 5 Rich. Eq. (S. C.) 76.

<sup>4</sup> *Boston v. Richardson*, 13 Allen, 155; *Ingraham v. Wilkinson*, 4 Pick. 268; *Pratt v. Lamson*, 2 Allen, 275, 284.

<sup>5</sup> *Ibid.*; *Devonshire v. Pattinson*, 20 Q. B. D. 263; *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133.

<sup>6</sup> *Fletcher v. Phelps*, 28 Vt. 262; *Platt v. Jones*, 43 Cal. 219; *Bartlett*

*v. Corliss*, 63 Maine, 287; *Nickerson v. Crawford*, 16 Maine, 247.

<sup>7</sup> *White v. Luning*, 93 U. S. 515; *Pride v. Lunt*, 19 Maine, 115; *Hurley v. Morgan*, 1 Dev. & Bat. 425; *Becton v. Chestnut*, 4 Dev. & Bat. 335; *Hill v. Mason*, 7 Jones, 551; *Slade v. Green*, 2 Hawks, 218; *Lynch v. Allen*, 4 Dev. & Bat. 62.

<sup>8</sup> *Ibid.*; *Emery v. Webster*, 43 Maine, 204; *Gerrish v. Towne*, 8 Gray, 82; *McCuthen v. McCuthen*, 9 Porter, 650; *Jenkins v. Cooper*, 50 Ala. 419; *Williams v. Kivett*, 82 N. C. 110; *Nourse v. Lloyd*, 1 Penn. St. 220; *Couchman v. Thomas*, Hardin (Ky.) 277; *Jones v. Burgett*, 46 Texas, 285.

it may be shown that Catawba River was intended;<sup>1</sup> and where land was bounded in a deed "by the side of the mill-pond," parol evidence was admitted of an intent to limit the grant to the margin of the water, as it overflowed in the spring.<sup>2</sup> In the case of tide waters, the ordinary high-water mark is the boundary of the adjoining lands at common law;<sup>3</sup> but in those States in which the title of the owner of the upland extends to low-water mark, the flats pass as appurtenant to, or parcel of, the upland, when that is conveyed, unless a different intention is manifested by the deed.<sup>4</sup> In Massachusetts and Maine, a grant of the upland, made since the ordinance of 1647, passes the adjoining shore to the extent of the grantor's title, if not restricted by specific description, but bounded generally by the water:<sup>5</sup> as "by the sea," "tide water," or "salt water,"<sup>6</sup> "by the harbor,"<sup>7</sup> "bay,"<sup>8</sup> "cove,"<sup>9</sup>

<sup>1</sup> *Middleton v. Perry*, 2 Bay, 539.

<sup>2</sup> *Lowell v. Robinson*, 16 Maine, 357. See *Eddy v. Chase*, 140 Mass. 471. Where land was described in a Crown grant as extending to and bounding upon the "margin" of the sea, it was left to the jury to determine whether the land reached to the water's edge or stopped at a line on the top of cliffs a short distance therefrom. *Kennedy v. Portland*, 7 Vict. L. R. (L.) 541. In *San Francisco S. Union v. Irwin*, 28 Fed. Rep. 708, a boundary on salt water "by the water's edge," was held not to include the shore. See, also, *Benson v. Townesend*, 4 N. Y. S. 860; 7 id. 162; *Scholle v. New York*, 6 id. 785.

<sup>3</sup> *Ante*, § 27; *Commonwealth v. Alger*, 7 Cush. 53; *Rogers v. Jones*, 1 Wend. 237; *Canal Commissioners v. People*, 5 Wend. 423, 446; *Wheeler v. Spinola*, 54 N. Y. 377, 385; *State v. Jersey City*, 1 Dutch. 525; *East Haven v. Hemingway*, 7 Conn. 186; *Moore v. Massini*, 37 Cal. 432; *Milne v. Girodeau*, 12 La. Ann. 324. See *Mayor v. Hart*, 16 Hun, 380; 95 N. Y. 443.

<sup>4</sup> *Ante*, § 169.

<sup>5</sup> *Ante*, § 169. A conveyance of "one-half of the land and flats below the house in quantity and quality," creates an estate in common between the parties. *Adams v. Frothingham*, 3 Mass. 352.

<sup>6</sup> *Boston v. Richardson*, 105 Mass. 351, 355; 13 Allen, 155; *Storer v. Freeman*, 6 Mass. 435, 439; *Mayhew v. Norton*, 17 Pick. 357; *Valentine v. Piper*, 22 Pick. 85; *Green v. Chelsea*, 24 Pick. 71; *Jackson v. Boston & Worcester R. Co.*, 1 Cush. 575, 578; *Saltonstall v. Long Wharf*, 7 Cush. 195, 200; *Doane v. Willcutt*, 5 Gray, 328, 335, 336. In *Mayor v. Hart*, 16 Hun, 380, 95 N. Y. 443, it was held that a grant to a town, for the benefit of the public, and bounded by a navigable river, extends to low-water mark.

<sup>7</sup> *Boston v. Richardson*, 105 Mass. 355; *Mayhew v. Norton*, 17 Pick. 357; *Litchfield v. Scituate*, 136 Mass. 39.

<sup>8</sup> *Ibid.*; *Partridge v. Luce*, 36 Maine, 16.

<sup>9</sup> *Hathaway v. Wilson*, 123 Mass. 359.

"creek,"<sup>1</sup> "river,"<sup>2</sup> or "the stream" of a tidal river.<sup>3</sup> So, under this ordinance, a boundary by a tidal creek, the bed of which is bare at low water, conveys *prima facie* to the centre of the creek;<sup>4</sup> and if a wharf on the shore be granted, it will carry with it, as parcel of the granted premises, the grantor's flats towards the low-water mark, unless limited by special words.<sup>5</sup> A grant of "a piece of flats below high-water mark, to set a shop upon, not exceeding forty feet in width," conveys flats of that width to low-water mark.<sup>6</sup> A creek or natural channel, from which the tide does not ebb, limits the right to the adjoining flats.<sup>7</sup>

§ 196. Same — Fresh waters.—In the case of non-tidal waters, also, a deed which describes the land as bounded by the water conveys *prima facie* as far as the grantor owns.<sup>8</sup>

<sup>1</sup> Ibid.; Harlow v. Fisk, 12 Cush. 302.

<sup>2</sup> Ibid.; Trull v. Wheeler, 19 Pick. 240; Moore v. Griffin, 22 Maine, 350; Pike v. Monroe, 36 Maine, 209; Brackett v. Persons Unknown, 53 Maine, 238; King v. Young, 76 Maine, 76. See Mobile v. Emanuel, 1 How. 95; 17 Peters, 155.

<sup>3</sup> Ibid.; Boston v. Richardson, 13 Allen, 155; Lapish v. Bangor Bank, 8 Maine, 85, 92; Thomas v. Hatch, 3 Sumner, 170; Dunlap v. Stetson, 4 Mason, 366.

<sup>4</sup> Boston v. Richardson, 13 Allen, 146, 155; Harlow v. Fisk, 12 Cush. 302; Chapman v. Edwards, 3 Allen, 512.

<sup>5</sup> Central Wharf v. India Wharf, 123 Mass. 561, 566; Wood v. Commissioners of Bridges, 122 Mass. 394; Doane v. Broad Street Association, 6 Mass. 332; Storer v. Freeman, 6 Mass. 435; Ashby v. Eastern R. Co., 5 Met. 368; Wheeler v. Stone, 1 Cush. 313; Ammidown v. Granite Bank, 8 Allen, 285; Commonwealth v. Alger, 7 Cush. 53, 90; Jackson v. Boston & Worcester Railroad, 1 Cush. 580; 2 Dane Abr. 690, 700; 9 Gray, 524. See

Gerrish v. Gary, 120 Mass. 132; Adams v. Frothingham, 3 Mass. 352; Palmer v. Hicks, 6 Johns. 133; Hodge v. Boothby, 48 Maine, 71; Brookhaven v. Strong, 60 N. Y. 56.

<sup>6</sup> Adams v. Frothingham, 3 Mass. 352.

<sup>7</sup> Sparhawk v. Bullard, 1 Met. 95; Lufkin v. Haskell, 3 Pick. 355; Walker v. Boston & Maine Railroad, 3 Cush. 1; Attorney General v. Boston Wharf Co., 12 Gray, 553; Porter v. Sullivan, 7 Gray, 441.

<sup>8</sup> Devonshire v. Pattinson, 20 Q. B. D. 263; Micklethwait v. Newlay Bridge Co., 33 Ch. D. 133; Wright v. Howard, 1 Sim. & Stu. 190; Wishart v. Wyllie, 1 Macq. H. L. 389; Tyler v. Wilkinson, 4 Mason, 397; Thomas v. Hatch, 3 Sumner, 170; Johnson v. Anderson, 18 Maine, 76; Jackson v. Hathaway, 15 Johns. 447; Varick v. Smith, 9 Paige, 547; 5 Paige, 138; Walton v. Tift, 14 Barb. 216; Demeyer v. Legg, 18 Barb. 16; Hammond v. McLachan, 1 Sand. 323; Herring v. Fisher, id. 344; Jackson v. Louw, 12 Johns. 252; People v. Law, 34 Barb. 494; Wetmore v. Law, id. 515, 519; Grove v. White, 20 Wis.

Thus, the term "river," when employed to designate a boundary by land-owners whose title extends *usque ad filum aquæ*, means in law the centre of the stream.<sup>1</sup> This rule applies to a grant from the Crown,<sup>2</sup> a State,<sup>3</sup> or the United States,<sup>4</sup> and to navigable as well as unnavigable fresh streams where the soil of navigable fresh rivers is held to be private property.<sup>5</sup> In New York it is held<sup>6</sup> that legislative grants of islands in navigable fresh rivers are not conclusive against the application of the common-law rule to such rivers; but in Pennsylvania<sup>7</sup> and other states,<sup>8</sup> such grants have been regarded as strong evidence in favor of the public character of these streams. The rule extending the grantee's title to the centre of the stream applies also when the granted premises are bounded by a ditch or canal made through the grantor's land;<sup>9</sup> by a mill-pond, created by damming a fresh-water

425; *Arnold v. Elmore*, 16 Wis. 509; *Newhall v. Ireson*, 8 Cush. 595; *Waterman v. Johnson*, 13 Pick. 261; *Buck v. Squires*, 22 Vt. 484; *Stanford v. Mangin*, 30 Ga. 355; *Williams v. Buchanan*, 1 Ired. 535; *Rix v. Johnson*, 5 N. H. 520; *Hammond v. Ridgeley*, 5 H. & J. 215; *Kingsland v. Chittenden*, 6 Lans. 15; *Muller v. Landa*, 31 Texas, 265. See *Union Pacific R. Co. v. Hall*, 91 U. S. 343; *Thomas v. Hatch*, 3 Sumner, 170; *Norris v. Hall*, 1 Mich. 202; *Richardson v. Prentiss*, 48 Mich. 88; *Cole v. Wells*, 49 Mich. 450.

<sup>1</sup> *Ibid.* See *St. Louis v. Rutz*, 138 U. S. 226; 35 Fed. Rep. 188.

<sup>2</sup> *Lord v. Commissioners of Sidney*, 12 Moo. P. C. 473.

<sup>3</sup> *Boston v. Richardson*, 105 Mass. 351, 355; 13 Allen, 156; *Lunt v. Holland*, 14 Mass. 149; *Cold Spring Iron Works v. Tolland*, 9 Cush. 492; *Claremont v. Carlton*, 2 N. H. 369; *Ex parte Jennings*, 6 Cowen, 518; *Arthur v. Case*, 1 Paige, 447; *Coover v. O'Conner*, 8 Watts, 470; *Hayes v. Bowman*, 1 Rand. 417, 420; *Browne v. Kennedy*, 5 H. & J. 195; *Baltimore*

*v. McKim*, 3 Bland Ch. 453; *Ridgeley v. Johnson*, 1 Bland Ch. 316, n.; *Camden v. Creel*, 4 W. Va. 365.

<sup>4</sup> *Middleton v. Pritchard*, 3 Scam. 510; *Morgan v. Reading*, 3 S. & M. 366; *Steamboat Magnolia v. Marshall*, 39 Miss. 109; *Gavit v. Chambers*, 3 Ohio, 495; *Hendricks v. Johnson*, 6 Porter, 472; *Jones v. Soulard*, 24 How. 41.

<sup>5</sup> *Ante*, ch. 3; *Dwyer v. Rich. Ir. R.* 4 C. L. 424; *Brooklyn v. Smith*, 104 Ill. 429.

<sup>6</sup> *Ex parte Jennings*, 6 Cowen, 548, and note; *People v. Canal Appraisers*, 17 Wend. 571; 18 Wend. 355; *Commissioners v. Kempshall*, 26 Wend. 404.

<sup>7</sup> *Ante*, § 65.

<sup>8</sup> *Ante*, ch. 3.

<sup>9</sup> *Boston v. Richardson*, 13 Allen, 155; *Lawson v. Mowry*, 52 Wis. 219; *Warner v. Southworth*, 6 Conn. 471; *Agawam Canal Co. v. Edwards*, 36 Conn. 476; *Goodyear v. Shanahan*, 43 Conn. 204, 210; *Cansler v. Henderson*, 64 N. C. 469; *Hoff v. Tobey*, 66 Barb. 347; 56 N. Y. 633. See *Morgan v. Bass*, 14 Fed. Rep. 454.



stream,<sup>1</sup> or by an artificial raceway.<sup>2</sup> It applies to city lots bounded upon streams.<sup>3</sup> Even a marsh, bayou,<sup>4</sup> or swamp<sup>5</sup> may constitute a well-defined boundary of a tract of land, and the thread of the channel or stream flowing through it, if any, may be regarded as the boundary line.<sup>6</sup> If the land on both sides of a river is owned by tenants in common, and they make partition according to its course, each takes to the thread of the stream.<sup>7</sup> The fact that the quantity of riparian land called for in a deed is satisfied by the dry land does not limit the boundary to the bank.<sup>8</sup> The presumption that a conveyance to the centre line was intended does not arise when land is bounded by a body of water contained in an artificial reservoir constructed for purposes not connected with the premises conveyed, and when such a presumption would be inconsistent with the uses for which the reservoir was created.<sup>9</sup>

§ 197. **Same — Limited to the bank.**—If the intention to limit the title to the bank does not appear from other terms in the instrument, a description of a riparian estate, by which a line runs to a monument on the bank, and thence “by,” “with,” “along,” or “on” the river, carries title to the thread of the stream, and thence follows the meanders thereof, the monument merely determining the direction of the line to-

<sup>1</sup> *Phinney v. Watts*, 9 Gray, 269; *Waterman v. Johnson*, 13 Pick. 261; *Paine v. Woods*, 108 Mass. 160; *Bradley v. Rice*, 13 Maine, 198; *Lowell v. Robinson*, 16 Maine, 357; *Mansur v. Blake*, 62 Maine, 38; *Wood v. Kelley*, 34 Maine, 47; *Holden v. Chandler*, 61 Vt. 291; *Nostrand v. Durland*, 21 Barb. 478; *Bartholomew v. Edwards*, 1 Houst. (Del.) 17; *Mill River Co. v. Smith*, 84 Conn. 462; *Kingsland v. Chittenden*, 6 Lans. 15; *Primm v. Raboteau*, 56 Mo. 407.

<sup>2</sup> *Dunklee v. Wilton Railroad Co.*, 24 N. H. 489; *Smith v. Ford*, 48 Wis. 115, 163; *Pettibone v. Hamilton*, 40 Wis. 402; *Carter v. Chesapeake Ry. Co.*, 26 W. Va. 644.

<sup>3</sup> *Watson v. Peters*, 26 Mich. 508.

<sup>4</sup> *Turner v. Holland*, 54 Mich. 800.

<sup>5</sup> See *post*, § 263.

<sup>6</sup> *Brumagim v. Bradshaw*, 39 Cal. 24; *Felder v. Bonnet*, 2 McMullan (S. C.), 44; *Stapleford v. Brinson*, 2 Ired. 311; *Brooks v. Britt*, 4 Dev. 481; *Spruell v. Davenport*, 1 Jones, 208; *Burnett v. Thompson*, 6 Jones, 210; 7 *id.* 407. In surveyed lands, the question often depends upon where the surveyor's line was drawn. *Allen v. Koepsel*, 77 Texas, 505.

<sup>7</sup> *King v. King*, 7 Mass. 496. See *Morrill v. Morrill*, 5 N. H. 134; *Hanson v. Willard*, 12 Maine, 142; *Smith v. Smith*, 10 Paige, 470; *Cooper v. Cedar Water Power Co.*, 42 Iowa, 398.

<sup>8</sup> *Dwyer v. Rich, Jr.*, 4 C. L. 424.

<sup>9</sup> *Hoff v. Tobey*, 66 Barb. 347.

wards the river.<sup>1</sup> When the line along the river is to run a stated distance, the meanderings of the stream are to be followed until the required distance, reduced to a straight line, is attained.<sup>2</sup> In *Lucas v. Carley*,<sup>3</sup> in New York, where the de-

<sup>1</sup> *Child v. Starr*, 4 Hill, 369, 375; 20 Wend. 149; *Jackson v. Snow*, 12 Johns. 202; *Mott v. Mott*, 68 N. Y. 246; 8 Hun, 474; *Howard v. Ingersoll*, 13 How. 381, 422; *Johnson v. Pannell*, 2 Wheat. 206; *Littlepage v. Fowler*, 11 Wheat. 215; *Pike v. Moulton*, 36 Maine, 309; *Bradford v. Cressey*, 45 Maine, 18; *Low v. Tibbetts*, 72 Maine, 92; *Robinson v. White*, 42 Maine, 209; *Grant v. White*, 63 Penn. St. 271; *Smallwood v. Hatton*, 4 Md. Ch. 95; *Thomas v. Godfrey*, 8 Gill & J. 42; *Wood v. Appal.* 63 Penn. St. 210; *Motley v. Sargent*, 119 Mass. 231; *Dunlap v. Stetson*, 4 Mason, 349; *Thomas v. Hatch*, 8 Sumner, 170; *Hughes v. Providence R. Co.*, 2 R. L. 508; *Berridge v. Ward*, 10 C. B. N. s. 400; *Kimball v. Kenosha*, 4 Wis. 321; *Goodeno v. Hutchinson*, 54 N. H. 157; *Reed's Petition*, 13 N. H. 381; *Rix v. Johnson*, 5 N. H. 520; *Leigh v. Jack*, 28 Am. L. Reg. 540, and note; *Paine v. Woods*, 108 Mass. 160, 171; *Walker v. Shepardson*, 4 Wis. 486; *Sizer v. Devereux*, 16 Barb. 160; *Coovert v. O'Conner*, 8 Watts, 470; *Bishop v. Seeley*, 18 Conn. 393; *McCullough v. Wall*, 4 Rich. (S. C.) 84; *Jackson v. Louw*, 12 Johns. 252; *Jones v. Pettibone*, 2 Wis. 308; *Weakly v. Legrand*, 1 Tenn. 265; *Buck v. Squiers*, 22 Vt. 489; *Marsh v. Burt*, 34 Vt. 289; *Morrow v. Willard*, 80 Vt. 118; *Maynard v. Weeks*, 41 Vt. 619; *Buckley v. Blackwell*, 10 Ohio, 508; *Massengill v. Boyles*, 4 Humph. 205; *Burns v. Greaves*, Cooke (Tenn.), 75; *Elder v. Burrus*, 6 Humph. 364; *Martin v. Nance*, 3 Head, 649; *Stuart v. Clark*, 2 Swan, 9; *Sandifer v. Foster*, 1 Hay.

(N. C.) 237; *Hartsfield v. Westbrook*, id. 258; *McPhaul v. Gilchrist*, 7 Ired. 169; *Cansler v. Henderson*, 64 N. C. 469; *Rogers v. Mabe*, 4 Dev. (N. C.) 180; *Smith v. Auldridge*, 2 Hay. (N. C.) 382; *Pender v. Coor*, id. 183; *Slade v. Neal*, 2 Dev. & Bat. 61; *Bruce v. Morgan*, 1 B. Mon. 26; *Calk v. Stribling*, 1 Bibb, 122; *Horton v. Roscoe*, 3 Hawks, 21; *Morgan v. Livingston*, 6 Martin, 19. See *Hoboken Land Co. v. Kerrigan*, 31 N. J. L. 16; *Higbee v. Camden R. Co.*, 20 N. J. Eq. 435; *Fleming v. Kenny*, 4 J. J. Marsh. 158; *Hills v. Houston*, 4 Sawyer, 195; *Grauger v. Swart*, 1 Woolw. 88; *Babcock v. Utter*, 1 Abb. (N. Y. App.) 27; 1 Keyes, 115, 397. A grantee of land, who takes a deed bounding by a river, is not estopped thereby to set up a title afterwards acquired by disseisin in land extending beyond the thread of the stream. *Kinsell v. Daggett*, 11 Maine, 309. See *Corning v. Troy Iron Factory*, 40 N. Y. 191; 34 Barb. 529.

<sup>2</sup> *Hicks v. Coleman*, 25 Cal. 142; *Sanders v. Morrison*, 2 Mon. (Ky.) 110; *Johnson v. Brown*, Sneed (Ky.), 50; *Galveston Co. v. Tankersley*, 39 Texas, 651; *Yoder v. Swope*, 3 Bibb, 204. When the tract is bounded by a *navigable* stream, the distance upon the stream will, it is said, be ascertained, in the absence of other controlling facts, by measuring in a straight line from the opposite boundaries. *People v. Henderson*, 40 Cal. 29, 32.

<sup>3</sup> 24 Wend. 451; *Seneca Nation v. Knight*, 23 N. Y. 498; *Halsey v. McCormick*, 3 Kernan, 297; *County of St. Clair v. Lovington*, 23 Wall. 46, 64; *Jones v. Soulard*, 24 How. 44.

scription began at a "tree standing on the east bank of the Onondaga River," and, after giving other courses and distances, proceeded west to the east bank of the river; "thence south along the Onondaga River to the first-mentioned bounds," the grant was held to extend to the centre of the stream. In *Cold Spring Iron Works v. Tolland*,<sup>1</sup> in Massachusetts, the corner was a tree on the bank, but the land was described as bounding on the river, the centre of which was held to be the boundary line. In *Newton v. Eddy*,<sup>2</sup> in Vermont, the land was described as bounded "easterly on Otter creek, and down said creek to a small butternut tree, marked, which is the northeast corner of said lot," and the corner was held to be at the centre of the stream opposite the tree.

§ 198. **Same — The thread.**— The thread of a private stream is the line midway between the banks at the ordinary state of the water, without regard to the channel or the lowest and deepest part of the stream,<sup>3</sup> and if the land upon one side is gradually and imperceptibly wearing away, and soil is deposited upon the other, it is the thread of the stream for the time being, and not that which existed when the opposite owners acquired their titles, which forms the boundary between their estates.<sup>4</sup> The "main channel" refers to that part of the bed over which the principal volume of water flows.<sup>5</sup> In those States in which navigable fresh-water streams are held to be common property, like tide waters, no description in a private grant can carry the grantee's title beyond the

See *Hughes v. Providence & Worcester Railroad*, 2 R. I. 515; *Stiles v. Curtis*, 4 Day, 328; *Peck v. Smith*, 1 Conn. 108.

<sup>1</sup> 9 Cush. 492; *Knight v. Wilder*, 2 Cush. 210; *Newhall v. Ireson*, 9 Gray, 262; 13 Gray, 263; *Beahan v. Stapleton*, 13 Gray, 427; *Morrison v. Keen*, 3 Maine, 474; *Mayo v. Quimby*, 3 Dane Abr. 4; *Ipswich, Petitioners*, 13 Pick. 431.

<sup>2</sup> 23 Vt. 319; *Morrow v. Willard*, 80 Vt. 118.

<sup>3</sup> *Hopkins Academy v. Dickinson*, 9 Cush. 552; *Boscawen v. Canter-*

*bury*, 28 N. H. 188; *Plymouth v. Holderness*, cited 28 N. H. 217. As to ascertaining the *medium flum* of a stream immediately below its junction with another stream, see *McGavin v. McIntyre*, 17 Ct. of Ses. (4th series) 818.

<sup>4</sup> *Niehaus v. Shepherd*, 26 Ohio St. 40; *ante*, § 166; *Primm v. Walker*, 38 Mo. 94, 98; *Mincke v. Skinner*, 44 Mo. 92.

<sup>5</sup> *St. Louis Packet Co. v. Keokuk Bridge Co.*, 31 Fed. Rep. 755; *Rowe v. Smith*, 51 Conn. 266.

line of low-water mark.<sup>1</sup> And if such a grant is bounded by a great pond or lake, which is public property, it extends to that line.<sup>2</sup>

**§ 199. Same—The water line.**—If the conveyance does not bound the land by the water, but refers to the shore or the land under the water as the boundary, it does not pass such shore or land.<sup>3</sup> Thus, a Crown grant of land, described as one tract situated on both sides of a tidal river, but bounded by the shore, conveys no title to the land below high-water mark.<sup>4</sup> So, under the above ordinance of 1641–7, the flats do not pass, in the absence of an expressed or implied intention to the contrary,<sup>5</sup> if the granted premises are bounded “by” or “on” the “beach,”<sup>6</sup> “shore,”<sup>7</sup> “flats,”<sup>8</sup> by the high-water mark,<sup>9</sup> by a “cliff,”<sup>10</sup> “marsh,”<sup>11</sup> or on a “way,” or “street,” extending along the edge of the water.<sup>12</sup> In *Doane v. Will-*

<sup>1</sup> *Martin v. Nance*, 3 Head, 649; *McManus v. Carmichael*, 3 Iowa, 1; *ante*, ch. 3; *Wood v. Appal*, 63 Penn. St. 210.

<sup>2</sup> *Canal Commissioners v. People*, 5 Wend. 423, 447; *Gouverneur v. National Ice Co.*, 11 N. Y. Sup. 87 (disapproving *Ledyard v. Ten Eyck*, 36 Barb. 102); *Champlain R. Co. v. Valentine*, 19 Barb. 484; *Wheeler v. Spinola*, 54 N. Y. 377; *Waterman v. Johnson*, 13 Pick. 261, 265; *West Roxbury v. Stoddard*, 7 Allen, 158, 167; *Paine v. Woods*, 108 Mass. 160, 170; *Wood v. Kelley*, 30 Maine, 47, 55; *Fletcher v. Phelps*, 28 Vt. 257; *Austin v. Rutland R. Co.*, 45 Vt. 215; *Fowler v. Vreeland*, 44 N. J. Eq. 268; *Sloan v. Biemiller*, 34 Ohio St. 492; *ante*, §§ 79–85; *State v. Gilmanton*, 9 N. H. 461; *Hathorn v. Stinson*, 10 Maine, 238; *Dillingham v. Smith*, 3 Maine, 370; *Hardin v. Jordan*, 11 S. C. 808; *Mitchell v. Small*, *id.* 819.

<sup>3</sup> *Boston v. Richardson*, 13 Allen, 154; 105 Mass. 851; *Hatch v. Dwight*, 17 Mass. 289; 9 Gray, 524; *Jones v. Soulard*, 24 How. 41; *Bradford v. Cressey*, 45 Maine, 9; *Dunlap v. Stet-*

*son*, 4 Mason, 349; *Nickerson v. Crawford*, 16 Maine, 245; *Clement v. Burns*, 43 N. H. 616; *Sanders v. McCracken*, Hardin (Ky.), 258.

<sup>4</sup> *Ante*, § 19; *Lock v. Cleveland*, 1 Allen (N. B.), 390.

<sup>5</sup> *Hathaway v. Wilson*, 123 Mass. 359; *Doane v. Willcutt*, 5 Gray, 328; *Chapman v. Edmands*, 3 Allen, 512; *Lufkin v. Haskell*, 3 Pick. 355.

<sup>6</sup> *Niles v. Patch*, 13 Gray, 254; *Tappan v. Burnham*, 8 Allen, 65; *Litchfield v. Ferguson*, 141 Mass. 97; *East Hampton v. Kirk*, 68 N. Y. 459; 6 Hun, 257; 84 N. Y. 215.

<sup>7</sup> *Storer v. Freeman*, 6 Mass. 435; *Chapman v. Edmands*, 3 Allen, 512; *Montgomery v. Reed*, 69 Maine, 510.

<sup>8</sup> *Storer v. Freeman*, 6 Mass. 439; *Saltonstall v. Long Wharf*, 7 Cush. 195; 9 Gray, 524.

<sup>9</sup> *Lapish v. Bangor Bank*, 8 Maine, 85.

<sup>10</sup> *Baker v. Bates*, 13 Pick. 256; *East Hampton v. Kirk*, 84 N. Y. 215.

<sup>11</sup> *Rust v. Boston Mill Corporation*, 6 Pick. 166. See *Brumagim v. Bradshaw*, 39 Cal. 24.

<sup>12</sup> *Codman v. Winslow*, 10 Mass. 149;

cutt,<sup>1</sup> the land was bounded "by the sea or beach," and this description, referring both to the water and the land, was held to convey the shore to low-water mark. So the fee in the land to low-water mark passed to the grantee where the described premises were bounded as following the shore, "including all the privilege of the shore to low-water mark."<sup>2</sup> A boundary along the high-water mark does not change with the advance or recession of the shore line.<sup>3</sup>

§ 200. Same — Same.— Upon the same principle, a deed conveying land adjoining a private fresh-water stream may so refer to the bank or margin of the water as to make that a monument. Thus, in *Hatch v. Dwight*,<sup>4</sup> in Massachusetts, the description was: Beginning at the end of a dam, running up the river two rods, and so round to the bank of the river; and it was held that the bed of the stream did not pass. In *Bradford v. Cressey*,<sup>5</sup> in Maine, where a line was run to a creek, thence "on the west bank of said creek," the river was held to be excluded. So, in *Child v. Starr*,<sup>6</sup> in New York, it was

*Charlestown v. Tufts*, 111 Mass. 348; *Cook v. Farrington*, 10 Gray, 70; *Commonwealth v. Alger*, 7 Cush. 53, 77. A covenant is implied, in a deed of land bounded by a way or street, that such way or street exists, even when the land is below high-water mark. *Parker v. Smith*, 17 Mass. 412.

<sup>1</sup> 5 Gray, 328; *Storer v. Freeman*, 6 Mass. 439; 9 Gray, 525; *Boston v. Richardson*, 105 Mass. 351; *Coleman v. Robertson*, 80 C. P. (Can.) 609.

<sup>2</sup> *Dillingham v. Roberts*, 75 Maine, 469.

<sup>3</sup> *Nixon v. Walter*, 41 N. J. Eq. 103.

<sup>4</sup> 17 Mass. 289; *Boston v. Richardson*, 18 Allen, 155.

<sup>5</sup> 45 Maine, 9; *Bradley v. Rice*, 13 Maine, 198; *Hathorn v. Stinson*, 10 Maine, 224; *Lincoln v. Wilder*, 29 Maine, 169; *Stone v. Augusta*, 46 Maine, 127; *Brown v. Chadbourne*, 81 Maine, 9; *Erskine v. Moulton*, 66 Maine, 276; *Nickerson v. Crawford*,

16 Maine, 245; *Dunlap v. Stetson*, 4 Mason, 349; *Jackson v. Halson*, 5 Cowen, 216; *Hayes v. Bowman*, 1 Rand. 417; *Daniels v. Cheshire R. Co.*, 20 N. H. 85. See *Buck v. Squires*, 22 Vt. 484; *Cole v. Haynes*, id. 589; *Sanders v. McCracken*, *Hardin*, 258.

<sup>6</sup> 4 Hill, 369; 5 Denio, 599 (overruling s. c. 20 Wend. 149); *Halsey v. McCormick*, 13 N. Y. 296; *Yates v. Van de Bogert*, 56 N. Y. 526; *Sizer v. Devereux*, 16 Barb. 160; *Seneca Nation v. Knight*, 23 N. Y. 498; *Bissell v. New York Central R. Co.*, 23 N. Y. 64; *Kingsland v. Chittenden*, 6 Lans. 15; *Varick v. Smith*, 9 Paige, 547; *Ex parte Jennings*, 6 Cowen, 536, and note; *Kingman v. Sparrow*, 12 Barb. 201; *Hammond v. McLachlan*, 1 Sand. (N. Y.) 323; *Paul v. Carver*, 26 Penn. St. 203; *Cox v. Freedley*, 33 Penn. St. 129; *Bishop v. Seeley*, 18 Conn. 393.

held that a boundary line running "eastwardly to the Genesee River, thence northwardly along the shore of said river," conveyed no part of the bed of the stream beyond low-water mark, the controlling words being "along the shore of said river." In *Lamb v. Rickets*,<sup>1</sup> in Ohio, the deed called for a corner on the south bank of a stream, thence south, thence east, thence north to the bank of the stream, "and with the course of the bank to the place of beginning," and the low-water mark of the stream was held to be the boundary. In *Rockwell v. Baldwin*,<sup>2</sup> in Illinois, boundaries "to the west side of Cedar Creek, thence down the west line of said creek to the north line of said quarter section," were held to be limited to the bank of the creek. In *Cook v. McClure*,<sup>3</sup> in New York, it was held that a line commencing at "a stake near the high-water mark" of an artificial pond, and running thence "along the high-water mark of said pond to the upper end of said pond," was a fixed boundary, and that the grantee could not claim accretions. In *Sleeper v. Laconia*,<sup>4</sup> in New Hampshire, a deed describing land as bounded by a line running "n. w'y to the river, thence n. e'y on the river shore," conveyed the land to the middle of the river, if the grantor owned so far. In the recent case of *Kanouse v. Stockbower*,<sup>5</sup> in New Jersey, it was held that a devise of the remainder of the homestead farm, beginning at a stake standing at the edge of a designated pond; thence, etc.; thence "to the edge of the pond; thence by the same," was bounded by the low-water mark,

<sup>1</sup> 11 Ohio, 311, 315; *Hopkins v. Kent*, 9 Ohio, 13; *Lough v. Machlin*, 40 Ohio St. 332. In the earlier case of *McCulloch v. Aten*, 2 Ohio, 309, 425, where the call was for "a white oak on the south-east bank of G. creek, thence *down said creek*, with the several meanderings thereof," the low-water mark was treated as the boundary. See this case explained in *Benner v. Platter*, 6 Ohio, 504, 508, where it was held that a call in a survey for an unnavigable stream is a call for the main branch of such stream, and the boundary is the middle of the stream. See, also, as

to boundaries upon streams having different branches or forks, *Doddridge v. Thompson*, 9 Wheat. 469; *Graves v. Fisher*, 5 Maine, 69; *Carter v. Oldham*, *Hughes* (Ky.), 345; *Johnson v. Brown*, *Sneed* (Ky.), 49.

<sup>2</sup> 53 Ill. 19. See, also, *Murphy v. Copeland*, 51 Iowa, 515; 58 id. 409; *Grand Rapids R. Co. v. Heisel*, 38 Mich. 62, 72; *Smith v. Ford*, 48 Wis. 117.

<sup>3</sup> 58 N. Y. 437. See *Seymour v. Creswell*, 18 Fla. 29; *Jones v. Parker*, 99 N. C. 18.

<sup>4</sup> 60 N. H. 201.

<sup>5</sup> 21 Atl. 197.



and that the testator died intestate as to the land covered by the pond. If the deed contains a double description "along the river" and "a marked line," the river, being a natural boundary, will control the marked line.<sup>1</sup> When the line is described as running "with the meander of the river," the sinuosities of the river are to be followed.<sup>2</sup>

§ 201. Same — Divergence from the stream.—In *Bowman v. Farmer*,<sup>3</sup> in New Hampshire, the deed described one line as "beginning at the mouth of Black Brook, on the south side of the brook, and running from thence up said brook due west until it strikes the common land," and it was held that the brook, which was very crooked, was not designated as a boundary with sufficient certainty to control the point of the compass stated to be due west. In *Thomas v. Godfrey*,<sup>4</sup> in Maryland, a patent calling for the main falls of a river, and thence "with the main falls by a direct line to the first bound tree," was held not to follow the meanders of the stream.

§ 202. Same — Towns — Nations.—By the common law, parishes or towns upon tide waters extend, like private estates, only to the high-water mark, unless proved by grant, prescription, or usage to include the shore.<sup>5</sup> When separated by a fresh-water river, its thread is *prima facie* the boundary between them,<sup>6</sup> the same rules of construction applying as in

<sup>1</sup> *Lynch v. Allen*, 4 Dev. & Bat. 62.

<sup>2</sup> *Turner v. Parker*, 14 Oregon, 340.

<sup>3</sup> 8 N. H. 402. See, also, *Massengill v. Boyles*, 4 Humph. 205; 11 Humph. 112. The phrase "up the brook," if not controlled by other terms in the deed, calls for a line following the windings of the stream. *Jackson v. Louw*, 12 Johns. 252; *Budd v. Brooke*, 3 Gill, 198.

<sup>4</sup> *Thomas v. Godfrey*, 8 Gill & J. 142; *Smallwood v. Hatton*, 4 Md. Ch. 95, 99; *Hammond v. Ridgely*, 5 H. & J. 246. In *Corsey v. Hammond*, 1 H. & J. 190, it was left to the jury to decide as to the construction of the deed.

<sup>5</sup> *Hale, De Jure Maris*, ch. 4; *Har-*

*grave's Law Tracts*, 27; *Reg. v. Musson*, 8 El. & Bk. 900; *Bridgewater Trustees v. Bootle*, L. R. 2 Q. B. 4; 7 B. & S. 348; *Boston v. Richardson*, 105 Mass. 358; *Pratt v. State*, 5 Conn. 890; *Hayden v. Noyes*, id. 395.

<sup>6</sup> *Rex v. Landulph*, 1 Moo. & R. 393; *Reg. v. Strand Board of Works*, 4 B. & S. 526, 545; *State v. Gilmanton*, 44 N. H. 467; *Boscawen v. Canterbury*, 23 N. H. 188; *State v. Canterbury*, 28 N. H. 195; *Crosby v. Hanover*, 36 N. H. 404; *Plymouth v. Holderness*, cited 28 N. H. 217; *Ipswich, Petitioners*, 18 Pick. 481; *Cold Spring Iron Works v. Tolland*, 9 Cush. 492; *Boston v. Richardson*, 18 Allen, 146, 157; *Warren v. Thomaston*, 75 Maine.

the case of a grant from one individual to another;<sup>1</sup> and if a stream is made the boundary between two towns, one of which is set off by statute from the other, its centre is the dividing line between them.<sup>2</sup> Between nations or States, the thread of a boundary river, whether tidal or fresh, is presumably the line of separation, without reference to the track of navigation,<sup>3</sup> although the use of the whole river for the purpose of navigation, trade, and passage may be common to both States,<sup>4</sup> which still have concurrent jurisdiction with respect to the navigation across the whole stream.<sup>5</sup> But when one State, being the owner of the territory upon both sides of a river, grants to another State a portion of it bounded by the river, it retains the soil of the river bed, and the grantee takes only to low-water mark.<sup>6</sup> This depends, however, upon considerations derived from the law of nations, and not from the rules of municipal law governing common assurances of estates.<sup>7</sup>

829. See *Thomaston v. St. George*, 17 Maine, 117; *In re McDonough*, 30 Q. B. (Can.) 288.

<sup>1</sup> *Granger v. Avery*, 64 Maine, 292; *Perkins v. Oxford*, 66 Maine, 545.

<sup>2</sup> *Flynn v. Boston* (Mass.), 26 N. E. 868. See *Jackson v. State* (Ala.), 8 So. 862.

<sup>3</sup> *Cessill v. State*, 40 Ark. 501.

<sup>4</sup> *Ante*, §§ 64, 166; *The Schooner Fame*, 3 Mason, 147; *St. Louis v. Rutz*, 138 U. S. 266; 35 Fed. Rep. 188; *The Annie M. Small*, 2 Sawyer, 226; *State v. Sturgess*, 9 Oregon, 537, 540; *Wheat Elements Int. Law*, 346; *Wheat Law of Nations*, 577. See *Missouri v. Iowa*, 7 How. 660; 10 How. 1. The eastern boundary of Iowa, declared by statute to be "the middle of the main channel of the Mississippi River," and the western boundary of Illinois, declared by another statute to be "the middle of the Mississippi River," are the *filum aquæ*, the middle of the main stream of the river and not the middle of the deep water used by vessels. *Dunleith Bridge Co. v. Dubuque County*,

55 Iowa, 558; *Rowe v. Smith*, 51 Conn. 266; *Re Spier*, 3 N. Y. S. 438; *Rabun County v. Habersham County*, 79 Ga. 248.

<sup>5</sup> *Wiggins Ferry Co. v. Reddig*, 24 Ill. App. 260; *Sanders v. St. Louis Line*, 97 Mo. 26. Under United States Revised Statutes, section 5346, the Federal courts have no jurisdiction of a crime committed on an American vessel in the Detroit River. *Ex parte Byers*, 32 Fed. Rep. 404.

<sup>6</sup> *Handly v. Anthony*, 5 Wheat. 374; *Howard v. Ingersoll*, 13 How. 381; *Alabama v. Georgia*, 23 How. 505; *Commonwealth v. Garner*, 3 Gratt. 655.

<sup>7</sup> *Boston v. Richardson*, 13 Allen, 146, 157. A Swamp Land Act by the Federal government, granting to a State all the lands surrounding a lake, admits of more liberal construction than a private agreement (*ante*, § 31); and may pass the title to the land under water to the State; but its grantees of the same lands do not, by virtue of their grant, acquire title to the bed of the lake, although it

§ 203. **Same — Lakes and ponds.**— The proprietors of lands upon a natural fresh-water lake or pond, which is public by reason of its size, and the waters of which rise and fall at different seasons of the year, hold to low-water mark, and grants bounded by such waters extend to that line,<sup>1</sup> the words “bank or edge,” employed in such grants, denoting the margin, and making the water’s edge the boundary.<sup>2</sup> The great lakes of the North appear to be less subject than streams and smaller lakes to an appreciable rise and fall of the water produced by a wet or dry season or by spring freshets.<sup>3</sup> In the case of *Seaman v. Smith*,<sup>4</sup> in Illinois, it was held that the boundary of land described in a deed which called for Lake Michigan as a line was the line of the water as it usually stands when unaffected by storms or other disturbing causes. So patents by the general government, of public lands bounding on navigable lakes, are not limited by the meander lines, but the purchasers take such lands to low-water mark.<sup>5</sup> If an artificial

may be estopped, by its conduct, to set up its title to such parts of the bed as have been reclaimed and platted into lots. *Indiana v. Milk*, 11 Biss. 197.

<sup>1</sup> *Canal Commissioners v. People*, 5 Wend. 423, 446; *Wheeler v. Spinola*, 54 N. Y. 377; *Champlain R. Co. v. Valentine*, 19 Barb. 484; *People v. Jones*, 112 N. Y. 597; *Gouverneur v. National Ice Co.*, 11 N. Y. S. 87; *Fletcher v. Phelps*, 28 Vt. 257; *Jake-way v. Barrett*, 38 Vt. 816, 823; *Austin v. Rutland R. Co.*, 45 Vt. 215; *Mariner v. Schulte*, 13 Wis. 692; *Wood v. Kelly*, 30 Maine, 47, 55; *Waterman v. Johnson*, 13 Pick. 261, 265, explained in *Paine v. Woods*, 108 Mass. 160, 170; *West Roxbury v. Stoddard*, 7 Allen, 158, 167; *Fay v. Salem Aqueduct Co.*, 111 Mass. 27, 28; *Mill River Woollen Manuf. Co. v. Smith*, 33 Conn. 468; *Ladd v. Osborne*, 79 Iowa, 93.

<sup>2</sup> *Ibid.*; *Burke v. Miles*, 2 Hannay (N. B.), 166; *Niles v. Burke*, 1 Pugsley (N. B.), 237.

<sup>3</sup> See *Seaman v. Smith*, 24 Ill. 521,

523. In *Rice v. Ruddiman*, 10 Mich. 125, 138, Christiancy, J., said: “The rise and fall of Lake Michigan, and other great lakes of the same chain, is not a tide occurring at regular intervals, like that of the ocean, nor does it arise from the same cause. And though it is probable their waters may be slightly affected by lunar attraction, and a very minute tide may perhaps be detected by a long and careful course of observation with accurate instruments, yet the court must judicially notice that it must be too slight to be recognized by ordinary observation, and to serve any practical purpose in determining the extent of riparian ownership. These facts were judicially noticed in *Lorman v. Benson*, 8 Mich. 18.”

<sup>4</sup> 24 Ill. 521. See, also, *Delaphine v. Chicago Ry. Co.*, 42 Wis. 214, 225; *Sloan v. Biemiller*, 34 Ohio St. 492; *Lincoln v. Davis*, 53 Mich. 375.

<sup>5</sup> *Hardin v. Jordan*, 11 S. C. 808, 838; 16 Fed. Rep. 823, and note; *Packer v. Bird*, 137 U. S. 366; 32 Cent. L. J. 291-9, and note; *ante*, §§ 76-85.

pond, like a mill-pond, is created by expanding a flowing stream by a dam, the title of the riparian owner extends *prima facie* to the centre of the pond as it did previously in the case of the stream, unless the pond has been so long kept up as to become permanent and to have acquired another well-defined boundary.<sup>1</sup> And if what was originally a natural

<sup>1</sup> *Phinney v. Watts*, 9 Gray, 269; *Paine v. Woods*, 108 Mass. 160, 170; *Waterman v. Johnson*, 18 Pick. 261; *Wheeler v. Spinola*, 54 N. Y. 877; *Robinson v. White*, 42 Maine, 209; *Hathorn v. Stinson*, 10 Maine, 224, 238; 12 Maine, 183; *Bradley v. Rice*, 13 Maine, 198, 201; *Wood v. Kelley*, 30 Maine, 47; *Lowell v. Robinson*, 16 Maine, 357, 361; *Mansur v. Blake*, 62 Maine, 38; *Primm v. Walker*, 38 Mo. 94, 98. In *Paine v. Woods*, 108 Mass. 160, 170, Gray, J., states and interprets the earlier Massachusetts case of *Waterman v. Johnson*, 13 Pick. 261, as follows: " *Waterman v. Johnson*, 13 Pick. 261, was the case of a complaint under the mill act for flowing land described in the deed under which the complainant claimed title as bounded by 'Jones River Pond,' a large natural pond, which before the date of the deed had at times been raised to a certain line by means of a dam of permanent materials, adapted in its ordinary use to raise the water to that line. The judge at the trial ruled that the high-water mark of the pond as thus extended would *prima facie* be considered as the boundary of the complainant's land; but admitted parol evidence to show, and the jury found, that at the time of the conveyance a certain natural bank or barrier, which was not thus overflowed, and which the natural pond had never overflowed, was intended and agreed upon by the parties as the marginal line of the pond referred to in the deed. The full court, in the judgment delivered by Chief Justice

Shaw, after stating the general rules of law, that, when the description of a boundary in a deed had a definite legal meaning, parol evidence was inadmissible to control it; that, by legal operation, a boundary by the sea or salt water gave a title in the soil to low-water mark; a boundary upon a river not navigable, to the thread of the stream; upon a large natural pond, having a definite low-water line, to that line; and upon an artificial pond raised by a dam swelling a stream over its banks, to the thread of the stream, unless the pond had been so long kept up as to have become permanent and to have acquired another well-defined boundary,—expressed an opinion that under the peculiar circumstances of the case, the parol evidence was rightly admitted, and held that there was no ground in point of law, or upon the evidence in the case, upon which the respondents could claim that the grant did not extend, in the direction of the pond, as far as the barrier. Upon that case, it is to be observed: first, the ruling at the trial, that the boundary was *prima facie* to be considered as the high-water mark of the pond, as artificially raised, was inconsistent with the opinion of the full court; second, the only point necessarily involved in the decision was, that the grant was not extended too far by carrying its effect to the natural barrier; third, that decision was equally sustained, whether the parol evidence was admitted, or the terms of the grant by their own force

pond has been for a long time enlarged by artificial means or diminished by the deepening of its outlet, grants of land bounded by the pond extend to the margin of the water as it stands at the time of the conveyance.<sup>1</sup> If the margin varies at different seasons of the year, the grant includes the land which is uncovered at low-water;<sup>2</sup> and if the pond is artificially raised only in winter, and retains its natural level in summer, the low-water mark in summer is the boundary, though the deed may have been executed in the winter.<sup>3</sup> If land is described as bounded "along the high-water mark of the pond," the boundary is fixed and does not follow the changes in the high-water mark.<sup>4</sup> A change in the water of a lake or pond from fresh to salt, caused by cutting a channel between it and an arm of the sea, and making it subject to the daily rise and fall of the tide, does not affect the boundaries of the riparian owners, who continue to hold to the former low-water mark, notwithstanding the rule which makes the high-water mark the boundary of lands upon tide waters.<sup>5</sup> It should also be observed in this connection that no title is acquired to the bed of a public or a private lake, by the existence of an easement of maintaining a dam for twenty years at its outlet,

extended so far; fourth, the admission of the parol evidence was based upon the theory that the boundary on the pond, as applied to the subject matter, was governed by no settled rule of legal construction, but created a latent ambiguity; and the rules for the construction of similar grants were not then as fully established in this Commonwealth as they have since been by the later decisions already referred to. For instance, in *Tyler v. Hammond*, 11 Pick. 193, in the previous year, the court had held that a boundary by a highway generally extended only to the margin of the way — a doctrine wholly repudiated by the modern decisions. *Newhall v. Ireson*, 8 Cush. 595; *Phillips v. Bowers*, 7 Gray, 21; *Boston v. Richardson*, 13 Allen, 146; *Stark v. Coffin*, 105 Mass. 328."

<sup>1</sup> *Bradley v. Rice*, 13 Maine, 198; *Wood v. Kelley*, 80 Maine, 47, 55; *Robinson v. White*, 42 Maine, 209; *Nelson v. Butterfield*, 21 Maine, 220, 229. See the last case upon the question when an arm of a pond is inclosed within the lines of land conveyed, so as to be included in the grant. A lease for 500 years of a factory lot and dam lot, "together with all the land which may be flowed by raising said dam" to a certain height, conveys all the land under the pond, and passes the pond of water and the fish therein, as incidents of the principal grant. *Smith v. Miller*, 5 Mason, 191.

<sup>2</sup> *Wood v. Kelley*, 80 Maine, 47; *Stevens v. King*, 76 Maine, 197.

<sup>3</sup> *Paine v. Woods*, 108 Mass. 160.

<sup>4</sup> *Cook v. McClure*, 58 N. Y. 437.

<sup>5</sup> *Wheeler v. Spinola*, 54 N. Y. 377.

and flooding back the water over the bed of the lake and the adjacent lands.<sup>1</sup> Such overflowing does not constitute an ouster.<sup>2</sup>

<sup>1</sup> *Perrine v. Bergen*, 2 Green (N. J.), 855; *Cocheco Co. v. Strafford*, 51 N. H. 455, 461; *Green v. Harman*, 4 Dev. (N. C.) 158; *Everett v. Dockery*, 7 Jones (N. C.), 890. The person who has maintained a dam at the outlet of a lake or pond for twenty years, and thereby held back the water, is not liable to be taxed for the bed of the lake, or for the lands so flowed on its borders. *Cocheco Manuf. Co. v. Strafford*, 51 N. H. 455. But this rule "may require qualification as applied to tide-mills." *Eastern Railroad v. Allen*, 135 Mass. 18. As to the taxation of canal-beds, see *Lowell v. County Commissioners*, 152 Mass. 372.

<sup>2</sup> *Ibid.* See *Charlotte v. Pembroke Iron Works*, 82 Maine, 891.



## PART II.

### PRIVATE WATERS.

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#### CHAPTER VI.

##### RIGHTS OF RIPARIAN PROPRIETORS IN THE NATURAL FLOW AND CONDITION OF THE STREAM

###### SECTION.

- 204. Rights of riparian proprietors to the flow of the water.
- 205. Ordinary and extraordinary use.
- 206-209. The right of each proprietor limited.
- 210. Evidence and effect of judgments.
- 211-211b. Measure of damages for flowage.
- 211c. Flowing caused by combination of natural and artificial causes.
- 212. Flowing when a public nuisance.
- 213-215. Diversion.
- 216. Alterations in the surface of riparian estate.
- 217. Diversion for irrigation.
- 218. Obstruction of the natural current.
- 218a. Acceleration of the current.
- 219-222. Pollution.
- 223. Remedies for pollution.
- 224. Rights of non-riparian proprietors.
- 225. Right of adjoining land-owners in artificial watercourses.

§ 204. **Riparian owners — Rights in the natural flow of the stream.**— Riparian proprietors upon both navigable and unnavigable streams are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration.<sup>1</sup> Each proprietor

<sup>1</sup>Shury v. Piggot, 3 Bulst. 339; Junction Canal Co., 7 Exch. 282; Poph. 166; Brown v. Best, 1 Wilson, Rex v. Trafford, 1 B. & Ad. 259; 174; Palmer v. Heblethwaite, Skinner, 65, 175; Rutland v. Bowler, 258; Wood v. Waud, 3 Exch. 748; Palmer, 290; Miner v. Gilmour, 12 Embrey v. Owen, 6 Exch. 353; Sampson v. Hoddinott, 1 C. B. N. s. 590; Sim. & Stu. 190; Dickinson v. Grand Lyon v. Fishmongers' Co., 1 App.

may, therefore, insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level.<sup>1</sup> The proprietors have no property in the flowing water, which is indivisible and not the subject of riparian ownership,<sup>2</sup> but may use it for any purpose

Cas. 662; *Chasemore v. Richards*, 5 H. & N. 989; 2 H. & N. 181; 7 H. L. Cas. 349; *Crossley v. Lightowler*, L. R. 3 Eq. 296; *Frankum v. Falmouth*, 6 C. & P. 5; *Rawstron v. Taylor*, 11 Exch. 382; *Williams v. Morland*, 2 B. & C. 910; *Bealey v. Shaw*, 6 East, 208; *Mason v. Hill*, 3 B. & Ad. 804; 5 B. & Ad. 1; *Duncombe v. Randall*, Hetley, 32; *Atchison v. Peterson*, 20 Wall. 507; *Davis v. Getchell*, 50 Maine, 602; 79 Am. Dec. 636, and note; *Pillsbury v. Moore*, 44 Maine, 154; *Johns v. Stevens*, 8 Vt. 308; *Anthony v. Lapham*, 5 Pick. 175; *Cary v. Daniels*, 8 Met. 466; *Pratt v. Lamson*, 2 Allen, 275; *Tourtlot v. Phelps*, 4 Gray, 370; *Whitney v. Eames*, 11 Met. 517; *Merrifield v. Worcester*, 110 Mass. 219; *Cowles v. Kidder*, 24 N. H. 365; *Agawam Canal Co. v. Edwards*, 38 Conn. 476; *Buddington v. Bradley*, 10 Conn. 213; *Gillett v. Johnson*, 30 Conn. 180; *King v. Tiffany*, 9 Conn. 162; *Hutchinson v. Coleman*, 5 Hal. (N. J.) 74; *Bowman v. Wathen*, 2 McLean, 376; *Dilling v. Murry*, 6 Ind. 324; *Mitchell v. Parks*, 26 Ind. 354; *Rhodes v. Whitehead*, 27 Texas, 304; *Shreve v. Voorhees*, 2 Green Ch. 25; *Hill v. Newman*, 5 Cal. 445; *McDonald v. Askew*, 29 Cal. 207; *Hendricks v. Johnston*, 6 Porter, 472; *Moffett v. Brewer*, 1 G. Greene, 348; *Overton v. Sawyer*, 1 Jones, 308; *Haynes v. Gratt*, 1 McCord, 543; *Omelvany v. Jaggers*, 2 Hill (S. C.), 634; *Martin v. Jett*, 12 La. 501; *Davis v. Fuller*, 12 Vt. 178; *Adams v. Barney*, 25 Vt. 225; *Martin v. Bigelow*, 2 Aik. (Vt.) 24; *Howe Scale Co. v. Terry*,

47 Vt. 109. And see cases cited *post*, § 214.

<sup>1</sup> *Ibid.*; *Tillotson v. Smith*, 32 N. H. 94.

<sup>2</sup> *Ibid.*; *Acton v. Blundell*, 12 M. & W. 324; *Owen v. Field*, 102 Mass. 104; *Baltimore v. Appold*, 42 Md. 442; *Pixley v. Clark*, 35 N. Y. 524; *Pollitt v. Long*, 56 N. Y. 200; 58 Barb. 20; *Corning v. Troy Iron Factory*, 40 N. Y. 191; 39 Barb. 311; 34 Barb. 485; 6 How. Pr. 89; *Clinton v. Myers*, 46 N. Y. 511; *Townsend v. McDonald*, 2 Kern. 391; *Arnold v. Foot*, 12 Wend. 330; *Lancey v. Clifford*, 54 Maine, 487, 490; *Munroe v. Gates*, 48 Maine, 463, 466; 42 Maine, 178; *Taylor v. Fickas*, 64 Ind. 167; *Plumleigh v. Dawson*, 1 Gilman, 544; *Bliss v. Kennedy*, 43 Ill. 67; *Druley v. Adam*, 102 Ill. 177; 2 Black. Com. 18; *Callis on Sewers*, 268; *Canal Trustees v. Havens*, 11 Ill. 554; *Cooper v. Williams*, 4 Ohio, 286; 5 Ohio, 391; *Frazier v. Brown*, 12 Ohio St. 299; *Tyler v. Wilkinson*, 4 Mason, 397; *McCord v. High*, 24 Iowa, 336; *Meyers v. St. Louis*, 8 Mo. App. 263; *Merrill v. Parker*, Coxe (N. J.), 460; *Mayor v. Commissioners*, 7 Penn. St. 348; *Hart v. Evans*, 8 Penn. St. 13; *McCoy v. Danley*, 20 Penn. St. 85; *Wheatley v. Christman*, 24 Penn. St. 298; *Beidelman v. Foulk*, 5 Watts, 308; *Randall v. Silverthorn*, 4 Penn. St. 173; *Eddy v. Simpson*, 3 Cal. 249; *McDonald v. Askew*, 29 Cal. 200; *Dalton v. Bowker*, 8 Nev. 190; *Kauffman v. Griesmer*, 26 Penn. St. 407; *Martin v. Riddle*, 27 Penn. St. 415; *Howell v. McCoy*, 3 Rawle, 256; *Hoy v. Sterrett*, 2 Watts, 327.

to which it can be applied beneficially without material injury to others' rights,<sup>1</sup> or for which the fall of the stream may make it available as a motive power.<sup>2</sup> They may insist that their right to thus use the water shall be regarded and protected as property.<sup>3</sup> The right to the use of the water in its natural flow is not a mere easement or appurtenance, but is inseparably annexed to the soil itself.<sup>4</sup> It does not depend upon appropriation or presumed grant from long acquiescence on the part of other riparian proprietors above and below, but exists *jure naturæ* as parcel of the land.<sup>5</sup> It is not suspended or destroyed by mere non-user,<sup>6</sup> although it may be extinguished by the long-continued, adverse enjoyment of others.<sup>7</sup> It is not affected by the use to which the water has been or may be applied.<sup>8</sup> Nor is it impaired by unity of possession and title in such land with the land above or below it,<sup>9</sup>

<sup>1</sup> Ibid.

<sup>2</sup> Ibid.; *Kidd v. Laird*, 15 Cal. 161.

<sup>3</sup> Ibid.; *Nuttall v. Bracewell*, L. R. 2 Ex. 1; *Hadley v. Hadley Manuf. Co.*, 4 Gray, 140; *Gould v. Boston Duck Co.*, 13 Gray, 442, 450; *Ashley v. Pease*, 18 Pick. 268; *Blanchard v. Baker*, 8 Maine, 253; *Keeney Manuf. Co. v. Union Manuf. Co.*, 39 Conn. 582; *McCalmont v. Whitaker*, 3 Rawle, 84; *Brown v. Bush*, 45 Penn. St. 61; *Beissell v. Scholl*, 4 Dallas, 211. Water-power, though an incident to property in the land, is itself the subject of property. *Tillotson v. Smith*, 82 N. H. 94; *Brown v. Bush*, 45 Penn. St. 61; *Eddy v. Simpson*, 8 Cal. 249; *Kidd v. Laird*, 15 Cal. 161.

<sup>4</sup> *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 299; *Wright v. Howard*, 1 Sim. & Stu. 190; *Wood v. Waud*, 3 Exch. 748; *Stokoe v. Singers*, 8 El. & Bk. 36; *Johnson v. Jordan*, 2 Met. 239; *Crittenden v. Alger*, 11 Met. 281; *Wadsworth v. Tillotson*, 15 Conn. 366, 373; *Marlborough Manuf. Co. v. Smith*, 2 Conn. 590; *Parker v. Griswold*, 17 Conn. 299; *Harding v. Stamford Water Co.*, 41 Conn. 87, 92; *Gardner v. Newburgh*, 2 Johns. Ch.

16; 7 Am. Dec. 526, note; *Holsman v. Boiling Spring Co.*, 1 McCart. 343; *Wheatley v. Baugh*, 25 Penn. St. 528; *Evans v. Merriweather*, 3 Scam. 492; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Shamleffer v. Peerless Mill Co.*, 18 Kansas, 24; *Williamson v. Lock's Creek Canal Co.*, 78 N. C. 156; 76 N. C. 478; *Pugh v. Wheeler*, 2 Dev. & Bat. 50; *Hill v. Newman*, 5 Cal. 445. See the excellent note to *Heath v. Williams* (25 Maine, 209), in 43 Am. Dec. 269.

<sup>5</sup> Ibid.

<sup>6</sup> *Sampson v. Hoddinott*, 1 C. B. N. s. 590; *Johnson v. Jordan*, 2 Met. 239; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396; 7 L. R. A. 613, note; *Eddy v. Chase*, 140 Mass. 471; *Orr v. O'Brien*, 77 Iowa, 253; 14 Am. St. Rep. 277, and note; *Pillsbury v. Moore*, 44 Maine, 154; *Townsend v. McDonald*, 12 N. Y. 381, 391; 14 Barb. 460.

<sup>7</sup> Ibid.; *post*, ch. 11.

<sup>8</sup> *Van Sickle v. Haynes*, 7 Nev. 249, *post*.

<sup>9</sup> Ibid.; *Hazard v. Robinson*, 3 Masson, 272.

or, after the expiration of the term, by a lease of the water rights from an upper to a lower riparian owner.<sup>1</sup> It is a natural right which arises immediately with every new division or severance of ownership.<sup>2</sup> "If," says Shaw, C. J.,<sup>3</sup> "the owner of a large tract, through which a watercourse passes, should sell parcels above and below his own land retained, each grantee would take his parcel with a full right, without special words, to the use of the water flowing on his own land, as parcel, and subject to the right of all other riparian proprietors to have the water flow to and from such parcel. There is no occasion, therefore, for the grantor, in such case, to convey the right of water to the grantee, or reserve the right of water to himself, in express words."

§ 205. Same — Ordinary use of the water.— Each riparian proprietor has a right to the *ordinary* use of the water flowing past his land, for the purpose of supplying his natural wants, including the use of the water for the domestic purposes of his home or farm, such as drinking, washing, or cooking, and for his stock.<sup>4</sup> For these natural uses, by the weight of authority, he may, if necessary, consume all the water of the stream.<sup>5</sup> This right is his only, and is strictly confined to

<sup>1</sup> Swift v. Goodrich, 70 Cal. 108.

<sup>2</sup> Cary v. Daniels, 8 Met. 466, 481; Stockport Water Works Co. v. Potter, 8 H. & C. 826; Hickok v. Parmelee, 21 Conn. 99.

<sup>3</sup> Cary v. Daniels, 8 Met. 466, 480.

<sup>4</sup> Miner v. Gilmour, 12 Moo. P. C. 181, 156; Norbury v. Kitchin, 8 F. & F. 292; 9 Jur. N. S. 182; Wood v. Waud, 8 Exch. 748; 18 Jur. 472; Nuttall v. Bracewell, L. R. 2 Exch. 1; Swindon Water Co. v. Wilts Canal Co., L. R. 7 H. L. 697; L. R. 9 Ch. 451; Union Mill Co. v. Ferris, 2 Sawyer, 176; Union Mill Co. v. Dangberg, id. 450; Slack v. Marsh, 23 Pitts. L. J. 29; Stein v. Burden, 29 Ala. 127; 24 Ala. 180; Springfield v. Harris, 4 Allen, 494; Anthony v. Lapham, 5 Pick. 175, 177; Philadelphia v. Collins, 68 Penn. St. 106; Baltimore v. Appold, 42 Md. 456; Evans v. Merriweather, 3 Scam. 492; Wadsworth v. Tillotson,

15 Conn. 866; Arnold v. Foot, 12 Wend. 830; Crooker v. Bragg, 10 Wend. 260; Gilm. 544; Ferrea v. Knipe, 28 Cal. 348; Hazeltine v. Case, 46 Wis. 391; Rhodes v. Whitehead, 27 Texas, 304; Tolle v. Carreth, 31 Texas, 862; Fleming v. Davis, 31 Texas, 173; Shook v. Colohan, 12 Oregon, 239; Kaler v. Campbell, 18 id. 596; Swift v. Goodrich, 70 Cal. 108; Drake v. Ernhart (Idaho), 23 Pac. 541; Mud Creek Ir. Co. v. Vivian, 74 Texas, 170.

<sup>5</sup> Ibid. According to some cases the use of the water for culinary purposes and for cattle must not deprive the other proprietors of an equal enjoyment of the same right. Chatfield v. Wilson, 31 Vt. 858; 28 Vt. 49; Blanchard v. Baker, 8 Maine, 253, 266; McElroy v. Goble, 6 Ohio St. 187; Hough v. Doylestown, 4 Brews. (Pa.) 342.

riparian land.<sup>1</sup> He has also the right to use it for any other purpose, as for irrigation or manufactures;<sup>2</sup> but this right to the *extraordinary* use of the water is inferior to the right to its ordinary use; and if the water of the stream is barely sufficient to answer the natural wants of the different proprietors, none of them can use the water for such extraordinary purposes as irrigation or manufactures.<sup>3</sup> It was formerly held that the diversion of the water for the purpose of irrigating the land of a riparian proprietor is a natural want, and that an action could not be maintained by a lower proprietor, who is thereby injured for want of irrigation;<sup>4</sup> but, according to more recent decisions, a diversion of water for this purpose is an extraordinary and not an ordinary use, and can only be exercised reasonably and with a proper regard to the right of the other proprietors to apply the water to the same or other purposes.<sup>5</sup> The term "domestic purposes" extends to culinary and household purposes, to the watering of a garden,<sup>6</sup> and to the cleansing and washing, feeding and supplying the ordinary quantity of cattle.<sup>7</sup> It would appear to extend also to brewing,<sup>8</sup> and the washing of carriages,<sup>9</sup> but it does not include such manufacturing use as the grinding, washing and cooling of rubber.<sup>10</sup> But railway companies, as riparian owners, are not entitled to take water for their engines so as to affect injuriously the navigation of the stream or the rights of other riparian owners, such use not being domestic or secured under the right of eminent domain;<sup>11</sup> and the fact that they

<sup>1</sup> *Williams v. Wadsworth*, 51 Conn. 277.

<sup>2</sup> *Post*, § 206.

<sup>3</sup> *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Crandall v. Woods*, 8 Cal. 136, 141; *Ellis v. Tone*, 58 Cal. 289.

<sup>4</sup> *Weston v. Alden*, 8 Mass. 136; *Bent v. Wheeler*, cited in *Sullivan's Land Titles*, 273; *Perkins v. Dow*, 1 Root, 535; *Hayward v. Mason*, id. 537; *Blanchard v. Baker*, 8 Maine, 266.

<sup>5</sup> *Post*, § 217; *Baker v. Brown*, 55 Texas, 377; *Gould v. Stafford*, 77 Cal. 66.

<sup>6</sup> *Bristol Waterworks Co. v. Uren*, 52 L. T. N. s. 655; 54 L. J. M. C. 97.

<sup>7</sup> *Attorney General v. Great East-*

*ern Railway*, 23 L. T. N. s. 344; *Lowe v. Lambeth Waterworks Co.*, cited 52 L. T. N. s. 661; *Union Mill Co. v. Ferris*, 2 Sawyer, 176.

<sup>8</sup> *Wilts Canal v. Swindon Water Co.*, L. R. 9 Ch. 457; *Coulson & Forbes on Waters*, 116.

<sup>9</sup> *Busby v. Chesterfield Water Co.*, El. Bk. & El. 176; *Coulson & Forbes on Waters*, 116.

<sup>10</sup> *Para Rubber Shoe Co. v. Boston*, 139 Mass. 155.

<sup>11</sup> So of a water company. *Lord v. Meadville W. Co.*, 26 W. N. C. (Penn.) 110. See *Ingraham v. Camden W. Co.*, 82 Maine, 335; *Re Barre Water Co.*, 62 Vt. 27.

do not require the water for domestic use does not entitle them to it for other purposes of a different character.<sup>1</sup> Even when the water is to be used for strictly domestic purposes, it is not lawful for one proprietor, wishing so to use it, to so erect dams across the stream that the water, being spread out, is in great measure lost by absorption and evaporation, to the injury of a lower proprietor.<sup>2</sup> In *Roberts v. Richards*,<sup>3</sup> a small stream flowed from a spring on A.'s land to his house, by an artificial channel of immemorial antiquity, through land of B. A. had had an almost exclusive use of the water for seventy years, when B. intercepted and appropriated nearly all the water of the stream. It was held that B. was a riparian proprietor, and as such was entitled to thus take the water for ordinary, but not for extraordinary, purposes.

§ 206. Same — Extraordinary use.— The right to such extraordinary use of flowing water is common to all riparian proprietors.<sup>4</sup> It is not an absolute and exclusive right to all the water flowing past their lands, but it is a right to the flow and enjoyment of the stream, subject to a similar right in all the proprietors, their privileges being in all respects equal.<sup>5</sup>

<sup>1</sup> *Attorney General v. Great Eastern Ry. Co.*, 23 L. T. N. s. 844; *Sandwich v. Great Northern Railway*, 10 Ch. D. 707; *Elliott v. Fitchburg R. Co.*, 10 Cush. 195; *Pennsylvania R. Co. v. Miller*, 112 Penn. St. 84; *Garwood v. New York Central R. Co.*, 83 N. Y. 400; 17 Hun, 356; *Swift v. Goodrich*, 70 Cal. 103.

<sup>2</sup> *Ferrea v. Knipe*, 28 Cal. 840.

<sup>3</sup> 50 L. J. Ch. 297; 51 id. 944; 44 L. T. 291. The order was discharged, on appeal, on undertaking. See W. N. (1881) p. 156.

<sup>4</sup> *Elliott v. Fitchburg R. Co.*, 10 Cush. 191, 196; *Merrifield v. Lombard*, 18 Allen, 16; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Van Sickle v. Haynes*, 7 Nev. 249; *Coffman v. Robbins*, 8 Oregon. 278; *Miner v. Gilmore*, 12 Moo. P. C. 181; *Chasemore v. Richards*, 7 H. L. Cas. 349; 5 H. & N. 982; 2 H. & N. 189; *Embrey v. Owen*, 6 Exch. 353; *Tyler*

*v. Wilkinson*, 4 Mason, 400; *ante*, § 204.

<sup>5</sup> *Ibid.*; *Gould v. Boston Duck Co.*, 13 Gray, 442, 450; *Haskins v. Haskins*, 9 Gray, 890; *Merrifield v. Worcester*, 110 Mass. 219; *Moulton v. Newburyport Water Co.*, 137 Mass. 163; *Prentice v. Geiger*, 74 N. Y. 841; 9 Hun, 350; *Penn. R. Co. v. Miller*, 112 Penn. St. 84; *Holden v. Lake Co.*, 53 N. H. 552; *Union Mill Co. v. Dangberg*, 2 Sawyer, 450; *Dumont v. Kellogg*, 29 Mich. 420; *Patten v. Marden*, 14 Wis. 478; *Rudd v. Williams*, 43 Ill. 385; *Rhodes v. Whitehead*, 27 Texas, 304; *Batavia Manuf. Co. v. Newton Wagon Co.*, 91 Ill. 230, 245; *Pinney v. Luce*, 44 Minn. 367; *Hendricks v. Johnson*, 6 Porter, 472; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587. In *Canfield v. Andrew*, 54 Vt. 1, it is said that the maxim *sic utere tuo ut alienum non lædas* applies.



If the reasonable use by one man of this common property does no actual and perceptible damage to the right of the other proprietors to use it, no action lies; but an unreasonable use of it, whereby others are deprived in whole or in part of the common benefit, is an actionable injury,<sup>1</sup> even though there is no present actual damage,<sup>2</sup> and without regard to the question whether the act which causes the injury is wilful or malicious,<sup>3</sup> or whether notice was given that the rights of others are infringed.<sup>4</sup> Their interest being common, different owners in severalty of premises along the stream may join as plaintiffs in a suit in equity to restrain such unauthorized use of the stream as affects them injuriously and in the same way;<sup>5</sup> and the fact that the sole owner of one mill is also tenant in common of another does not authorize him to so use the water coming to his own mill as to injuriously affect the mill owned in common.<sup>6</sup> In view of the varying rights of the different riparian owners on the same stream, injunctions should not be granted to regulate such rights, except in clear cases of intentional violation. A decree by which an upper proprietor is restrained from permitting the water to flow over his dam in greater quantities than is needed to run his machinery, and is required to allow it to flow into another mill-pond, according to the natural flow of the stream, discriminates in favor of the lower proprietor and is erroneous.<sup>7</sup> Riparian owners upon navigable waters cannot lawfully use the water so as to impair the public rights of navigation and fishery;<sup>8</sup> and, by the common

<sup>1</sup> Ibid.; *Embrey v. Owen*, 6 Exch. 853; *Elliott v. Fitchburg R. Co.*, 10 Cush. 196; *Davis v. Getchell*, 50 Maine, 602; 79 Am. Dec. 636, and note; *Hargreaves v. Kimberly*, 26 W. Va. 787; *Randall v. Silverthorn*, 4 Penn. St. 173; authorities *ante*, § 204, note 1; *Farrell v. Richards*, 80 N. J. Eq. 511; *Phinizy v. Augusta*, 47 Ga. 260; *Robertson v. Miller*, 40 Conn. 40.

<sup>2</sup> *Elliott v. Fitchburg R. Co.*, 10 Cush. 196; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Adams v. Barney*, 25 Vt. 225; *post*, § 214.

<sup>3</sup> *Honsee v. Hammond*, 89 Barb. 89;

*Heywood v. Miner*, 102 Mass. 466; *Twiss v. Baldwin*, 9 Conn. 291; *Lawson v. Price*, 45 Md. 123; *Timm v. Bear*, 29 Wis. 254; *post*, § 290.

<sup>4</sup> *Rood v. Johnson*, 26 Vt. 64.

<sup>5</sup> *Emery v. Erskine*, 6 Barb. 9; *Reid v. Gifford*, Hopk. Ch. 416; *Cadigan v. Brown*, 120 Mass. 493; *Ballou v. Hopkinson*, 4 Gray, 324; *ante*, § 121.

<sup>6</sup> *May v. Parker*, 12 Pick. 84.

<sup>7</sup> *Hoxsie v. Hoxsie*, 38 Mich. 77.

<sup>8</sup> *Ante*, § 87; *People v. Gold Run Ditch Co.*, 66 Cal. 188; *People v. Stratton*, 25 Cal. 242; *Sacramento v. Central Pac. R. Co.*, 61 Cal. 250.

law, the right to have fish pass up private rivers from the sea is a common right in all the proprietors upon the stream.<sup>1</sup> In general, as between themselves, the privileges of riparian proprietors include: first, Rights relating to the flow of the water; second, Rights relating to the taking or diversion of the water; third, Rights relating to the purity of the water.

§ 207. Same — Continued.— “It is apparent,” says Merrick, J.,<sup>2</sup> “that the rights of riparian proprietors on opposite banks of the stream do not depend upon, and are not affected by, the locality of the channel or current through or along which the larger, or even the chief and principal, part of the water flows. Wherever this current may be, the central line in the bed of the stream, parallel to and equally distant from each shore, is the boundary of their lands. And as their respective rights to the use of the water do not result from this line of division, but arise by mere operation of law, as incident to their ownership of the bank, the formation of the bed of the stream, its varying depth, and the consequent course and direction of the current, must be circumstances wholly immaterial.” “The rule, which is a necessary inference from these principles, that parties so situated are each entitled to the use of an equal share and proportion of the running water, is not only simple, direct, and equitable, but seems to be essential as the only practical rule by which their respective rights can be accurately ascertained or effectively protected.” As each proprietor has simply the usufruct of the water as it passes along, no exclusive title is acquired to one-half or to any definite part, as an article of property or merchandise,<sup>3</sup> but each proprietor is entitled, *per my et per tout*, to the use of his proportion of the whole bulk and volume of the water as it flows down the channel.<sup>4</sup> It follows that, although an exclusive use of the water may be acquired by an actual adverse possession and enjoyment,<sup>5</sup> yet the mere use by one proprietor of all the water, unaccompanied by any act of exclusion

<sup>1</sup> *Ante*, § 187.

<sup>3</sup> *Moulton v. Newburyport Water*

<sup>2</sup> *Pratt v. Lamson*, 2 Allen, 275, 285; *Tourtellot v. Phelps*, 4 Gray, 376; *Webb v. Portland Manuf. Co.*, 3 Sumner, 189; 3 Law Rep. 374.

Co., 137 Mass. 163.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Post*, ch. 11.

against the other proprietors, or by the assertion of any superior or exclusive claim, is not in its nature adverse and affords no cause of complaint.<sup>1</sup>

§ 208. **Same — Reasonable use.**— Every riparian proprietor may make a reasonable use of the stream passing by his land for purposes which are not domestic.<sup>2</sup> With respect to diminution in quantity, or the retardation or acceleration of the current, or any extraordinary use of the water, it is a question of fact for the jury in each case whether the user is reasonable, according to the width and depth of the river, the fall, the volume of water and the state of improvement in manufactures and the useful arts.<sup>3</sup> This question cannot be determined by the requirements of the defendant's business,<sup>4</sup> or the use which was previously made of the stream in the case of a purchase of a mill privilege from the owner of a lower privilege;<sup>5</sup> but is to be decided by considering merely

<sup>1</sup> *Pratt v. Lamson*, 2 Allen, 288; 6 Allen, 457; *Pitts v. Lancaster Mills*, 13 Met. 156; *Brace v. Yale*, 10 Allen, 444; *Pillsbury v. Moore*, 44 Maine, 154; *Howe Scale Co. v. Terry*, 47 Vt. 109, 126; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Stillman v. White Rock Co.*, 3 Wood. & M. 341.

<sup>2</sup> *Patten v. Marden*, 17 Wis. 473; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; *Dickson v. Carnegie*, 1 Ontario, 110; *Horn v. Miller*, 136 Penn. St. 640; 9 L. R. A. 810.

<sup>3</sup> *Holden v. Lake Co.*, 53 N. H. 552; *Norway Plains Co. v. Bradley*, 52 N. H. 110; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Hayes v. Waldron*, 44 N. H. 584; *Elliott v. Fitchburg R. Co.*, 10 Cush. 195; *Reg. v. North Midland Railway*, 2 Railway Cases, pt. I, p. 1; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Miller v. Miller*, 9 Penn. St. 74; *Arnold v. Foot*, 12 Wend. 330; *Bullard v. Saratoga Manuf. Co.*, 77 N. Y. 525; *Phillips v. Sherman*, 64 Maine, 171; *Case v.*

*Weber*, 2 Carter (Ind.), 108; *Cooper v. Hall*, 5 Ohio, 323; *Columbus Gaslight Co. v. Freeland*, 12 Ohio St. 392, 398; *Timm v. Bear*, 29 Wis. 254; *Dilling v. Murry*, 6 Ind. 324; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Thurber v. Martin*, 2 Gray, 394; *Hinkley v. Nickerson*, 117 Mass. 213; *Brace v. Yale*, 99 Mass. 488; 97 Mass. 18; *Clinton v. Myers*, 46 N. Y. 511; *McKee v. Delaware Canal Co.*, 125 N. Y. 353; *Wright v. Shindler*, 17 Oregon, 404; *Hill v. Ward*, 2 Gilman, 285; *Bisher v. Richards*, 9 Ohio St. 495, 503; *Dumont v. Kellogg*, 29 Mich. 420; *Red River Roller Mills v. Wright*, 30 Minn. 249; *Hetrich v. Deachler*, 6 Penn. St. 32; *Parker v. Hotchkiss*, 25 Conn. 321; *Pool v. Lewis*, 41 Ga. 162; *Prentice v. Geiger*, 74 N. Y. 341; 9 Hun, 350.

<sup>4</sup> *Wheatley v. Christman*, 24 Penn. St. 298; *Brace v. Yale*, 10 Allen, 447; 4 Allen, 393; *Perley v. Marshall*, 57 N. H. 206; *Canfield v. Andrew*, 54 Vt. 1.

<sup>5</sup> *Haskins v. Haskins*, 9 Gray, 390.

whether his use of the stream is reasonable and appropriate to the size of the stream and the quantity of water usually flowing therein.<sup>1</sup> The mere fact that a portion of the water is lost does not give a cause of action;<sup>2</sup> for some of the water is inevitably absorbed, wasted, or evaporated whenever it is spread in a mill-pond, or when ice is taken<sup>3</sup> from the stream; and, in such cases, no action can be maintained unless the rights of others are materially impaired.<sup>4</sup> An artificial pond formed by damming a stream may be drained off and the water withheld to fill and cleanse it in order that the ice may be pure;<sup>5</sup> and, on the other hand, if a dam causes the water to be spread over a wide surface, and much reduced by evaporation and absorption, this may give just cause of complaint to a lower proprietor.<sup>6</sup> In England it is held that any permanent encroachment upon the *alveus* of a running stream may be complained of by an opposite or adjacent proprietor to whose proprietary right the erection is a present sensible injury, without proof that actual damage has been or will be sustained therefrom.<sup>7</sup> In this country it has been held that an encroachment by one proprietor upon his side of the stream does not give a cause of action to another proprietor without proof of appreciable injury.<sup>8</sup> If a riparian owner attempts to authorize a water company to take a supply from a watercourse, thereby causing substantial damage to another riparian owner, such a diversion cannot be regarded as a reasonable use of the common property between the co-owners.<sup>9</sup>

<sup>1</sup> Gould v. Boston Duck Co., 13 Gray, 442; Springfield v. Harris, 4 Allen, 494; Woodin v. Wentworth, 57 Mich. 278.

<sup>2</sup> Bullard v. Saratoga Manuf. Co., 77 N. Y. 525.

<sup>3</sup> An injunction will not be granted for thus taking ice from a stream or pond without proof of real, substantial injury. Lathrop v. Haley (Iowa), 47 N. W. 878.

<sup>4</sup> Seeley v. Brush, 35 Conn. 419; Cummings v. Barrett, 10 Cush. 195.

<sup>5</sup> De Baun v. Bean, 29 Hun, 236.

<sup>6</sup> Ferrea v. Snipe, 28 Cal. 340.

<sup>7</sup> Brickett v. Morris, L. R. 1 H. L. Sc. 47; Attorney General v. Terry, L. R. 9 Ch. 425; Orr Ewing v. Colquhoun, 2 App. Cas. 839, 853; Attorney General v. Lonsdale, L. R. 7 Eq. 377; Norbury v. Kitchen, 15 L. T. N. s. 501; Edleston v. Crossley, 18 L. T. N. s. 15; Menzies v. Breadelbane, 3 Bligh, N. s. 414.

<sup>8</sup> Norway Plains Co. v. Bradley, 52 N. H. 108; Niles Works v. Cincinnati, 2 Disney (Ohio), 400.

<sup>9</sup> Higgins v. Flemington Water Co., 36 N. J. Eq. 538.

§ 209. **Same — Continued.**— When the stream is so used by one proprietor as to injure another proprietor upon the stream, the wrong consists in turning the water where it would not naturally flow; and the source of the water is immaterial, if damage results, whether it is by a retardation or sudden release of the water of the same or another stream, or whether it is made to flow in a course where no water flowed before, or in the channel of an ancient stream.<sup>1</sup> The injured proprietor is equally entitled to redress whether the damage is caused by a diversion of the water,<sup>2</sup> by backwater, by inundation from above his land,<sup>3</sup> or by the percolation of the water through the banks.<sup>4</sup> Each proprietor is entitled to enjoy the natural fall and current of the stream,<sup>5</sup> and a mill-owner cannot lawfully appropriate additional power, to the injury of a lower proprietor, by lowering the natural channel even on his own land.<sup>6</sup> In Pennsylvania it is held that the method of measuring the fall of the stream by instrumental levelings must yield to actual visible facts;<sup>7</sup> but the opposite has been held in Minnesota.<sup>8</sup> It is also to be observed that the right of each riparian owner to the accustomed course of a natural stream, with respect to both velocity and direction, relates to the natural and apparently permanent course existing when

<sup>1</sup> *Tillotson v. Smith*, 32 N. H. 90; *Butz v. Ihrie*, 1 Rawle, 218; *Shaw v. Cumiskey*, 7 Pick. 76; *Tuthill v. Scott*, 43 Vt. 525; *Doud v. Guthrie*, 11 Brad. (Ill.) 194; 13 id. 653; *McCombs v. Stewart*, 40 Ohio St. 647; *Winchester v. Stevens Point*, 58 Wis. 350.

<sup>2</sup> *Hodges v. Raymond*, 9 Mass. 316; *Gilman v. Tilton*, 5 N. H. 232; *Cowles v. Kidder*, 24 N. H. 364; *Smith v. Agawam Canal Co.*, 2 Allen, 355; *Stiles v. Hooker*, 7 Cowen, 266; *Good v. Dodge*, 3 Pitts. 557; *Rhodes v. Whitehead*, 27 Texas, 804; *Strout v. Millbridge*, 42 Maine, 76.

<sup>3</sup> *Byrd v. Blessing*, 11 Ohio St. 365.

<sup>4</sup> *Pixley v. Clark*, 35 N. Y. 520; *Cooper v. Barber*, 9 Taunt. 99; *Wilson v. New Bedford*, 108 Mass. 261.

<sup>5</sup> *McCalmont v. Whitaker*, 3 Rawle, 84; *Brown v. Bush*, 45 Penn. St. 61; *Mack v. Bensley*, 74 Wis. 112; *Oakley Manuf. Co. v. Neese*, 54 Ga. 459; *Dorman v. Ames*, 12 Minn. 451; *Plumleigh v. Dawson*, 1 Gilman, 544; *Belfast Rope Works Co. v. Boyd*, 21 L. R. Ir. 560.

<sup>6</sup> *Gleason v. Assabet Manuf. Co.*, 101 Mass. 72; *Arthur v. Case*, 1 Paige, 447; *Webster v. Fleming*, 2 Humph. 518; *Townsend v. McDonald*, 2 Kernan, 391.

<sup>7</sup> *Brown v. Bush*, 45 Penn. St. 61; *McLeod v. Lee*, 17 Nev. 108.

<sup>8</sup> *Finch v. Green*, 16 Minn. 355. See *Perry v. Binney*, 108 Mass. 156; *post*, § 844, note.

the right is asserted or questioned, and that the riparian owner cannot restore the flow of the water to its former state, if it has become permanently altered by long-continued natural accretion of gravel in the river bed.<sup>1</sup>

**§ 210. Flowing — Evidence — Judgments.**— It is not a trespass to flow the land of another with water by erecting a dam below his land,<sup>2</sup> for any one may lawfully build a dam on his own land,<sup>3</sup> and the act, being injurious only in its consequences, is to be redressed by an action on the case.<sup>4</sup> An injunction may also be granted in cases of flowage when there is a clear violation of the plaintiff's right and irreparable injury or danger thereof.<sup>5</sup> In an action for backwater, the plaintiff, in order

<sup>1</sup> *Withers v. Purchase*, 60 L. T. N. S. 819.

<sup>2</sup> *Perrine v. Bergen*, 14 N. J. L. 357; *Reynolds v. Clark*, Stra. 634; *Cooper v. Hall*, 5 Ohio, 320; 3 Black. Com. 220.

<sup>3</sup> *Ibid.*; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Snow v. Cowles*, 22 N. H. 302; *Delaware Canal Co. v. Lee*, 22 N. J. 243; *Ten Eyck v. Delaware Canal Co.*, 3 Harr. (N. J.) 200; *Vandewere v. Delaware Canal Co.*, 2 Dutch. 151; *Ward v. Ward*, 2 Zab. 699; *Beissell v. Sholl*, 4 Dall. 211; *Hoy v. Sterrett*, 2 Watts, 327; *Whaler v. Ahl*, 29 Penn. St. 98; *Oregon Iron Co. v. Trullenger*, 3 Oregon, 1; *Shaw v. Etheridge*, 7 Jones (N. C.), 225; *Sackrider v. Beers*, 10 Johns. 241; *Clinton v. Myers*, 46 N. Y. 517; *Bullard v. Saratoga Victory Manuf. Co.*, 77 N. Y. 525; 13 Hun, 43; *Hill v. Ward*, 2 Gilman, 285; *Johns v. Stevens*, 3 Vt. 308; *Schoff v. Upper Connecticut Improvement Co.*, 57 N. H. 113.

<sup>4</sup> *Ibid.*; *Hutchinson v. Coleman*, 5 Hal. (N. J.) 74; *Keller v. Stoltz*, 71 Penn. St. 356. Trespass lies under the statutes of Maine. *Reynolds v. Chandler River Co.*, 43 Maine, 513; *Taylor v. Keeler*, 50 Conn. 346; *Smith v. Scott*, 1 Kerr (N. B.), 1; *post*, § 371.

The declaration or complaint need not aver that the defendant's act was wrongful or without license. *Wilkinson v. Applegate*, 64 Ind. 98; *Akin v. Davis*, 11 Kansas, 580. As to acts of a wife binding her husband, see *Enright v. Hartsig*, 46 Mich. 469.

<sup>5</sup> *Sheldon v. Rockwell*, 9 Wis. 166; *Cobb v. Smith*, 16 Wis. 661; *Newton v. Allis*, 12 Wis. 378; *Shannon v. State*, 18 Wis. 604; *Halm v. Thornberry*, 7 Bush, 403; *Ogle v. Dill*, 55 Ind. 130; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Fulton v. Greacen*, 36 N. J. Eq. 216; *Bradwell v. Dewell*, 48 Mich. 9; *Ronayne v. Loranger*, 66 Mich. 373. Under the prayer for general relief, a complainant in equity is not entitled to an injunction restraining the defendant from obstructing flowage on his land outside of the place where the watercourse is alleged to be. *Rigg v. Hancock*, 36 N. J. Eq. 42. In a suit to lower a dam a mandatory judgment may be issued to lower to the proper height, but neither an extra allowance computed on the value of the land flowed nor the expense of surveys, maps, etc., are allowable. *Rothery v. N. Y. Rubber Co.*, 90 N. Y. 30; 24 Hun, 172; *Mark v. Buffalo*, 87 N. Y. 184. See *Oliver v. N. T. Bay Cemetery Co.*, 38 N. J. Eq. 42.



to recover more than nominal damages, must show that the water flowed back upon his land; that a wrongful act of the defendant caused it so to flow, and that he suffered injury therefrom before suit brought.<sup>1</sup> The wrong begins when the water is appreciably raised at the point where it leaves the plaintiff's land or is ponded back beyond that point,<sup>2</sup> whether the plaintiff has a mill upon his land or not,<sup>3</sup> and although the water does not overflow his banks.<sup>4</sup> The owner of the overflowed land may maintain successive actions when, as in the case of the destruction of crops from year to year, the wrong does not involve the destruction of the entire estate or its beneficial use and the injuries in different years may be included in a single count;<sup>5</sup> but recovery in a single suit, for any unauthorized use of the stream, is a bar to a subsequent action, where, as in the case of a permanent and complete deprivation of the use of the land, or of the water of the stream, the injury is of a permanent character and goes to the entire value of the estate,<sup>6</sup> even though the damages awarded are unsub-

<sup>1</sup> *Lewin v. Simpson*, 38 Md. 468; *Shafer v. Stonebraker*, 4 Gill & J. 345; *Godfrey v. Maberry*, 84 N. C. 255; *Jones v. Lavender*, 55 Ga. 228; *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241; *Brown v. Bowen*, 30 N. Y. 519; *Cobb v. Smith*, 38 Wis. 21; *Langdon v. C., B. & Q. R. Co.*, 48 Iowa, 437; *Penfield v. New York W. Co.*, 6 N. Y. S. 180; 53 Hun, 633. Damages for a continuing trespass are computed only to the beginning of the action. *Close v. Samm*, 27 Iowa, 503.

<sup>2</sup> *Heath v. Williams*, 25 Maine, 209; *Munroe v. Gates*, 42 Maine, 178; 48 Maine, 463; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Alexander v. Kerr*, 1 Rawle, 83, 89; *McCalmont v. Whitaker*, 3 Rawle, 84; *Graver v. Sholl*, 42 Penn. St. 58; *Mangold v. St. Louis R. Co.*, 24 Mo. App. 52. Where the erection of dams or dykes causes the water to flow upon the plaintiff's land, the law will imply nominal damages. *Doud v. Guthrie*, 13 Brad. (Ill.) 653; 11 id. 194.

<sup>3</sup> *Hill v. Ward*, 2 Gilman, 285; *Stout v. McAdams*, 2 Scam. 67; *Cory v. Silcox*, 6 Ind. 39; *New Britain v. Sargent*, 42 Conn. 137; *Williamson v. Lock's Creek Canal Co.*, 76 N. C. 448; 78 N. C. 156; *Hatch v. Dwight*, 17 Mass. 289.

<sup>4</sup> *Garrett v. McKie*, 1 Rich. (S. C.) 444; *Chalk v. McAlily*, 11 Rich. (S. C.) 153; *Little v. Stanback*, 63 N. C. 285; *Johnson v. Roan*, 3 Jones (N. C.), 523; *Burnett v. Nicholson*, 72 N. C. 334.

<sup>5</sup> *Hamilton v. Plainwell W. P. Co.*, 81 Mich. 21.

<sup>6</sup> *Stodghill v. C., B. & Q. R. Co.*, 53 Iowa, 341; *Van Hoozier v. Hannibal R. Co.*, 71 Mo. 145; *Dickson v. Chicago R. Co.*, 71 Mo. 575; *Close v. Samn*, 27 Iowa, 503; *Chicago R. Co. v. Schaffer*, 26 Ill. App. 280; *Hester v. Broach*, 84 N. C. 252; *Bare v. Hoffman*, 79 Penn. St. 71; *Cumberland Canal v. Hitchings*, 65 Maine, 140; *Savannah Canal Co. v. Bourquin*, 51 Ga. 378; *Cobb v. Smith*, 38 Wis. 21; *Fowle v. New Haven Co.*, 107 Mass. 352; 112 Mass. 334; *post*, § 259;

stantial.<sup>1</sup> So too a suit for flowing part of a tract of land precludes the plaintiff from maintaining another suit for flowing another part of the same tract, if nothing prevented including this in the first suit.<sup>2</sup> A judgment for the defendant, in a suit for flowing land, is a bar to a subsequent suit between the same parties and depending upon the same facts;<sup>3</sup> but a judgment for the plaintiff in such suit, even for nominal damages, establishes the right, and in a second action substantial damages may be allowed if proved.<sup>4</sup> When successive actions lie, the statute of limitations is not a bar to an action for the continued flooding of land within the statutory period, although the first flowage may be barred.<sup>5</sup> The period of limitation does not begin to run until actual injury is suffered.<sup>6</sup> Where

Springfield Ry. Co. v. Rhea, 44 Ark. 258; Same v. Henry, id. 360. Estoppels must be mutual. In an action for penning back water by a dam, a plea of a verdict, on the plea of not guilty, in an action by the plaintiff against a tenant for years under a predecessor of the defendant in title, is not good on demurrer. Smith v. Wallbridge, 6 C. P. (Can.) 324. The time should be specified, if long enough for the raising of two or more crops. International R. Co. v. Pape, 73 Texas, 501.

<sup>1</sup> Swantz v. Muller, 27 Ill. App. 320.

<sup>2</sup> Wichita R. Co. v. Beebe, 39 Kan. 465.

<sup>3</sup> Dick v. Webster, 6 Wis. 681; McDowell v. Langdon, 3 Gray, 513.

<sup>4</sup> Casebeer v. Mowry, 55 Penn. St. 419; Plate v. New York Central Railroad, 37 N. Y. 472. See Burwell v. Cannady, 3 Jones (N. C.), 165.

<sup>5</sup> Spilman v. Roanoke Navigation Co., 74 N. C. 675; Connors v. McLaggan, 2 Kerr (N. B.), 446; Louisville R. Co. v. Hays, 11 Lea (Tenn.), 382; Prentiss v. Wood, 132 Mass. 486; Wells v. New Haven & N. Co., 151 Mass. 46; Hardesty v. Ball, 43 Kansas, 151; Austin Ry. Co. v. Anderson (Texas), 15 S. W. 484; Drake v. Chi-

cago Ry. Co., 63 Iowa, 802. The same is true of a diversion. Wright v. Syracuse R. Co., 49 Hun, 445; Silsby Manuf. Co. v. State, 104 N. Y. 562; Colrick v. Syracuse, 105 N. Y. 508; Valley R. Co. v. Franz, 43 Ohio St. 623; Chicago R. Co. v. Glenney, 28 Ill. App. 364; 118 Ill. 487. A recovery for erecting a nuisance bars another action for the erection, but not other actions for the continuance of the nuisance. Staple v. Spring, 10 Mass. 72, 74; Hodges v. Hodges, 5 Met. 205. In McCoy v. Danley, 20 Penn. St. 85, it was held that, if the continuance of a dam is of great value to the defendant, and causes but inconsiderable injury to the plaintiff, the latter is entitled to such damages as will compel an abatement of the nuisance. Battishell v. Reed, 18 C. B. 696. In White v. Moseley, 8 Pick. 356, it was held, upon the facts of the case, that two distinct trespasses were committed in removing a dam. In general, punitive damages are not matter of right, but rest largely in the jury's discretion. Wabash R. Co. v. Rector, 104 Ill. 296. See Kiel v. Chartiers Gas Co., 181 Penn. St. 466.

<sup>6</sup> Miller v. Keokuk Ry. Co., 63 Iowa,

a stream was obstructed wrongfully, and several years later this act caused the plaintiff's land to be overflowed, it was held that the statute of limitations ran only from the latter event.<sup>1</sup> So, where an embankment, which caused water to flow back upon an upper proprietor, was abandoned, and the water passed off through a cut made in it, but a similar structure was afterwards built which obstructed the flow, the statute was held to commence running at the completion of the second embankment.<sup>2</sup> If a trespass is committed by breaking barriers, and water is thereby let in, the flow of water is merely consequential, and a verdict for the plaintiff in a suit for breaking the barriers and for damages resulting therefrom precludes the recovery of further damages.<sup>3</sup> But if a trench is dug or a ditch deepened on a man's own land, whereby water is injuriously diverted from a neighboring stream, or the supply of water to a neighbor's mill is diminished, it is a continuing injury.<sup>4</sup> The owners of non-riparian lands are entitled to use the stream for drainage, and may recover on this ground when injured by backwater.<sup>5</sup> Where the materials of a bridge forming part of a discontinued highway were sold by a town to a riparian proprietor, he was held

680; *Culver v. Chicago Ry. Co.*, 38 Mo. App. 130; *Omaha R. Co. v. Brown* (Neb.), 46 N. W. 39, 46.

<sup>1</sup> *Devery v. Grand Canal Co., Ir. R.* 9 C. L. 194; *Ramsdale v. Foote*, 55 Wis. 557; *Stanchfield v. Newton*, 142 Mass. 110. In separating the damages thus accruing within the statutory period from those suffered before that time, much latitude is allowed to the jury. *Hughes v. Anderson*, 68 Ala. 280.

<sup>2</sup> *Little Rock Ry. Co. v. Chapman*, 39 Ark. 463. See *St. Louis Ry. Co. v. Biggs*, 52 Ark. 100; 12 S. W. 331; *Miller v. Hayden* (Ky.), 15 S. W. 243, 667; *National Copper Co. v. Minnesota Mining Co.*, 57 Mich. 83.

<sup>3</sup> *Clegg v. Dearden*, 12 Q. B. 576; *Case of the Farmers of Hampstead Water*, 12 Mod. 519. See *Buntin v. Chicago R. Co.*, 41 Fed. Rep. 744.

<sup>4</sup> *Ibid.* 591; *Schoch v. Foreman*, 3 Brewst. (Penn.) 157. Under a complaint in an action to recover damages for the wrongful obstruction of a watercourse, alleging the tort to have been committed on a particular day, evidence of similar torts previously committed is inadmissible. *Noah v. Angle*, 63 Ind. 425; *Amoskeag Manuf. Co. v. Head*, 59 N. H. 332; 113 U. S. 9. In such case, the opinion of a witness as to the amount of damages resulting from the tort is inadmissible, and the jury must make the estimate from the facts proved. *Ibid.*; *post*, § 493.

<sup>5</sup> *Treat v. Bates*, 27 Mich. 390; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Johnson v. Roan*, 3 Jones (N. C.), 523; *Bowman v. New Orleans*, 37 La. Ann. 501.

liable to the land-owners above for damages caused by the setting back of the water in consequence of such materials remaining in the river, and was not permitted to set up in defense that he had removed greater obstructions from the river before the purchase.<sup>1</sup> The plaintiff is always entitled to compensation in money, and it is not an answer to an action for illegal flowage that the mill and dam which caused it are beneficial to the plaintiff or to the public.<sup>2</sup> Such evidence is only admissible in mitigation of damages.<sup>3</sup>

**§ 211. Same—Damages.**—In an action for injury to the plaintiff's land by backwater, the measure of damages is the actual injury to the land by the overflow,<sup>4</sup> or its fair rental value from the time when the injury commenced to the date of the writ.<sup>5</sup> He may show, in aggravation of damages, that the fertility and future value of the overflowed land are impaired,<sup>6</sup> and the prospective loss of growing crops or timber when reasonably certain to occur;<sup>7</sup> the expense of draining off the water standing upon or percolating through the soil;<sup>8</sup> the

<sup>1</sup> *Talbot v. Whipple*, 7 Gray, 122.

<sup>2</sup> *Engard v. Frazier*, 7 Ind. 294; *Gerrish v. New Market Manuf. Co.*, 30 N. H. 478; *Tillotson v. Smith*, 32 N. H. 90; *Webb v. Portland Manuf. Co.*, 3 Sumner, 402; *Marcy v. Fries*, 18 Kansas, 353; *McKellip v. McIlhenny*, 4 Watts, 317; *Ware v. Allen*, 140 Mass. 513; *McGee v. Fox*, 107 N. C. 766; *Rowe v. Titus*, 1 Allen (N. B.), 326.

<sup>3</sup> *Mize v. Glenn*, 38 Mo. App. 98.

<sup>4</sup> *Phinizy v. Augusta*, 47 Ga. 260; *Hardin v. Ledbetter*, 103 N. C. 90; *Murray v. Scribner*, 74 Wis. 602; *Noe v. Chicago R. Co.*, 76 Iowa 360; *Taylor v. B. & O. R. Co.*, 33 W. Va. 39; *Owens v. Mo. Pac. Ry. Co.*, 67 Texas, 679; *Galveston Ry. Co. v. Ware*, id. 635.

<sup>5</sup> *Baldwin v. Calkins*, 10 Wend. 167; *Chicago v. Huenerbein*, 85 Ill. 594; *Willey v. Hunter*, 57 Vt. 479; *Brown v. Chicago R. Co.*, 80 Mo. 457.

<sup>6</sup> *Hutchinson v. Granger*, 13 Vt.

386; *Powell v. Lash*, 64 N. C. 456; *Marsh v. Trullinger*, 6 Oregon, 356; *Pixley v. Clark*, 35 N. Y. 579; *Schieble v. Law*, 65 Ind. 332; *Rooker v. Perkins*, 14 Wis. 79; *Bevier v. Dillingham*, 18 Wis. 529; *Brower v. Merrill*, 3 Chand. (Wis.) 46; *Clark v. Nevada Land Co.*, 6 Nev. 203; *Standish v. Washburn*, 21 Pick. 237; *Lincoln v. Copper Manuf. Co.*, 9 Allen, 181, 190; *Spilman v. Roanoke Navigation Co.*, 74 N. C. 675; *Sabine Ry. Co. v. Johnson*, 65 Texas, 389. Evidence is admissible as to how an obstructing dam was constructed in order to rebut alleged malice. *A. C. Conn Co. v. Little Suamico L. & M. Co.*, 74 Wis. 652.

<sup>7</sup> *Folsom v. Apple River Log Driving Co.*, 41 Wis. 602; *Hayden v. Albee*, 20 Minn. 159.

<sup>8</sup> *Ibid.*; *Clark v. Nevada Land Co.*, 6 Nev. 203; *Chicago R. Co. v. Carey*, 90 Ill. 514.

injurious effect of the water upon a spring or well, whether caused by flowing or percolation;<sup>1</sup> the destruction of a ford;<sup>2</sup> or the decrease in the productiveness of the neighboring upland by the percolation of water from the mill-pond.<sup>3</sup> In an action for overflowing land by a city reservoir, the law is the same as in the case of damages from a mill-dam.<sup>4</sup>

§ 211a. **Same — Continued.**—Flowing meadow or pasture land and thereby destroying grass, which is a natural product of the soil and not an emblement, is waste at common law.<sup>5</sup> If a dam causes the water of a stream to flow back upon the plaintiff's meadow, on which hay or other property is placed, he is bound to use reasonable care and diligence to protect his property,<sup>6</sup> and cannot recover from another, who causes his land to be flowed, a greater amount than would have been necessary to protect his property, if reasonable diligence had been used.<sup>7</sup> But he is entitled to recover, if not guilty of negligence, the full amount of the injury, although it might have been prevented by the expenditure of a smaller amount.<sup>8</sup> The supposed value of crops which might be raised on the land if it had been cultivated, what the land might produce, or what a crop not planted would sell for when produced, are too uncertain and speculative elements to be included in the damages for deprivation of the use of land.<sup>9</sup> But evidence is admissible

<sup>1</sup> *Lehigh Valley R. Co. v. Trone*, 28 Penn. St. 206; *Commonwealth v. Fisher*, 1 Penn. 462; *Neal v. Henry*, Meigs (Tenn.), 17; *Payne v. Taylor*, 3 A. K. Marsh. 328; *Allen v. McCorkle*, 3 Head, 181; *Harding v. Funk*, 8 Kansas, 315. If the roots of a tree run into and pollute a neighbor's well, he may sue therefor if not abated after notice. *Buckingham v. Elliott*, 62 Miss. 296.

<sup>2</sup> *Monson v. Brimfield Manuf. Co.*, 15 Pick. 544.

<sup>3</sup> *Trimble v. Gilbert*, 3 Blackf. 218; *Cagle v. Parker*, 97 N. C. 271; *Bentonville R. Co. v. Baker*, 45 Ark. 252.

<sup>4</sup> *Brown v. Atlanta*, 66 Ga. 71.

<sup>5</sup> *Potts v. Clarke*, Spencer (N. J.), 536, 543.

<sup>6</sup> *Chase v. New York Central R. Co.*, 24 Barb. 278.

<sup>7</sup> *Van Pelt v. Davenport*, 42 Iowa, 308; *Simpson v. Keokuk*, 84 Iowa, 568; *Hoehl v. Muscatine*, 57 Iowa, 444; *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490; *Chambers v. Kyle*, 87 Ind. 83; *Mack v. Jackson*, 9 Col. 536; *McCleneghan v. Omaha R. Co.*, 25 Neb. 523; *Silver Creek Nav. Co. v. Mangum*, 64 Miss. 682; *Lloyd v. Jones*, 60 Vt. 288.

<sup>8</sup> *Reynolds v. Chandler River Co.*, 43 Maine, 513; *Robinson v. Shanks*, 118 Ind. 125.

<sup>9</sup> *Chicago v. Huenerbein*, 85 Ill. 594; *Chicago v. Rock Island R. Co.*, 16 Ill. 522; *Sabine Ry. Co. v. Joachimi*, 58 Texas, 456; *Harrison v. Spring Val-*

showing the value of the injured and other like crops at the time and place of their destruction,<sup>1</sup> and how much the crop of one year, made after the commencement of the action, was less than those of former seasons.<sup>2</sup>

§ 211b. **Same — Continued.**— If a mill above is obstructed by backwater, evidence may be submitted to the jury of the profits of manufacture at the mill as a means of determining the value of the water-power, if the declaration alleges such loss of profits;<sup>3</sup> but the measure of damages is not the loss caused by the stoppage of the mill, but the loss which could not be avoided by the use of other appliances.<sup>4</sup> A mill-owner, who, having the right to use a reservoir and dam, is bound to maintain the dam, but does not own the land, is entitled to recover from a lower proprietor upon the stream, who sets the water back upon his dam, for the interference with his easement, including the diminished benefit of the reservoir, the increased expense of repairing the dam, or the obstruction of repairs.<sup>5</sup> And a mortgagee who is in possession of a mill privilege which is rendered useless by the flowing back of the water, is entitled, as damages, to interest upon the value of the privilege, when unobstructed, from the time of his taking possession.<sup>6</sup> A declaration in case, which alleges that the de-

ley H. G. Co., 65 Cal. 376; *Drake v.* Chicago Ry. Co., 63 Iowa, 302; *Cheeves v. Danielly*, 74 Ga. 712. Damages for flowing land cannot be pleaded in set-off, unless liquidated by agreement, and pleaded as on contract. *Pitts v. Holmes*, 10 Cush. 92.

<sup>1</sup> *Sabine Ry. Co. v. Smith*, 73 Texas, 1; *Gulf Ry. Co. v. McGowan*, id. 355; *International Ry. Co. v. Pape*, id. 501; *Kankakee R. Co. v. Horan*, 131 Ill. 288; 17 Ill. App. 650.

<sup>2</sup> *Garrett v. Commissioners*, 74 N. C. 388; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457.

<sup>3</sup> *Plimpton v. Gardiner*, 64 Maine, 360; *Simmons v. Brown*, 5 R. I. 299; *Sumner v. Tileston*, 7 Pick. 198; *Hol- den v. Lake Co.*, 53 N. H. 552; *White v. Moseley*, 8 Pick. 356; *Crawford v.*

*Parsons*, 63 N. H. 438; *Taylor v. Dus- tin*, 43 N. H. 493; *Lawson v. Price*, 45 Md. 123; *Potter v. Froment*, 47 Cal. 165; *Jutte v. Hughes*, 67 N. Y. 287; *Ripley v. Great Northern Ry. Co.*, L. R. 10 Ch. 435; *Horton v. Hall* (Pa.), *Chicago Legal News*, Feb. 1882, p. 187; *Gibson v. Fischer*, 68 Iowa, 29; *Woodin v. Wentworth*, 57 Mich. 278. See *Burnett v. Nicholson*, 86 N. C. 99; *Auger v. Cook*, 39 Q. B. (Can.) 537.

<sup>4</sup> *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Thompson v. Shattuck*, 2 Met. 615. See *Winne v. Kelley*, 34 Iowa, 339.

<sup>5</sup> *Robertson v. Woodworth*, 42 Conn. 163. See *Bottomly v. Chism*, 102 Mass. 465.

<sup>6</sup> *Hatch v. Dwight*, 17 Mass. 289.



fendant unlawfully maintained a dam across a stream, whereby the water was set back upon the plaintiff's land, is sustained by proof that backwater was caused by the act of the defendant in keeping the gates or sluices in the dam shut at times when they should have been open.<sup>1</sup> If the owner of land on both sides of a stream erects a dam across it, and causes the water to flow back upon a mill-dam above, which is built partly on land belonging to its owner, and partly on land belonging to the lower proprietor, without his license, the latter is not liable for thus obstructing the wheels of the higher mill.<sup>2</sup>

§ 211c. *Same — Continued.*— Backwater and other injuries resulting from an interference with the natural flow of the stream may arise from a combination of natural and artificial causes. In an action for flowing land by means of a dam, it is a question of fact for the jury whether the flowage was caused by the dam or by other obstructions;<sup>3</sup> and evidence is admissible which tends to show that it was produced by a natural cause.<sup>4</sup> Where backwater was caused by the narrowness of the stream below a dam, and that circumstance preponderated largely in producing the injury to the plaintiff's land, it was held that there was no cause of action.<sup>5</sup> But, in general, the fact that the defendant's dam is not the sole or even the principal cause of the damage, if it clearly causes some part of the damage, would not defeat the action<sup>6</sup> or jus-

<sup>1</sup> *Hutchinson v. Granger*, 13 Vt. 386.

<sup>2</sup> *Jewell v. Gardiner*, 12 Mass. 311.

<sup>3</sup> *Smith v. Russ*, 17 Wis. 227; *Brown v. Bush*, 45 Penn. St. 61; *Dickinson v. Boyle*, 17 Pick. 78; *Chidester v. Consolidated People's Ditch Co.*, 53 Cal. 56; *Chicago Ry. Co. v. Hoag*, 90 Ill. 339.

<sup>4</sup> *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Miss. R. Co. v. Archibald*, 67 Miss. 38. See *Rust v. Victoria G. Dock Co.*, 36 Ch. D. 113.

<sup>5</sup> *Bucker v. Athens Manuf. Co.*, 54 Ga. 84; *Brown v. Atlanta*, 66 Ga. 71; *Monongahela Navigation Co. v. Coons*, 6 Penn. St. 383. So, in case of ex-

traordinary floods. *China v. Southwick*, 12 Maine, 238; *Smith v. Agawam Canal Co.*, 2 Allen, 358; *Sprague v. Worcester*, 13 Gray, 193; *Borchardt v. Wausau Boom Co.*, 54 Wis. 107; *Loughran v. Des Moines*, 72 Iowa, 382. A verdict for nominal damages will not be set aside when the jury might infer from the evidence that the flowage was occasioned in part by the defendant's acts, although the damage mainly results from other causes. *Phillips v. Phillips*, 34 N. J. L. 208; *Janssen v. Lammers*, 29 Wis. 88.

<sup>6</sup> *Ibid.*; *Monmouth v. Gardiner*, 85 Maine, 247.

tify a verdict for merely nominal damages.<sup>1</sup> A lower proprietor is bound to construct his dam so that it will not throw back the water, in times of ordinary freshets, upon the land of an upper proprietor, and cannot successfully defend upon the ground that his dam causes the flowage only when the stream is swollen.<sup>2</sup> Under this rule, freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years, although at no regular intervals.<sup>3</sup> In proceedings under the mill acts, which authorize the flowage of others' lands, the jury, in estimating damages, may consider the effect of those ordinary periodical freshets which can be foreseen with reasonable certainty.<sup>4</sup> In Massachusetts it is held that if a dam erected by the owner of lands upon both sides of an unnavigable stream does not ordinarily throw back the water so as to obstruct an ancient mill above, he is not liable if the broken ice formed upon his pond in winter becomes so packed as to press back the water to an unusual extent.<sup>5</sup> In New Hampshire it is held that the owner of the dam is liable in such a case, if there is no evidence of a sudden and accidental accumulation of ice by extraordinary means, not liable to occur each winter, or of any unusual state of the water.<sup>6</sup> In *Proctor v. Jennings*,<sup>7</sup> in Nevada, where a

<sup>1</sup> *Learned v. Castle*, 78 Cal. 454.

<sup>2</sup> *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *Dorman v. Ames*, 12 Minn. 451; *Pixley v. Clark*, 35 N. Y. 525; *Cowles v. Kidder*, 24 N. H. 381; *Davis v. Fuller*, 12 Vt. 178; *Bell v. McClintock*, 9 Watts, 119; *Roush v. Walters*, 10 Watts, 86; *Lehigh Bridge Co. v. Lehigh Navigation Co.*, 4 Rawle, 9; *Wallace v. Headley*, 23 Penn. St. 106; *Casebeer v. Mowry*, 55 Penn. St. 419; *McCoy v. Danley*, 20 Penn. St. 85; *Burbank v. Ditch Co.*, 13 Nev. 431; *Cobb v. Smith*, 38 Wis. 21; *Borchardt v. Wausau Boom Co.*, 54 Wis. 107; *Ames v. Cannon Manuf. Co.*, 27 Minn. 245; *Pugh v. Wheeler*, 2 Dev. & Bat. 50; *Rex v. Trafford*, 1 B. & Ad. 874; 8 Bing. 204.

<sup>3</sup> *Gray v. Harris*, 107 Mass. 492; *Dorman v. Ames*, 12 Minn. 451; *Mc-*

*Kenzie v. Mississippi River Boom Co.*, 29 Minn. 288; *People v. Utica Cement Co.*, 22 Ill. App. 159.

<sup>4</sup> *Sabine v. Johnson*, 35 Wis. 185, 203.

<sup>5</sup> *Smith v. Agawam Canal Co.*, 2 Allen, 355. See *Shrewsbury v. Brown*, 25 Vt. 197; *State v. Ousatonic Water Co.*, 51 Conn. 137; *Shaw v. Susquehanna Boom Co.*, 125 Penn. St. 324. In general, if a natural cause contributes to an injury which could not happen without fault on the part of the defendant, he is liable. *Dickinson v. Boyle*, 17 Pick. 78; *Salisbury v. Herchenroder*, 106 Mass. 458.

<sup>6</sup> *Cowles v. Kidder*, 24 N. H. 364; *Hooksett v. Amoskeag Manuf. Co.*, 44 N. H. 105. See *Bell v. McClintock*, 9 Watts, 119.

<sup>7</sup> 6 Nev. 83. See *Yuba County v. Cloke*, 79 Cal. 289.

dam erected on a stream below the plaintiff's mill was not injurious when built, but afterwards extraordinary quantities of sediment, arising from a new process of mining used on the stream above, in connection with the dam, caused the water to flow back and interfere with the mill, the owner of the dam was held not to be responsible for such unforeseen and fortuitous circumstances. So a boom company, incorporated by the legislature of Maine, which erected and maintained its boom without fault or negligence, was held not liable for the flowage of land, not taken under its charter, caused by its boom in co-operation with an unusual accumulation of logs and a large rise of water.<sup>1</sup> Where backwater was caused during a part of each year by a peculiar grass which commenced growing in the defendant's reservoir, in which dirt had accumulated, the defendant was held not liable, if the grass would have grown in the channel, had there been no dam or deposit, but liable if the accumulation caused the grass to grow.<sup>2</sup> And where the proprietors of a canal, in order to prevent the canal bank from bursting under an extraordinary rainfall, the effect of which would have been to destroy the plaintiffs' works and cause devastation through a wide area, opened a sluice and discharged the water from the canal into a brook, which overflowed and flooded the plaintiffs' mines, and it appeared that in any event the plaintiffs' works would have been thus injured, it was held that the injury was *damnum absque injuria*, and that the plaintiffs could not recover even under the compensation clauses of the statute under which the canal was constructed.<sup>3</sup> But the owner of a ditch or canal, who negligently permits it to become obstructed with sand or weeds, is liable for injuries to the adjoining lands caused by deposits thereon, or by water overflowing the banks during a season of periodical high water;<sup>4</sup> and the same is true when the overflowing is caused by backwater which percolates through the soil.<sup>5</sup>

<sup>1</sup> *Lawler v. Baring Boom Co.*, 56 Co., 49 L. J. Q. B. 851; 43 L. T. N. S. Maine, 443; *China v. Southwick*, 12 435.

Maine, 238; *Plummer v. Penobscot Lumber Association*, 67 Maine, 363. <sup>4</sup> *Chidester v. Consolidated People's Ditch Co.*, 53 Cal. 56; 59 Cal. 197;

<sup>2</sup> *Knoll v. Light*, 76 Penn. St. 268. *Savannah v. Cleary*, 67 Ga. 153;

<sup>3</sup> *Thomas v. Birmingham Canal* *Trinity Ry. Co. v. Schofield*, 72 Texas,

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<sup>5</sup> *Pierce Mill Co. v. Koltermann* (Neb.), 42 N. W. 877.

§ 212. **Flowage causing public nuisance.**— If a dam causes the water to be ponded back over a public highway, it is a common nuisance.<sup>1</sup> So it has been held indictable for a mill-owner to cut his dam during a freshet and thereby to flood a public road, although his purpose is merely to save the dam.<sup>2</sup> If the owner of a mill and dam permits them to decay, and a highway is afterwards made across the land flowed by the dam, he cannot grant the mill privilege and right to flow so as to authorize his grantee to overflow the highway by a new dam on the site of the old.<sup>3</sup> If a mill-owner negligently maintains a dam or causeway, forming part of a highway which a town is bound to keep in repair, he is liable to the town for such repairs as are made necessary by his negligence.<sup>4</sup> When water held by a dam, or standing in a ditch,<sup>5</sup> becomes stagnant and so corrupts the atmosphere as to impair the health of the neighborhood,<sup>6</sup> or when, without causing illness, it makes life and property in the community uncomfortable,<sup>7</sup> it is indictable and abatable as a nuisance,<sup>8</sup> and ground for an ac-

496. See *Harrison v. Great Northern Ry. Co.*, 33 L. J. N. S. (Ex.) 266.

Where A, with B's permission, placed a log and rails in a ditch which bounded their lands, in order to prevent it from being choked by silt, and B afterwards removed the obstruction from his own half of the ditch, causing the ditch to become so obstructed that A's land was overflowed, A was held entitled to maintain an action of trespass against B. *Hogwood v. Edwards*, Phill. N. C. 850.

<sup>1</sup> *Commonwealth v. Stevens*, 10 Pick. 247; *Monmouth v. Gardiner*, 35 Maine, 347; *Kellogg v. Thompson*, 66 N. Y. 88; *State v. Phipps*, 4 Ind. 515; *State v. Raypholtz*, 32 Kans. 450; *People v. Crounse*, 51 Hun, 489; *Charlotte v. Pembroke Iron Works*, 82 Maine, 391. On an information for obstructing an ancient watercourse to the injury of a highway, it must appear that the traveling public was hindered to make a nuisance; and

that is for the jury. *State v. Smith*, 54 Vt. 408.

<sup>2</sup> *State v. Knotts, 2 Spears* (S. C.), 694.

<sup>3</sup> *Commonwealth v. Fisher*, 6 Met. 433.

<sup>4</sup> *Brookfield v. Walker*, 100 Mass. 94; *Andover v. Sutton*, 12 Met. 182. See *Welton v. Worcott*, 51 Conn. 259.

<sup>5</sup> *Walley v. Platte & D. Ditch Co.* (Col.) 26 Pac. 129.

<sup>6</sup> *State v. Close*, 35 Iowa, 570; *Gherkey v. Haines*, 4 Blackf. 159; *Rhodes v. Whitehead*, 27 Texas, 304; *State v. Gainer*, 8 Humph. 39; *Kownslar v. Ward*, Gilm. (Va.) 127; *Mayo v. Turper*, 1 Munf. (Va.) 405; *Grace v. Newton Board of Health*, 135 Mass. 490.

<sup>7</sup> *Ibid.*; *Eames v. New England Worsted Co.*, 11 Met. 570; *State v. Rankin*, 3 S. C. 488.

<sup>8</sup> *Ibid.*; *King v. Wharton*, 12 Mod. 510; *Holt*, 499; *State v. Purse*, 4 McCord, 472; *State v. Close*, 35 Iowa, 570; *State v. Bush*, 29 Ind. 110; *Lun-*

tion,<sup>1</sup> or for relief in equity by injunction,<sup>2</sup> on the part of those suffering special injury. If a corporation, which has purchased a canal, part of the public works constructed by the State, permits water to escape through the bank of the tow-path and form stagnant and noisome pools on the adjoining land not owned by the company, it is indictable for maintaining a nuisance.<sup>3</sup> Length of time does not legalize a public nuisance,<sup>4</sup> and if a mill-pond which has existed for seventy years corrupts the air, the owner may be indicted.<sup>5</sup> But the nuisance must actually exist, and not be merely apprehended, in order to justify an abatement.<sup>6</sup> Taking ice from the pond during one or two winters, and suggesting means and making efforts to render the pond innoxious, do not amount to such acquiescence in the

ing *v. State*, 1 Chand. (Wis.) 178, 186; 2 Pin. 215; *Douglass v. State*, 4 Wis. 387; *Munson v. People*, 5 Park. C. C. 16; *People v. Townsend*, 3 Hill, 479; *State v. Gainer*, 3 Humph. 39; *Commonwealth v. Clarke*, 1 Marsh. (Ky.) 323. In Virginia, if the dam is not near a public highway, and the health of a particular locality only is impaired, an indictment will not lie. *Commonwealth v. Webb*, 6 Rand. 726; *Stephen v. Commonwealth*, 2 Leigh, 759; *Maire v. Gallahue*, 9 Gratt. 94; *Kownslar v. Ward*, Gilm. (Va.) 127.

<sup>1</sup> *Ibid.*; *Story v. Hammond*, 4 Ohio, 376; *Morris v. McCaney*, 9 Ga. 160; *Central R. Co. v. Wood*, 51 Ga. 515; *Hamilton v. Columbus*, 52 Ga. 435; *Ellington v. Bennett*, 56 Ga. 158; *Neal v. Henry*, Meigs (Tenn.), 17. In such action, evidence showing the comparative healthfulness of the plaintiff's property before and after the act complained of, is alone material to the issue. *Watson v. Van Meter*, 43 Iowa, 76; *Ferguson v. Firmenich Manuf. Co.*, 77 Iowa, 576. Except in extraordinary cases the attorney general cannot proceed at his own instance by information in equity, as relator for the State, to abate a mill-dam hurtful to the public health, but the case should be pros-

ecuted by the public and submitted to a jury. *Attorney General v. Hare*, 50 Mich. 447. See *Attorney General v. Jamaica Pond Aqueduct Co.*, 133 Mass. 361.

<sup>2</sup> *Carlisle v. Cooper*, 21 N. J. Eq. 576; 19 *id.* 257; *Holsman v. Boiling Spring Co.*, 14 N. J. Eq. 335; *Nelms v. Morgan*, 44 Ga. 617; *Ogletree v. McQuaggs*, 67 Ala. 580; *Thomas v. Calhoun*, 58 Miss. 80; *Miller v. Trueheart*, 4 Leigh, 569; *Ramsay v. Chandler*, 3 Cal. 90. In such case, the injury must be clearly established. *Ibid.*; *Lassater v. Garrett*, 5 Baxter (Tenn.), 268; *ante*, § 210. But the injunction may be allowed although an indictment for the same cause is pending. *Raleigh v. Hunter*, 1 Dev. Eq. 12.

<sup>3</sup> *Delaware Division Canal Co. v. Commonwealth*, 60 Penn. St. 367.

<sup>4</sup> *Ante*, § 121; *Wright v. Moore*, 38 Ala. 598. If a road is used for forty years without the incumbrance of a ditch, the right to reopen the ditch is lost. *Commonwealth v. Belding*, 13 Met. 10.

<sup>5</sup> *Ibid.*; *State v. Rankin*, 3 S. C. 438.

<sup>6</sup> *Gates v. Blincoe*, 2 Dana, 158. See *Attorney General v. Revere Copper Co.*, 152 Mass. 444.

continuance of the nuisance as precludes an action.<sup>1</sup> In Massachusetts, damages to lands not flowed by the dam, but rendered less valuable as building lots in consequence of noxious and offensive smells proceeding from the flowed land when not covered by water, are not within the scope of the mill acts.<sup>2</sup> And if navigable waters, subject to the jurisdiction of a State, are obstructed by a dam or similar structure, which, erected in pursuance of legislative authority, causes the health of the neighborhood to be impaired, the person making the structure is not thereby made subject to a prosecution for maintaining a public nuisance, nor can it be abated as such;<sup>3</sup> but the legislature, upon providing just compensation, may require the removal of such works on the ground that they are detrimental to the health of the surrounding country.<sup>4</sup> If a canal company purchases from the State a canal, part of the public works, as it had been constructed by the State, and water escapes through the bank of the towpath and forms stagnant and noisome pools on adjoining land not belonging to the company, it is indictable for maintaining a nuisance.<sup>5</sup> The rule of liability for endangering the public health applies only to artificial waters; and the owner of swampy or overflowed lands is not guilty of a public nuisance if he neglects

<sup>1</sup> *Adams v. Popham*, 76 N. Y. 410. See *Heiskell v. Cobb*, 11 Heisk. 638; *Mosser v. Seeley*, 10 Neb. 460.

<sup>2</sup> *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 46; *Eames v. New England Worsted Co.*, 11 Met. 570. In the above case of *Fuller v. Chicopee Manuf. Co.*, Merrick, J., said: "The law does not justify an allowance for remote, possible, or speculative damages, or damages to any other subject than land, or by any other means than raising water by a dam for mill purposes. The rule admits all direct damage by raising water upon a complainant's land, or preventing all valuable growth, or by saturating it so as to render it unfit to produce good grass, by separating one part of the complainant's land from another

so as to render bridges or causeways necessary, or other direct damage." To the same effect, see *Rooker v. Perkins*, 14 Wis. 79; *Brower v. Merrill*, 3 Chand. (Wis.) 46; 3 Phin. 46. See *Smith v. Longewald*, 140 Mass. 205.

<sup>3</sup> *Depew v. Trustees*, 5 Ind. 8; *Butler v. State*, 6 Ind. 165; *Neaderhouser v. State*, 28 Ind. 257, 268; *Barnes v. Racine*, 4 Wis. 494; *Stoughton v. State*, 5 Wis. 291; *Harris v. Thompson*, 9 Barb. 350; *Williams v. New York Central R. Co.*, 18 Barb. 222; *People v. Law*, 34 Barb. 514.

<sup>4</sup> *Miller v. Craig*, 11 N. J. Eq. 175; *Rogers v. Barker*, 31 Barb. 447; *The Wharf Case*, 3 Bland Ch. 442.

<sup>5</sup> *Delaware Canal Co. v. Commonwealth*, 60 Penn. St. 367.



to drain them.<sup>1</sup> The right of the legislature, in New Jersey, to order low lands to be drained at the expense of the owners is upheld under the police power.<sup>2</sup>

**§ 213. Diversion.**—A riparian proprietor may divert the water from the stream, as it passes through his own land, without license from the proprietors above him, if he does not obstruct the water from flowing as freely as it was wont, and without license from the lower proprietors if he restores the water to its natural channel before it enters their land and does not materially diminish its flow.<sup>3</sup> The distinction is to be observed between the right to divert or change the course of the stream itself so as to turn it away from a lower proprietor, and the right to take water from the stream. The first is wholly unlawful; the second may be exercised to a reasonable extent.<sup>4</sup> There must not be such an abstraction of the water as will materially interfere with the rights of any other proprietor, and it is no answer to such a violation of right by one party that the other has increased the usefulness

<sup>1</sup> *Woodruff v. Fisher*, 17 Barb. 224.

<sup>2</sup> *Wurts v. Hoagland*, 114 U. S. 606; *Springer v. Lawrence* (N. J.), 21 Atl. 41; *In re Drainage along Pequest River*, 41 N. J. L. 175; 39 id. 197, 433; 40 id. 380; 42 id. 553; *In re Drainage*, 35 N. J. L. 497. See *State v. Clinton*, 39 N. J. L. 656.

<sup>3</sup> *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Sandwich v. Great Northern Ry. Co.*, 10 Ch. D. 707; *Garwood v. New York Central R. Co.*, 83 N. Y. 400; 17 Hun, 356; 116 N. Y. 649; *Pettibone v. Smith*, 37 Mich. 579; *Hilliker v. Coleman*, 78 Mich. 170; *Preston v. Hull*, 77 Iowa, 809; *Dilling v. Murray*, 6 Ind. 324; *Robinson v. Sharks*, 118 Ind. 125; *Norton v. Valentine*, 14 Vt. 239; *Ford v. Whitlock*, 27 Vt. 265; *Canfield v. Andrew*, 54 Vt. 1; *Society v. Morris Canal Co.*, Sax. (N. J.) 157; *Halsey v. Lehigh Valley R. Co.*, 45 N. J. L. 26; *Webster v. Fleming*, 2 Humph. 518; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Shamleffer v.*

*Council Grove Peerless Co.*, 18 Kansas, 24. As to the measure of damages, for diversion, in special cases, see *Hanover Water Co. v. Ashland Iron Co.*, 84 Penn. St. 279; *Bare v. Hoffman*, 79 Penn. St. 71; *Stein v. Burden*, 29 Ala. 127; 24 Ala. 130; *Stein v. Ashby*, id. 521; *Thayer v. Brooks*, 17 Ohio, 489; *Plumleigh v. Dawson*, 1 Gilman, 544. As to counter-claim, see *Grange v. Gilbert*, 44 Hun, 9.

<sup>4</sup> *Elliott v. Fitchburg R. Co.*, 10 Cush. 191; *Dumont v. Kellogg*, 29 Mich. 420; *Wadsworth v. Tillotson*, 15 Conn. 366; *Hartzall v. Sill*, 12 Penn. St. 248; *Coalter v. Hunter*, 4 Rand. 58; *Loud Gold Mining Co. v. Blake*, 24 Fed. Rep. 249; *Learned v. Castle*, 78 Cal. 454; *Tucker v. Salem Flouring Mills Co.*, 15 Oregon, 581; *Fulmer v. Williams*, 122 Penn. St. 191; *New York Rubber Co. v. Rothery*, 10 N. Y. S. 873; 57 Hun, 590; *Vernum v. Wheeler*, 35 Hun, 53.

of the stream by means of a reservoir higher up, since the private right of one man cannot be taken by another upon the substitution of an equivalent benefit.<sup>1</sup> Where a lower proprietor, with the consent of proprietors higher up the stream, diverted the water above the plaintiff's land lying upon one side of the stream into a channel which conducted a considerable portion of the water around the plaintiff's land to his own mill below, it was held that this was not such an incidental obstruction or loss of the water as was necessarily consequent upon the lawful use of the stream by one proprietor, giving no ground for an action,<sup>2</sup> and that the license of the upper proprietors afforded the defendant no protection as against the plaintiff.<sup>3</sup> The question whether the injury is caused by the defendant's diversion or by a gradual drying up of the stream is properly a question of fact for the jury.<sup>4</sup> Where the defendant, being one of two tenants in common of a mill upon one side of a stream, and of the water privilege connected therewith, agreed with the plaintiff, his co-tenant, that each should use the mill alternately for several days at a time, and afterwards diverted a portion of the water from the mill-pond by means of a channel, dug upon his own land opposite, for the purpose of driving machinery on that land, an injunction was granted to restrain the diversion during the plaintiff's turn, but relief was refused against the use of the channel, which was not shown to be injurious to the common property, or against the diversion of the water through it during the defendant's turn.<sup>5</sup> If water is added to a natural stream by artificial means, it becomes a part of the stream and subject to the same natural rights as the rest of the water.<sup>6</sup> A riparian proprietor cannot lawfully dig in the bed

<sup>1</sup> *Webb v. Portland Manuf. Co.*, 3 Sumner, 189; *Weiss v. Oregon Iron Co.*, 13 Oregon, 496. Upon the landlord's liability for his tenant's diversion of water for other purposes than those authorized by his agreement, see *Clement v. Gould*, 61 Vt. 573.

<sup>2</sup> *Wadsworth v. Tillotson*, 15 Conn. 266; *Harding v. Stamford Water Co.*, 41 Conn. 87.

<sup>3</sup> *Parker v. Griswold*, 17 Conn. 288; *Armstrong v. Potts*, 23 N. J. Eq. 92;

*Larsh v. Test*, 48 Ind. 130; 76 Ind. 452; 98 Ind. 301; *Kimberly Co. v. Hewitt* (78 Wis.), 48 N. W. 873.

<sup>4</sup> *Marsh v. Delaware R. Co.*, 12 N. Y. S. 376.

<sup>5</sup> *Bliss v. Rice*, 17 Pick. 23. See *Alhambra A. W. Co. v. Mayberry* (Cal.), 25 Pac. 1101.

<sup>6</sup> *Wood v. Waud*, 3 Exch. 748, 779; *Davis v. Gale*, 32 Cal. 26; *Druley v. Adam*, 102 Ill. 177; *Adams v. Slater*, 8 Brad. (Ill.) 72.

of a stream, on his own side of the thread, in such manner as to change materially the natural flow of the water;<sup>1</sup> and if A diverts more than the natural flow of the water towards the land of B, thereby causing it to flow thereon, B may remedy it by the erection of any dams or banks on his own land.<sup>2</sup> A lower riparian proprietor is not entitled to maintain an action against an owner above for a diversion of the water, if he is not entitled to the use of the water so diverted by reason of the rights of an intervening proprietor.<sup>3</sup> The ownership of land abutting on a canal which is a public highway, although it carries title to the centre of the canal, does not give to the land-owner the right to draw off the water through his lot for the purpose of creating a water-power.<sup>4</sup> An upper proprietor is liable in damages at law, or may, in case of irreparable injury, be restrained by injunction,<sup>5</sup> if he so diverts the stream as to cause the water to be discharged upon the land or into the ditches or mines of a neighbor;<sup>6</sup> if he so extends a ditch into a marsh upon the border of a lake as to lessen the water-power of a river into which the lake empties, and upon which the plaintiff's mills are situated;<sup>7</sup> or if he exhausts a spring or marsh which is the source of a watercourse, and thereby stops the stream.<sup>8</sup> In an action for preventing, by

<sup>1</sup> *Van Hoesen v. Coventry*, 10 Barb. 518.

<sup>2</sup> *Merritt v. Parker*, Coxe (N. J.), 460.

<sup>3</sup> *Olney v. Fenner*, 2 R. I. 211.

<sup>4</sup> *Lawson v. Mowry*, 52 Wis. 219; *Medway Co. v. Romney*, 9 C. B. N. S. 575. An abandonment of a State canal, and a conveyance thereof to trustees, does not revert title in the original owners. *Mason v. Lake Erie Ry. Co.*, 9 Biss. 239. See *Collett v. Vanderburgh Co.*, 119 Ind. 27.

<sup>5</sup> *Marble v. Adams*, 46 Vt. 496; *Chesapeake R. Co. v. Bobbett*, 5 W. Va. 138. Standing by, and permitting another without objection to divert a small stream at great expense, will prevent the obtaining a mandatory injunction. *Slocumb v. C. B. & Q. R. Co.*, 57 Iowa, 675; *Muncey v. Joest*, 74 Ind. 409.

<sup>6</sup> *Musgrave v. Smith*, 2 App. Cas.

781; *Shaw v. Cumiskey*, 7 Pick. 76; *Porter v. Dunham*, 74 N. C. 767; *Chapman v. Copeland*, 55 Miss. 476; *Thompson v. Crocker*, 9 Pick. 59; *Boynton v. Rees*, id. 528.

<sup>7</sup> *Bennett v. Murtaugh*, 20 Minn. 151; *Curtiss v. Ayrault*, 3 Hun, 487; 47 N. Y. 73; 5 *Thomp. & C.* 611; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 578. See *Bearse v. Perry*, 117 Mass. 211.

<sup>8</sup> *Post*, § 263; *Howe v. Norman*, 13 R. I. 488; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Arnold v. Foot*, 12 Wend. 330; *Colrick v. Swinburne*, 105 N. Y. 503; *Fleming v. Davis*, 37 Texas, 173; *Wadsworth v. Tillotson*, 15 Conn. 366; *Eulrich v. Richter*, 41 Wis. 318; 37 Wis. 226; *Williamson v. Lock's Creek Canal Co.*, 76 N. C. 478; 78 N. C. 156; *Gillett v. Johnson*, 30 Conn. 180.

diversion, the waters of a stream from coming to the plaintiff's mill, the return of a certain percentage of the water to the stream may be considered as an element of damages.<sup>1</sup> And one who has diverted water but has returned it undiminished in quantity is not a necessary party to the suit.<sup>2</sup>

§ 214. **Same — Actual damage.**— Although the decisions are not in entire harmony, yet, by the weight of authority, neither an upper or lower proprietor can maintain an action for the diversion, the raising or detention of the water by a neighbor upon the stream, which, being reasonable in mode and degree, is not the cause of actual perceptible damage.<sup>3</sup> Under this rule, as no right of action accrues until injury is inflicted, no prescription begins to run until that time.<sup>4</sup> In *Sandwich v. Great Northern Ry. Co.*,<sup>5</sup> it was held to be within the rights of a railway company, as a riparian owner, to take water from the neighboring stream for the purpose of supplying its engines and station, and that the quantity taken, which did not affect the depth of the stream more than one-fifth of an inch, was reasonable. Actual present damage need not be shown in order to support an action for any extraordinary

<sup>1</sup> *Mannville Co. v. Worcester*, 188 Mass. 89.

<sup>2</sup> *Smith v. Logan*, 18 Nev. 149.

<sup>3</sup> *Elliott v. Fitchburg R. Co.*, 10 Cush. 191; *Norway Plains Co. v. Bradley*, 52 N. H. 108; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Tyler v. Wilkinson*, 4 Mason, 397; *McElroy v. Goble*, 6 Ohio St. 187; *Cooper v. Hall*, 5 Ohio, 320; *Longstreet v. Harkrader*, 17 Ohio St. 28; *Garrett v. McKie*, 1 Rich. (S. C.) 444; *Chalk v. McAlily*, 11 Rich. (S. C.) 153; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Howatt v. Laird*, 1 Pr. Edw. Island, 7, 21, 157; *post*, §§ 401-425.

<sup>4</sup> *Murgatroyd v. Robinson*, 7 El. & Bk. 391; *Cooper v. Barber*, 8 Taunt. 99; *Sturges v. Bridgman*, 28 Am. L. Reg. 348; *Angus v. Brown*, 4 Q. B. D. 162; *Thurber v. Martin*, 2 Gray, 394; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Gilmore v. Driscoll*, 122 Mass.

207; *Heath v. Williams*, 25 Maine, 209; *Mitchell v. Mayor*, 49 Ga. 19; *Holsman v. Boiling Spring Co.*, 14 N. J. Eq. 345; *Crosby v. Bessey*, 49 Maine, 539; *Norton v. Volentine*, 14 Vt. 239; *Hurlburt v. Leonard*, Brayt. (Vt.) 202; *Parker v. Hotchkiss*, 25 Conn. 321; *Keeney Manuf. Co. v. Union Manuf. Co.*, 39 Conn. 576; *Dumont v. Kellogg*, 29 Mich. 420; *Hoyt v. Sterrett*, 2 Watts, 327; *Platt v. Johnson*, 15 Johns. 213; *Richart v. Scott*, 7 Watts, 462; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185; *Moore v. Clear Lake Water-Works*, 68 Cal. 146.

<sup>5</sup> 10 Ch. D. 707; 27 W. R. 616; *Dakin v. Cornish*, cited 6 Exch. 360; *Cummings v. Barrett*, 10 Cush. 191; *Garwood v. New York Central R. Co.*, 83 N. Y. 400; 17 Hun, 356. *Cf.* *Graham v. Northern Ry. Co.*, 10 Ch. (Can.) 259.

and unreasonable use of the water by a riparian owner, when the act complained of, if continued, would bar the plaintiff's right,<sup>1</sup> and nominal damages may be recovered in order to prevent the acquisition of an adverse title by prescription.<sup>2</sup> A riparian proprietor may maintain an action for the diver-

- <sup>1</sup> *Ibid.*; *Rochdale Canal Co. v. King*, 14 Q. B. 134; 2 Sim. N. s. 78; *Harrop v. Hirst*, L. R. 4 Ex. 43; *Westbury v. Powel*, cited in *Fineaux v. Hovenden*, Cro. Eliz. 664; *Mellor v. Spateman*, 1 W. Saund. 346 (a), note; *Bower v. Hill*, 1 Bing. 549; 1 Scott, 526; *Embrey v. Owen*, 6 Exch. 353; *Northam v. Hurley*, 1 EL. & Bk. 665; *Chasemore v. Richards*, 7 H. L. Cas. 849; 2 H. & N. 180; 5 H. & N. 982; *Sampson v. Hoddinott*, 1 C. B. N. s. 590; *Crossley v. Lightowler*, L. R. 8 Eq. 296; *Chatfield v. Wilson*, 27 Vt. 670; *Woodman v. Tufts*, 9 N. H. 88; *Gerrish v. New Market Manuf. Co.*, 80 N. H. 478; *Tillotson v. Smith*, 32 N. H. 90; *Blodgett v. Stone*, 60 N. H. 167; *Butman v. Hussey*, 12 Maine, 407; *Heath v. Williams*, 25 Maine, 209; *Munroe v. Stickney*, 48 Maine, 462; *Blanchard v. Baker*, 8 Maine, 253; *Appleton v. Fullerton*, 1 Gray, 186; *Thompson v. Crocker*, 9 Pick. 58; *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241; *Newhall v. Ireson*, 8 Cush. 595; *Stowell v. Lincoln*, 11 Gray, 434; *Lund v. New Bedford*, 121 Mass. 286; *Ware v. Allen*, 140 Mass. 513; *Cook v. Hull*, 3 Pick. 269; *Bliss v. Rice*, 17 Pick. 23; *Union Co. v. Dangberg*, 2 Sawyer, 450; *Whipple v. Cumberland Manuf. Co.*, 2 Story, 664; *Webb v. Portland Manuf. Co.*, 3 Sumner, 139; *Bullard v. Saratoga Manuf. Co.*, 77 N. Y. 525; *Crooker v. Bragg*, 10 Wend. 260; *Baldwin v. Calkins*, id. 167; *Palmer v. Mulligan*, 3 Caines, 307; *Platt v. Johnson*, 15 Johns. 213; *Van Hoesen v. Coventry*, 10 Barb. 518; *Thomas v. Brackney*, 17 Barb. 654; *Wadsworth v. Tillotson*, 15 Conn. 366; *Chapman v. Thames Manufacturing Co.*, 18 Conn. 269; *Parker v. Griswold*, 17 Conn. 288; *Branch v. Doane*, 18 Conn. 233; 17 Conn. 402; *Seeley v. Brush*, 35 Conn. 424; *Hulme v. Shreve*, 3 Green (N. J.), 116; *Gladfelter v. Walker*, 40 Md. 1; *Pastorious v. Fisher*, 1 Rawle, 27; *Alexander v. Kerr*, 2 Rawle, 83; *Howell v. McCoy*, 3 Rawle, 256; *Ripka v. Sergeant*, 7 Watts & S. 9, 11; *Beiswell v. Sholl*, 4 Dallas, 211; *Hartzall v. Sill*, 12 Penn. St. 248; *Graver v. Sholl*, 42 Penn. St. 58; *Dumont v. Kellogg*, 29 Mich. 422; *Plumleigh v. Dawson*, 1 Gilman, 544; *Hill v. Ward*, 2 id. 285; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; *Stein v. Burden*, 24 Ala. 130; 29 Ala. 127; *Stein v. Ashby*, 24 Ala. 521; *Close v. Sann*, 27 Iowa, 503; *Watson v. Van Meter*, 43 Iowa, 76; *Cory v. Silcox*, 6 Ind. 39; *Little v. Stanback*, 63 N. C. 285; *Pugh v. Wheeler*, 3 Dev. & Bat. 50; *Chapman v. Copeland*, 55 Miss. 476; *Hendrick v. Cook*, 4 Ga. 24; *Ellington v. Bennett*, 59 Ga. 286; *Green v. Weaver*, 63 Ga. 302; *Attwood v. Fricot*, 17 Cal. 37; *Creighton v. Evans*, 53 Cal. 55; *Welton v. Martin*, 7 Mo. 307; *Smith v. McConathy*, 11 Mo. 517; *Haas v. Choussard*, 17 Texas, 588. And see *ante*, p. 396, n. 6; *post*, ch. 12.
- <sup>2</sup> *Ibid.*; *Wilts Canal Co. v. Swindon Water Works Co.*, L. R. 9 Ch. 451; L. R. 7 H. L. 697; *Plumb v. McGannon*, 32 Q. B. (Can.), 8, 12; *Mueller v. Fruen*, 36 Minn. 273; *McGlone v. Smith*, 22 L. R. Ir. 559.

sion of a stream without proof that he has an ancient mill thereon or that he has appropriated the water to any special use,<sup>1</sup> and is entitled to have the water run through his land undiminished by any persons who are not themselves riparian owners and do not act under the license of such owners.<sup>2</sup> As against a wrong-doer, the mere possession of rights, corporeal or incorporeal, is sufficient to maintain an action for their disturbance.<sup>3</sup>

§ 215. *Same.*—As each proprietor has no exclusive title to one-half or any definite part of the water flowing past his land, he cannot claim the right as against any other proprietor to divert or sever a proportionate part of it.<sup>4</sup> He may divert so much of the water as will not unreasonably impair the rights of other proprietors.<sup>5</sup> In this respect there appears to be no distinction between the diversion and the detention or other use of the stream. One who wrongfully diverts the water from another's mill so as to diminish its power cannot excuse himself for the injury, to the extent that it is caused by him, by alleging that the plaintiff by his own act, as by alterations in his wheels or machinery, requires more water than previously and has thus caused a loss to himself;<sup>6</sup> and the purchaser of an estate upon a stream from which others have unreasonably diverted the water is entitled to recover

<sup>1</sup> *Rutland v. Bowler*, 3 Exch. 290, 774; *Sands v. Trefuses*, Cro. Car. 575; *Cox v. Matthews*, 1 Vent. 237; *Wright v. Howard*, 1 Sim. & Stu. 190; *Mason v. Hill*, 5 B. & Ad. 1; 3 B. & Ad. 304; *Adams v. Barney*, 25 Vt. 225; *Van Sickle v. Haynes*, 7 Nev. 249; *Wright v. Syracuse R. Co.*, 49 Hun, 445; *Lefurgy v. N. Y. R. Co.*, 50 Hun, 606; 8 N. Y. S. 302.

<sup>2</sup> *Hayden v. Long*, 8 Oregon, 244; *Nuttall v. Bracewell*, L. R. 2 Ex. 1, 7, 11; *Covington v. Becker*, 5 Nev. 281.

<sup>3</sup> *Pullan v. Roughfort Bleaching Co.*, 21 L. R. Ir. 73; *Boyington v. Squires*, 71 Wis. 276; *Norris v. Glen*, 1 Idaho, N. S. 590; *Emerson v. Bergin*, 71 Cal. 335; *Moore v. Clear Water Lake Co.*, 68 Cal. 146; *Salis-*

*bury v. Western N. C. R. Co.*, 91 N. C. 490.

<sup>4</sup> *Webb v. Portland Manuf. Co.*, 3 Sumner, 189; *Corning v. Troy Iron Factory*, 40 N. Y. 191; *Blanchard v. Baker*, 8 Maine, 253; *Curtis v. Jackson*, 13 Mass. 507; *Elliott v. Fitchburg R. Co.*, 10 Cush. 191; *Vanderburgh v. Vanbergen*, 13 Johns. 212; *Arthur v. Case*, 1 Paige, 447; *Parker v. Griswold*, 17 Conn. 301; *Runnels v. Bullen*, 2 N. H. 532; *Bare v. Hoffman*, 79 Penn. St. 71; *Plumleigh v. Dawson*, Gilman, 544.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Stickney v. Monroe*, 44 Maine, 195; *Buddington v. Bradley*, 10 Conn. 218; *Johnson v. Lewis*, 18 Conn. 303; *Brooke v. Winter*, 39 Ind. 505.



if such diversion is continued, although he was not informed thereof at the time of his purchase.<sup>1</sup> Upon the ground of irreparable mischief and to prevent a multiplicity of suits, a court of equity will interfere by injunction to restrain an unlawful diversion of water from a stream.<sup>2</sup> Even when serious damage is not proved, an injunction may be granted to prevent the acquisition by prescription of an adverse right to divert;<sup>3</sup> and if the diversion is clearly wrongful, it is not necessary for the plaintiff to prove damages in order that he may be entitled to an injunction.<sup>4</sup>

§ 216. **Riparian estates — Alteration of surface.**— If a littoral proprietor so excavates on his own land as to let in the sea, which undermines his neighbor's land adjoining, he is liable for the injury thus caused, including the percolation of salt water into the neighbor's well.<sup>5</sup> But a riparian proprietor may alter the surface of his own land at pleasure, if his operations do not materially affect the usual flow of the stream to another's injury.<sup>6</sup> If he digs a ditch on his own land through which no water flows when the stream is at its ordinary height, he is not bound to fill the ditch or to maintain embankments to pen in the water for the benefit of a lower proprietor who attempts to erect a dam without right on his own land,<sup>7</sup> and if after the ditch is dug such lower proprietor is authorized by statute to maintain his dam, this imposes no duty upon the ditch-owner to restore his land to its original condition.<sup>8</sup> So the owner of land may cultivate it in the usual manner, if reasonable, and is not liable to a lower proprietor into whose mill-pond the soil is drained from his land as a result of such cultivation.<sup>9</sup> And if he makes excavations on his own land, in which water collects forming a pond, he

<sup>1</sup> *Atlanta Mills v. Mason*, 120 Mass. 244; *Chapman v. Copeman*, 55 Miss. 476; *Shamleffer v. Peerless Mill Co.*, 18 Kansas, 24.

<sup>2</sup> *Marble v. Adams*, 46 Vt. 496; *Chesapeake R. Co. v. Bobbett*, 5 W. Va. 138; *Wright v. Moore*, 38 Ala. 593.

<sup>3</sup> *Franklin v. Pollard Mill Co.*, 88 Ala. 318.

<sup>4</sup> *Conkling v. Pacific Imp. Co.*, 87 Cal. 296.

<sup>5</sup> *Mears v. Dole*, 135 Mass. 508.

<sup>6</sup> *Storm v. Manchaug Co.*, 13 Allen, 10; *Bearse v. Perry*, 117 Mass. 211; *Stewart v. Schneider*, 22 Neb. 286.

<sup>7</sup> *Bearse v. Perry*, 117 Mass. 211.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Middlesex Co. v. McCue*, 149 Mass. 103. See *Peoria v. Utica Cement Co.*, 22 Ill. App. 159.

is not liable if a trespasser is drowned therein.<sup>1</sup> Where the right of flowage is given by statute without creating any easement in the lands of others which are overflowed,<sup>2</sup> as is the case with respect to the mill act of Massachusetts, one proprietor is under no obligation to keep his land in good condition for his neighbor's mill-pond; and if the mill-owner has begun to raise the dam connected with his mill, intending to raise it to a height which, when completed, will overflow the land of others, they may lawfully dig a canal upon their own land before it is flowed, to prevent the flowing beyond the height to which the water was previously raised.<sup>3</sup> They are not entitled to draw off the water unreasonably after it has been raised by a dam so authorized, but they may lawfully apply it to any useful purpose, including that of irrigation, the watering of cattle, and the taking of ice, if they do not, in point of fact, and in a perceptible and substantial manner, impair the right to run the mill.<sup>4</sup>

§ 217. **Irrigation.**—The right of a riparian proprietor to divert the water of a stream for the purpose of irrigation is recognized in England,<sup>5</sup> and generally in this country.<sup>6</sup> Ac-

<sup>1</sup> *Klix v. Nieman*, 68 Wis. 271; *Overholt v. Vieths*, 93 Mo. 422; *McCormick v. Horan*, 81 N. Y. 86.

<sup>2</sup> *Murdock v. Stickney*, 8 Cush. 113; *Lowell v. Boston*, 111 Mass. 466; *Boston Manuf. Co. v. Burgin*, 114 Mass. 340.

<sup>3</sup> *Storm v. Manchaug Co.*, 13 Allen, 10; *post*, §§ 253, 591.

<sup>4</sup> *Ibid.*; *Cook v. Hull*, 3 Pick. 269; *Paine v. Woods*, 108 Mass. 160, 173.

<sup>5</sup> *Embrey v. Owen*, 6 Exch. 353; *Sandwich v. Great Northern Ry. Co.*, 10 Ch. D. 707, 711; *Chasemore v. Richards*, 2 H. & N. 190; 5 H. & N. 982; 7 H. L. Cas. 349; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Green-slade v. Haliday*, 6 Bing. 379; *Hall v. Swift*, 9 Scott, 167; *Strutt v. Boving-ton*, 5 Esp. 56; *Gale & Whatley on Easements*, 284.

<sup>6</sup> *Blanchard v. Baker*, 8 Maine, 253,

266; *Davis v. Getchell*, 50 Maine, 604; *Newhall v. Ireson*, 8 Cush. 595; *Elliott v. Fitchburg R. Co.*, 10 Cush. 194; *Colburn v. Richards*, 13 Mass. 420; *Anthony v. Lapham*, 5 Pick. 175; *Cook v. Hull*, 3 Pick. 269; *Paine v. Woods*, 108 Mass. 160, 173; *Garwood v. New York Central R. Co.*, 83 N. Y. 400, 405; 17 Hun, 356; *Messinger's Appeal*, 109 Penn. St. 285; *Farrell v. Richards*, 30 N. J. Eq. 511; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Union Mill Co. v. Dangberg*, *id.* 450; *Ingraham v. Hutchinson*, 2 Conn. 584; *Wadsworth v. Tillotson*, 15 Conn. 366; *Gillett v. Johnson*, 30 Conn. 180; *Randall v. Silverthorn*, 4 Penn. St. 173; *Miller v. Miller*, 9 Penn. St. 74; *Tolle v. Correth*, 31 Texas, 362; 98 Am. Dec. 540, and note; *Fleming v. Davis*, 37 Texas, 173; *Mud Creek Ir. Co. v. Vivian*, 74 Texas, 170; *Stein v.*

According to the later decisions in both countries this is not a natural want, authorizing an exclusive or undue appropriation by one proprietor, but the use of the stream for this purpose must be reasonable and must not materially affect the application of the water by other riparian proprietors.<sup>1</sup> The extent of each proprietor's right to thus withdraw the water depends upon the circumstances of the case. The owner of a large tract of porous land, abutting on one part of the stream, could not lawfully irrigate such land continually by canals and drains, and so cause a serious diminution of the quantity of water, though there may be no other loss to the natural stream than that arising from the natural absorption and evaporation of the water employed for the purpose.<sup>2</sup> If the water used for irrigation is not abstracted on a person's own land, but is withdrawn at a distance above it or returned at a distance below it, this would have a material bearing upon the question of reasonable use with respect to an opposite or other proprietor affected by such diversion.<sup>3</sup> So, a riparian proprietor who obstructs the stream by a dam for the purpose of overflowing and irrigating his land, or who diverts the water for such purpose excessively, and without returning the surplus into the natural channel, is liable to the owner of a mill below, the operation of which is thereby impeded,<sup>4</sup> or to another proprietor below, who only uses the water for irrigation and is deprived of that right to an unreasonable extent.<sup>5</sup> A riparian owner, who withdraws water from a stream for

Burden, 29 Ala. 127; 24 Ala. 130; Potier v. Burden, 38 Ala. 651; Blessing v. Blair, 45 Ind. 546; Lux v. Haggin, 69 Cal. 255; Learned v. Tangeman, 65 Cal. 334; Ferrea v. Knipe, 28 Cal. 343; Perego v. McKissick, 79 Cal. 572; Perego v. Sellick, id. 568; Sharp v. Hoffman, id. 404; Wheeler v. No. Col. Ir. Co., 10 Col. 582.

<sup>1</sup> Ibid. According to earlier authorities, irrigation is a natural want. *Ante*, § 205. See, also, Pomeroy on Riparian Rights, § 138.

<sup>2</sup> Embrey v. Owen, 6 Exch. 353, 371.

<sup>3</sup> Ibid.; Union Mill Co. v. Ferris, 2 Sawyer, 176; Stein v. Burden, 29 Ala. 127; 24 Ala. 130; Wadsworth v. Tillotson, 15 Conn. 366. See *post*, § 534. In Heinlen v. Fresno Canal Co., 68 Cal. 35, held that evidence of injuries from diversion to lands not bordering on the stream, and to the plaintiff's cattle there pastured, was inadmissible.

<sup>4</sup> Cook v. Hull, 3 Pick. 269; Colburn v. Richards, 13 Mass. 420.

<sup>5</sup> Anthony v. Lapham, 5 Pick. 175; Cummings v. Barrett, 10 Cush. 186, 195; Bent v. Wheeler, 3 Dane Abr. 16.

irrigation, cannot, after using it, lawfully discharge the surplus upon other lands in such manner as to there increase the burden of the natural servitude of drainage.<sup>1</sup>

§ 218. **Obstructing the flow.**— It is not lawful for one proprietor to impede or diminish the ordinary flow of the water so as to materially interfere with the enjoyment of other proprietors;<sup>2</sup> and if the owner of a mill withholds or lets down the water in excessive quantities, beyond what is incident to the necessary or reasonable use of his mill, he is liable to an action of tort at common law for any appreciable damage thereby caused to a lower proprietor.<sup>3</sup> It is a reasonable use of the stream by one proprietor to detain the water for such time as is necessary to fill a mill-pond used in connection with machinery, which the power of the stream, in its ordinary stages, is adequate to propel.<sup>4</sup> In times of drouth, the water may be detained for such length of time as is necessary to enable it to be advantageously and profitably used for such machinery.<sup>5</sup> If a mill-owner, in seasons of drouth, shuts his gates so as to stop the flow of the water until his pond becomes full, it is not an unreasonable exercise of his right to

<sup>1</sup> *Boynton v. Longley*, 19 Nev. 69.

<sup>2</sup> *Embrey v. Owen*, 6 Exch. 353; *Shears v. Wood*, 7 Moore, 584; *Hinckley v. Nickerson*, 117 Mass. 215; *Twiss v. Baldwin*, 9 Conn. 291; *Phillips v. Sherman*, 64 Maine, 171; *Davis v. Winslow*, 51 Maine, 290; *Davis v. Getchell*, 50 Maine, 602; *Timm v. Bear*, 29 Wis. 254; *Vliet v. Sherwood*, 35 Wis. 229; 38 Wis. 159; *Sackrider v. Beers*, 10 Johns. 241; *Hendrick v. Cook*, 4 Ga. 241; *Pool v. Lewis*, 41 Ga. 162; *Hoy v. Sterrett*, 2 Watts, 327; *Hetrick v. Deachler*, 6 Penn. St. 32; *Case v. Weber*, 2 Ind. 108; *Noah v. Angle*, 63 Ind. 425.

<sup>3</sup> *Clapp v. Herrick*, 129 Mass. 292; *Thompson v. Crocker*, 9 Pick. 59; *Soule v. Russell*, 13 Met. 436; *O'Brien v. St. Paul*, 18 Minn. 176; *Gerrish v. Brown*, 50 Maine, 604; *Merritt v. Brinckerhoff*, 17 Johns. 306; *Gerrish v. New Market Manuf. Co.*, 80 N. H.

478. As to proceedings by a petition of right, where the Crown or its officers obstruct the flow of water to the suppliant's mill, see *Muskoka Mill Co. v. The Queen*, 28 Grant's Ch. (Can.) 563.

<sup>4</sup> *Pitts v. Lancaster Mills*, 13 Met. 156; *Chander v. Howland*, 7 Gray, 350; *Canfield v. Andrew*, 54 Vt. 1; *Whaler v. Ahl*, 29 Penn. St. 98; *Merritt v. Brinckerhoff*, 17 Johns. 306; *Clinton v. Myers*, 46 N. Y. 511; *Hartzell v. Sill*, 12 Penn. St. 245; *Bullard v. Saratoga Victory Manuf. Co.*, 13 Hun, 43; *Mabie v. Matteson*, 17 Wis. 1; *Timm v. Bear*, 29 Wis. 254; *Coldwell v. Sanderson*, 69 Wis. 52; *Egan v. Russ*, 39 La. Ann. 967; *Pool v. Lewis*, 41 Ga. 162; *Oregon Iron Co. v. Trullinger*, 3 Oregon, 1; *Proulx v. Tremblay*, 7 Quebec L. R. 353; *Keith v. Corey*, 1 Pugs. & B. (N. B.) 400.

<sup>5</sup> *Ibid.*

let down the water and thereby increase the volume of the stream to any extent that does not exceed the usual and natural flow, or overflow the natural banks.<sup>1</sup> But he has no right to erect machinery, requiring for its operation more water than the stream supplies in its ordinary state, and to operate such machinery by a full pond, discharging the water upon those below in unusual quantities, so that they are unable to use it.<sup>2</sup> The right to reasonably detain the water is not limited to extraordinary occasions or to the time necessary for repairs, but applies to the ordinary use of the stream.<sup>3</sup> The fact that a mill-owner partially obstructs the flow of the water from his mill does not prevent his maintaining an action against a lower proprietor for an additional obstruction caused by the maintenance of the latter's dam at too great a height, and the doctrine of contributory negligence does not apply to such a case.<sup>4</sup> The stoppage of a watercourse at its springhead, where it has its origin, and first begins to flow in a natural channel, is as unlawful as an obstruction lower down the stream;<sup>5</sup> and the same is true also of flood-waters, causing flowage by back-water.<sup>6</sup>

§ 218a. **Acceleration of the current.**—The decisions relating to the acceleration of the flow of the stream are not numerous. According to the civil law any augmented flow of the water, whereby the servitude of a lower proprietor is aggravated, is unlawful, and the upper proprietor has no right to insist upon a free course for the water thus sent down.<sup>7</sup> In Georgia an upper riparian owner, who removed from the bed of the stream a ledge of rock, which, by retarding the flow of

<sup>1</sup> *Drake v. Hamilton Woolen Co.*, 99 Mass. 574; *Wood v. Edes*, 2 Allen, 580; *Brace v. Yale*, 10 Allen, 444; 97 Mass. 18; 99 Mass. 488; *Gould v. Boston Duck Co.*, 13 Gray, 453; *Clinton v. Myers*, 46 N. Y. 511. See *Rock Manuf. Co. v. Hough*, 39 Conn. 190.

<sup>2</sup> *Merritt v. Brinckerhoff*, 17 Johns. 306; *Clinton v. Myers*, 46 N. Y. 511; *Brace v. Yale*, 10 Allen, 441.

<sup>3</sup> *Davis v. Getchell*, 50 Maine, 602; *Denison Paper Manuf. Co. v. Robinson Manuf. Co.*, 74 Maine, 116.

<sup>4</sup> *Brown v. Dean*, 123 Mass. 254.

<sup>5</sup> *Dudden v. Guardians of the Poor*, 1 H. & N. 627; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Arnold v. Foot*, 12 Wend. 330; *Howe v. Norman*, 13 R. L. 488; *Ford v. Lukens*, 81 Ga. 633.

<sup>6</sup> *Montgomery v. Locke* (Cal.), 11 Pac. 874.

<sup>7</sup> *Frechette v. La Compagnie Manufacturière* (Quebec), 9 App. Cas. 170.

the water, naturally protected a lower tract from overflow, was held liable for thereby causing water and sand to overspread the lower tract, although the damage was wholly done below the point where the stream entered the lower land.<sup>1</sup> In North Carolina, where an upper mill-owner wilfully, and with intent to injure the plaintiff, accumulated a large head of water by shutting down his gates, and then discharged it against the plaintiff's dam, which was washed away, trespass *vi et armis* was held a proper remedy.<sup>2</sup> So if a mill-owner increases the natural flow of the stream by artificial means, as by turning into his mill-pond the waters of another stream, which do not naturally flow there, he is liable to an action for injury so caused to another proprietor.<sup>3</sup> And although a land-owner may, in the reasonable use of his land, collect into an artificial stream the surface-water thereof, and the water drawn from wells therein, and discharge the same into a natural watercourse running through his estate, yet he must not, by increasing the watercourse beyond its natural capacity to discharge the water, injure adjoining or lower proprietors.<sup>4</sup>

**§ 219. Pollution.**—Riparian owners have, also, a natural right to have natural streams flow unimpaired in quality as well as quantity; and any use of the stream by one proprietor, which defiles or corrupts it to such a degree as essentially to impair its purity and usefulness for any of the purposes to which running water is usually applied, is an invasion of private right, for which those injured thereby are entitled to a remedy.<sup>5</sup> Various sources of pollution have been held by the

<sup>1</sup> Grant v. Kuglar, 81 Ga. 637.

<sup>2</sup> Kelly v. Lett, 13 Ired. 50; Hogwood v. Edwards, Phil. Law, 350; McKee v. Delaware & H. Canal Co., 125 N. Y. 353.

<sup>3</sup> Tillotson v. Smith, 82 N. H. 90; Merritt v. Parker, Coxe (N. J.), 460.

<sup>4</sup> Jackman v. Arlington Mills, 137 Mass. 277; *post*, § 274.

<sup>5</sup> Mason v. Hill, 5 B. & Ad. 1; 3 B. & Ad. 304; 2 Nev. & Man. 747; Embrey v. Owen, 6 Exch. 153; Wood v. Waud, 3 Exch. 748; Bealey v. Shaw, 6 East, 208; Aldred's Case, 9 Co.

59; Tenant v. Goldwin, 2 Ld. Raym.

1089; Salk. 21, 360; 6 Mod. 311; Holt, 500; Stonehewer v. Farrar, 6 Q. B. 730; Lingwood v. Stonemarket Co., L. R. 1 Eq. 77; Buccleuch v. Cowan,

2 App. Cas. 344; Merrifield v. Lombard, 13 Allen, 16; Woodward v.

Worcester, 121 Mass. 245; Dwight Printing Co. v. Boston, 122 Mass. 583;

McGenness v. Adriatic Mills, 116

Mass. 177; Richmond Manuf. Co. v.

Atlantic De Laine Co., 10 R. L. 106;

Lewis v. Stein, 16 Ala. 214; O'Riley

v. McChesney, 3 Lans. 278; 49 N. Y.



courts to be actionable; as to set up cattle-yards, hog-pens, or lime-pits for calf and sheep skins so near the water as to pollute it;<sup>1</sup> discharging blood from a slaughter-house into the stream;<sup>2</sup> erecting a cess-pool, placing manure, or oil,<sup>3</sup> or permitting gas to escape, so near a well, spring, or stream, as to contaminate it;<sup>4</sup> the casting, upon one's own land, of dirt and foul water or substances which reach the stream by percolation;<sup>5</sup> the letting off of water made noxious by precipitation of minerals;<sup>6</sup> or dye wares, or liquors, or madder, indigo, or potash,<sup>7</sup> or sulphuric<sup>8</sup> or muriatic<sup>9</sup> acid; or vitriol, whereby the boilers and machinery of a lower proprietor are corroded;<sup>10</sup> discharging heated water into a stream injuriously,<sup>11</sup>

672; *Gladfelter v. Walker*, 40 Ind. 1; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Potter v. Froment*, 47 Cal. 165; *Sanderson v. Pennsylvania Coal Co.*, 86 Penn. St. 401; 102 Penn. St. 370; *Mitchell v. Barry*, 26 Q. B. (Can.) 416. An allegation in an action for polluting a stream that "said river flows partly around and partly through plaintiff's land aforesaid," sufficiently shows that he is a riparian proprietor thereon. *Greene v. Nunnemacher*, 36 Wis. 50.

<sup>1</sup> Year Book, Hen. II. b. 6; *Moore v. Webb*, 1 C. B. N. s. 673; *Coulson & Forbes on Waters*, 170; *Greene v. Nunnemacher*, 36 Wis. 50; *Hazeltine v. Case*, 46 Wis. 391; *Smith v. McConathy*, 11 Mo. 517; *Baltimore v. Warren Manuf. Co.*, 59 Md. 96.

<sup>2</sup> *Attorney General v. Stewart*, 20 N. J. Eq. 415; *Babcock v. New Jersey Stock Yard Co.*, id. 296; *Wood-year v. Schaefer*, 57 Md. 1.

<sup>3</sup> *Kinnaird v. Standard Oil Co. (Ky.)* 12 S. W. 937.

<sup>4</sup> *Norton v. Scholefield*, 9 M. & W. 665; *Womersley v. Church*, 17 L. T. N. s. 190; *Millington v. Griffiths*, 30 id. 65; *Hipkins v. Birmingham Gaslight Co.*, 6 H. & N. 250; 5 H. & N. 74; *Sherman v. Fall River Iron Works*, 5 Allen, 213; 2 Allen, 524;

*Ball v. Nye*, 99 Mass. 582; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Ottawa Gaslight Co. v. Graham*, 35 Ill. 346; *Woodward v. Aborn*, 35 Maine, 271; *Carhart v. Auburn Gaslight Co.*, 22 Barb. 297; *Maywood v. Logan*, 78 Mich. 135; *Tate v. Parrish*, 7 Mon. (Ky.) 325; *post*, § 288; *Pensacola Gas Co. v. Pebley*, 25 Fla. 381.

<sup>5</sup> *Hodgkinson v. Ennor*, 4 B. & S. 229, 240; *Carhart v. Auburn Gaslight Co.*, 22 Barb. 297; *Ball v. Nye*, 99 Mass. 582.

<sup>6</sup> *Hodgkinson v. Ennor*, 4 B. & S. 229; *Wright v. Williams*, 1 M. & W. 77; *Lincoln v. Taunton Copper Manuf. Co.*, 9 Allen, 181.

<sup>7</sup> *Wood v. Sutcliffe*, 16 Jur. N. s. 75. See 18 Journ. of Jur. 429; 21 id. 185.

<sup>8</sup> *Pennington v. Brinsop*, 5 Ch. D. 769.

<sup>9</sup> *Stockport Waterworks Co. v. Potter*, 7 H. & N. 160. So of the discharge of polluting matters which become injurious to health by combination in the watercourse or sewer. *St. Helens Chemical Co. v. St. Helens*, 1 Ex. D. 196.

<sup>10</sup> *Merrifield v. Lombard*, 13 Allen, 16.

<sup>11</sup> *Mason v. Hill*, 3 B. & Ad. 304; *Wood v. Waud*, 8 Exch. 748; *Tipping v. Eckersley*, 2 K. & J. 264.

or sewage;<sup>1</sup> or rendering the water unfit for domestic, culinary,<sup>2</sup> or mining<sup>3</sup> purposes, or for cattle to drink of,<sup>4</sup> or fish to live in,<sup>5</sup> or for manufacturing purposes.<sup>6</sup> If the pollution affects the public, as by the destruction of fish in a public river,<sup>7</sup> or by placing the carcass of a dead animal in a pond or river,<sup>8</sup> or urinating in a spring near a highway,<sup>9</sup> from which persons in the vicinity and travelers upon the highway are accustomed to drink, it is the subject of a public prosecution.<sup>10</sup> If a business is so conducted as not only to foul adjoining streams but also to dangerously taint the atmosphere passing over adjacent highways and the entire neighborhood, a suit therefor by one neighboring proprietor is not an action to abate a private nuisance, but a private action to abate a public nuisance.<sup>11</sup> A statute which prohibits the pollution of a

<sup>1</sup> *Attorney General v. Cockermouth*, L. R. 18 Eq. 172; *Attorney General v. Colney Hatch*, L. R. 4 Ch. 146; *Attorney General v. Leeds*, L. R. 5 Ch. 533; *Attorney General v. Birmingham*, 4 K. & J. 528; *Goldsmid v. Tunbridge Wells Commissioners*, L. R. 1 Ch. 349; *Attorney General v. Kingston*, 13 W. R. 888; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42; *Attorney General v. Hackney Local Board*, L. R. 20 Eq. 626; *Poulsum v. Thirst*, L. R. 2 C. P. 449; *Columbus v. Hydraulic Woollen Mills Co.*, 33 Ind. 435; *Jacksonville v. Lambert*, 62 Ill. 519. A city is not liable for depreciation in the rental value of property caused by the bad smells of a sewer in process of construction, which is not kept open for an unreasonable time. *Arn v. City of Kansas*, 14 Fed. Rep. 236.

<sup>2</sup> *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349; *Howell v. McCoy*, 3 Rawle, 256; *Barton v. Union Cattle Co. (Neb.)* 44 N. W. 454.

<sup>3</sup> *Satterfield v. Rowan*, 83 Ga. 187.

<sup>4</sup> *Attorney General v. Birmingham*, 4 Kay & J. 528; *Manchester Railway v. Worksop*, 23 Beav. 198; *Attorney General v. Luton*, 2 Jur. N. S. 181;

*Oldaker v. Hunt*, 6 De G. M. & G. 376; *Dwight Printing Co. v. Boston*, 122 Mass. 583; *Moore v. Webb*, 1 C. B. N. S. 673; *Sanderson v. Pennsylvania Coal Co.*, 86 Penn. St. 401.

<sup>5</sup> *Ibid.*; *Bidder v. Croydon*, 6 L. T. N. S. 778; *Aldred's Case*, 9 Rep. 59a; *Seaman v. Lee*, 10 Hun, 607.

<sup>6</sup> *Clowes v. Staffordshire Potteries Co.*, L. R. 8 Ch. 125; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Lingwood v. Stowmarket Co.*, L. R. 1 Eq. 77; *Tipping v. Eckersley*, 2 K. & J. 264; *Wood v. Sutcliffe*, 2 Sim. N. S. 163.

<sup>7</sup> *Rex v. Medley*, 6 C. & P. 292; *Watson v. Toronto Gas Light Co.*, 4 Q. B. (Can.) 158.

<sup>8</sup> *State v. Wahl*, 85 Kansas, 608.

<sup>9</sup> As to cutting off the shade from a spring, see *Lucas v. Bishop*, 15 Lea, 165; 52 Am. Rep. 264, and note. As to the liability of municipal corporations for impure wells, see *Danaher v. Brooklyn*, 119 N. Y. 241.

<sup>10</sup> *State v. Taylor*, 29 Ind. 517; *Board of Health v. Casey*, 3 N. Y. S. 399.

<sup>11</sup> *Meiners v. Frederick Miller Brewing Co. (Wis.)* 47 N. W. 485; *Montezuma v. Minor*, 73 Ga. 484.

supplying stream is not complied with by polluting and purifying its waters before they reach the storage reservoir.<sup>1</sup> A person cannot justify as agent for another in maintaining a public nuisance; and the fact that persons have come to live within the scope of a nuisance after its creation does not prevent their complaining of it.<sup>2</sup> If the plaintiff has himself contributed to the pollution, he cannot recover therefor against an upper proprietor.<sup>3</sup>

§ 220. *Same.*—Proprietors upon streams may cast sewage and waste material therein, if they do not thereby cause material injury to public or private rights.<sup>4</sup> The natural right of one proprietor to have the stream descend to him in its pure state must yield in a reasonable degree to the equal right of the upper proprietors, whose fertilization, cultivation or occupation of their own lands, and whose use of the stream for mill and manufacturing purposes, for irrigation, and domestic purposes, will tend to make the water more or less impure, especially when the population becomes dense.<sup>5</sup> So, it is of public importance that the proprietors of useful manufactories should be held responsible only for appreciable injury caused by their works and not for slight inconveniences or occasional annoyances,<sup>6</sup> or even some degree of interference with irrigation or agriculture.<sup>7</sup> When an injunction is sought to stop large and expensive works which cause a stream to be polluted, it must clearly appear that the legal remedy is inadequate, and that the plaintiff will suffer irreparable injury from the continuance of the pollution. An injunction will be

<sup>1</sup> *State v. Wheeler*, 44 N. J. L. 88.

<sup>2</sup> *Bliss v. Hall*, 4 Bing. N. C. 183; *Reg. v. Brewster*, 8 C. P. (Can.) 208; *Platte & Denver Ditch Co. v. Anderson*, 8 Col. 131.

<sup>3</sup> *Ferguson v. Firménich Manuf. Co.*, 77 Iowa, 576; *Topeka W. S. Co. v. Potwin*, 43 Kansas, 404.

<sup>4</sup> *Haskell v. New Bedford*, 108 Mass. 208, 214; *Hayes v. Waldron*, 44 N. H. 580; *Smith v. Barnham*, 1 Ex. D. 419; *Prentice v. Geiger*, 74 N. Y. 841; 9 Hun. 850; *O'Riley v. McChesney*, 49 N. Y. 672; 3 Lans. 278; *Thomas v.*

*Brackney*, 17 Barb. 654; *Palmer v. Mulligan*, 3 Caines, 307; *Honsee v. Hammond*, 39 Barb. 89; *Ridge v. Midland Railway*, 53 J. P. 55.

<sup>5</sup> *Merrifield v. Worcester*, 110 Mass. 221, 222; *Cator v. Lewisham Board of Works*, 5 B. & S. 143; *Sanderson v. Pennsylvania Coal Co.*, 86 Penn. St. 401; 113 id. 126; 56 Am. Rep. 89, note.

<sup>6</sup> *Sanderson v. Pennsylvania Coal Co.*, 86 Penn. St. 401; 102 id. 370.

<sup>7</sup> *People v. Rogers*, 12 Col. 278.

refused if the plaintiff's premises are several miles below those of the defendant, and the water of the stream in the plaintiff's vicinity is not materially affected;<sup>1</sup> or if, the defendant having ceased to discharge the refuse-matter for nearly a year, the increase of the nuisance, if any, has not been through his acts.<sup>2</sup> The right of each riparian owner to deposit in the stream is a question of reasonable use, as in the case of the detention, obstruction or diversion of the water.<sup>3</sup>

"In regard to many uses of the water in streams," says Redfield, C. J.,<sup>4</sup> "it has been so long settled by common consent, or is so obvious in itself, that it is determinable as matter of law. Such are the uses for irrigation, for propelling machinery, and for watering cattle, and some others. And in regard to some debris or waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and in some instances the indispensable necessity, would seem sufficiently to decide such cases. Among these may be named the infusion of soap dyes, and other materials used in manufacturing, into the streams by which the machinery is propelled. The deposit of saw-dust,<sup>5</sup> to some extent, is nearly indispensable in the running of saw-mills, and most other machinery used in the manufacture of wood and propelled by water power. The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below." A riparian owner is liable when he permits the drift-stuff from his mill to be carried, by the ordinary force of the current, or by freshets which are likely to occur in the stream, upon the land of a lower proprietor to his injury;<sup>6</sup> when he injures another

<sup>1</sup> *New Boston Coal Co. v. Pottsville Water Co.*, 54 Penn. St. 164; *Richard's Appeal*, 57 Penn. St. 105.

<sup>2</sup> *Swan v. Adams*, 28 Ch. (Can.) 220.

<sup>3</sup> *Red River Roller Mills v. Wright*, 30 Minn. 249.

<sup>4</sup> *Snow v. Parsons*, 28 Vt. 459, 461; *Jacobs v. Allard*, 42 Vt. 403; *Canfield v. Andrew*, 54 Vt. 1; *Prentice v. Geiger*, 74 N. Y. 341.

<sup>5</sup> See also *Green v. Gilbert*, 60 N. H. 144; *Lockwood Co. v. Lawrence*, 77

*Maine*, 297; *Waterman v. Buck*, 58 Vt. 519.

<sup>6</sup> *Crosley v. Bessey*, 49 Maine, 539; *Veazie v. Dwinel*, 50 Maine, 479; *Gerish v. Brown*, 51 Maine, 256; *Washburn v. Gilman*, 64 Maine, 163; *Winchester v. Osborne*, 61 N. Y. 555; 62 Barb. 337; *Bushnell v. Proprietors*, 81 Conn. 150; *Robinson v. Black Diamond Coal Co.*, 50 Cal. 460. He is not, however, liable for polluting material washed off his land into a canal

by an overflow of the water caused by his allowing dirt to accumulate in the channel of the stream,<sup>1</sup> or in the pool of his dam;<sup>2</sup> or when his operations cause refuse or mud to accumulate to an unreasonable amount in a lower dam<sup>3</sup> or mill-race,<sup>4</sup> or to obstruct the plaintiff's irrigating ditches.<sup>5</sup> When the property of others is thus encumbered, the measure of damages is the cost of removing the deposit from the premises, if less than the depreciation in value of the property, and, if greater, then the difference in the value of the property.<sup>6</sup> Where water is polluted to the injury of the plaintiff's brewery, evidence of the difference in sales of beer before and after the maintenance of the nuisance has been held competent;<sup>7</sup> but interest, as damages, will be allowed on such difference of values only when a sale is actually defeated.<sup>8</sup> The plaintiff cannot recover for such consequential injuries as might have been avoided by timely and reasonable action on his own part;<sup>9</sup> but the right to damages is not affected by the fact that it is more economical and convenient for the defendant

by unusual and unexpected floods. *People v. Utica Cement Co.*, 22 Ill. App. 159.

<sup>1</sup> *Carlyon v. Lovering*, 1 H. & N. 784.

<sup>2</sup> *Schuylkill Navigation Co. v. McDonough*, 33 Penn. St. 73; *Fehr v. Schuylkill Navigation Co.*, 69 Penn. St. 161.

<sup>3</sup> *Murgatroyd v. Robinson*, 7 El. & Bk. 391; *Brooke v. Winter*, 39 Md. 505. A reversioner has a right of action for this cause. *Beavers v. Trimmer*, 25 N. J. L. 97.

<sup>4</sup> *Panton v. Norton*, 18 Ill. 496; *Jones v. Crow*, 32 Penn. St. 398; *Lawson v. Price*, 45 Md. 123.

<sup>5</sup> *Bell v. Shultz*, 18 Cal. 449; *Levaroni v. Miller*, 34 Cal. 231.

<sup>6</sup> *Seely v. Alden*, 61 Penn. St. 302; *Michel v. Monroe County Supervisors*, 39 Hun, 47; *Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433; *Easterbrook v. Erie R. Co.*, 51 Barb. 94.

<sup>7</sup> *Cunningham v. Stein*, 109 Ill. 375.

<sup>8</sup> *Moore v. Langdon*, 6 Mackey, 6.

<sup>9</sup> *Lawson v. Price*, 45 Md. 123. If land is bought on a stream with the sole purpose of compelling its purchase by the owner of an expensive quartz mill above, the operations of which necessarily deposit large quantities of sand upon this land, the plaintiff's motive may be inquired into upon a bill for an injunction, and he may be left to his remedy at law. *Edwards v. Allouez Mining Co.*, 38 Mich. 46; *Jenkins v. Cooper*, 50 Ala. 419; *Bassett v. Salisbury Manuf. Co.*, 47 N. H. 426. A corporation formed for specific purposes cannot purchase or lease land overflowed, which is not required for its legitimate business, for the sole purpose of instituting a suit for the flooding. *Occum Co. v. Sprague Manuf. Co.*, 34 Conn. 529, 541. But, in general, the defendant, in an action for a trespass or nuisance, has no right to inquire into the good faith of the plaintiff's possession. *Eberhard v. Tuolumne Water Co.*, 4 Cal. 303.

to cast rubbish into the stream than to dispose of it otherwise.<sup>1</sup> The fact that the defendant's act is supported by a uniform and established usage upon the same or similar streams is competent but not conclusive evidence upon the question of reasonable use, inasmuch as it affords some proof of the tacit consent of all parties interested to the general convenience and necessity of such use.<sup>2</sup> The vendor of a riparian estate cannot, in derogation of his own grant, continue to pollute the stream in front of the land sold;<sup>3</sup> and a person who is in actual occupation and possession of the land on a stream, under an executory contract of purchase, has the same right as a riparian proprietor to maintain an action for injuries to his interest caused by fouling.<sup>4</sup> Where the defendant, in working a coal mine, caused a deposit of coal dust, ashes, sand, and other debris to be carried down by the water of a natural stream and deposited upon the plaintiff's land, he was held liable for the damage so caused, although the stream overflowed the plaintiff's land in its natural course.<sup>5</sup> In a suit for corrupting a private watercourse the fact that the defendant's tortious act increased the supply of water and was otherwise of advantage to the plaintiff is immaterial, and such benefits cannot be set up by way of set-off or recoupment.<sup>6</sup>

§ 221. Same.—In *Pennington v. Brinsop Hall Coal Co.*<sup>7</sup> the plaintiffs claimed both as riparian proprietors and as having a prescriptive right to use the water of the stream for the purposes of their mill, and their bill for an injunction to restrain the pollution of the stream by the defendants was maintained without proof of actual damage. It was held that rights to running water and to light and air are not analogous, and

<sup>1</sup> *Ante*, §§ 209, 211; *Canfield v. Andrew*, 54 Vt. 1.

<sup>2</sup> *Ibid.*; *Red River Roller Mills v. Wright*, 30 Minn. 249; *Pennsylvania Coal Co. v. Sanderson*, 94 Penn. St. 302; *Hayes v. Waldron*, 44 N. H. 580; *Prentice v. Geiger*, 74 N. Y. 346; *Snow v. Parsons*, 28 Vt. 459; *Gould v. Boston Duck Co.*, 13 Gray, 442.

<sup>3</sup> *Crossley v. Lightowler*, L. R. 3 Eq. 279; L. R. 2 Ch. 478.

<sup>4</sup> *Honsee v. Hammond*, 39 Barb. 89.

<sup>5</sup> *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412; *Columbus Coal & Iron Co. v. Tucker* (Ohio), 26 N. E. 630.

<sup>6</sup> *Sanderson v. Penn. Coal Co.*, 102 Penn. St. 370; 113 id. 126; *ante*, § 213.

<sup>7</sup> 5 Ch. D. 769; 46 L. J. Ch. 773; *Elmhirst v. Spencer*, 2 Mac. & G. 45; *Green v. Gilbert*, 60 N. H. 144.



that damages should not be awarded in lieu of the remedy sought. "The rights of the plaintiffs as riparian owners," said Fry, J., "are not limited to their present modes of enjoyment." "It is impossible to foresee what mode of enjoyment the plaintiffs, or their successors in title, may resort to, or the extent of damages which would be a compensation for the injury which the continued pollution might cause to such new modes of enjoyment." Respecting the difference between injury and damage, the learned judge further said: "The pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions."

§ 222. **Same — Joinder of wrong-doers.**— If one of two tenants in common of a mill, the rubbish from which obstructs the mills below, does not participate in the wrong, he is not liable for the act of his co-tenant.<sup>1</sup> In general, where two or more persons act independently in producing an injury, they are not jointly liable for the combined results of their acts,<sup>2</sup> but the riparian owner may prevent each from discharging his contribution to that which becomes in the aggregate a nuisance.<sup>3</sup> Where suit was brought for damages to a dam filled by deposits of coal dirt from different mines on the stream, some of which were worked by the defendants and their tenants and some by persons not connected with the defendants, the latter were held not liable for the whole damage caused by the deposits, or for the acts of their tenants so far as these were done without their sanction.<sup>4</sup> So, where the plaintiff's borders

<sup>1</sup> *Simpson v. Seavey*, 8 Maine, 188.

<sup>2</sup> *Little Schuylkill Navigation Co. v. Richards*, 57 Penn. St. 142; *Wheeler v. Worcester*, 10 Allen, 591; *Blaisdell v. Stephens*, 14 Nev. 17; *Southwestern R. Co. v. Lee*, 47 Ga. 380; *Long v. Swindell*, 77 N. C. 176; *Richardson v. Emerson*, 8 Wis. 319.

<sup>3</sup> *Nixon v. Tynemouth Rural S. Authority*, 52 J. P. 504; *Blair v. Deakin*, id. 327; 57 L. T. N. S. 522; *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Martin-*

*owsky v. Hannibal*, 35 Mo. App. 70.

The same is true of diversion. *Evans v. Ross* (Cal.), 8 Pac. 88; *Heilbron v. Canal Co.*, 76 Cal. 11; *Gould v. Stafford*, 77 Cal. 66.

<sup>4</sup> *Little Schuylkill Navigation Co. v. Richards*, 57 Penn. St. 142; *Seely v. Alden*, 61 Penn. St. 302; *Little Schuylkill Navigation Co. v. French*, 81 Penn. St. (Pt. 2) 366; *Sanderson v. Pennsylvania Coal Co.*, 86 Penn. St. 401, 408; 102 id. 370; *Bard v. Yohn*, 26 Penn.

left his boarding house in consequence of the corrupt and offensive condition of the adjoining stream, caused by the sewage discharged into it from a large number of hotels and other boarding houses before it reached the plaintiff's premises, it was held that each proprietor causing the pollution was liable only to the extent of the wrong committed by him.<sup>1</sup> Miller, J., said: "The right of action arises from the discharge into the stream, and the nuisance is only a consequence of the act. The liability commences with the act of the defendant upon his own premises, and this act was separate and independent of and without any regard to the act of others. The defendant's act, being several when it was committed, cannot be made joint because of the consequences which followed in connection with others who had done the same or a similar act." The fact, however, that the stream is fouled by others, even by a large number of persons, is not a defense to a suit to restrain the fouling by one,<sup>2</sup> and if at the time when the defendant began to pollute, the stream was already so much fouled by others as to be unfit for the plaintiff's use, the action would still be maintainable.<sup>3</sup> These rules are equally applicable when land is *flowed* by the acts of several parties contributing together, though not in combination or concert. It is not a defense to an action against one of them that all are not joined as defendants, and the fact that the independent trespasses of others also produced injury to the plaintiff can be considered only upon the question of damages.<sup>4</sup> An action for causing the waters of a lake to overflow the plaintiff's land by the

St. 482; O'Riley v. McChesney, 8 Lans. 278; 49 N. Y. 672; Hillman v. Newington, 57 Cal. 56.

<sup>1</sup> Chipman v. Palmer, 77 N. Y. 51; Sellick v. Hall, 47 Conn. 260.

<sup>2</sup> Crossley v. Lightowler, L. R. 2 Ch. 482; L. R. 3 Eq. 279; Attorney General v. Leeds Corporation, L. R. 5 Ch. 583; Woodyear v. Schaefer, 57 Md. 1; Hill v. Smith, 32 Cal. 166. So of fouling a well. Sherman v. Fall River Iron Works, 5 Allen, 213.

<sup>3</sup> Ibid.; Tipping v. St. Helen's Smelting Co., 11 H. L. Cas. 642; L. R. 1 Ch. 66; 4 B. & S. 608.

<sup>4</sup> Pumpelly v. Green Bay Co., 13 Wall. 166; Arimond v. Green Bay Canal Co., 85 Wis. 41; Jones v. United States, 48 Wis. 385; Folsom v. Apple River Co., 41 Wis. 602; Richardson v. Kier, 34 Cal. 63; Hooksett v. Amoskeag Manuf. Co., 44 N. H. 105; Trenton Board of Health v. Hutchinson, 39 N. J. Eq. 218, 569; Chicago R. Co. v. Glenney, 118 Ill. 487; 28 Ill. App. 364. So of diversion. Heilbron v. King's River Canal Co., 76 Cal. 11.

maintenance of a dam across one branch of the outlet of the lake lies, although another and higher dam was subsequently erected across the other branch of the outlet by a third person acting separately, and neither dam of itself would cause the flowage.<sup>1</sup> In *Lull v. Fox Improvement Co.*,<sup>2</sup> in Wisconsin, it was held that each of the owners of different dams is liable for the injury occasioned by his own dam, and that the several causes of action cannot be joined in the same suit. The rule which prevents a recovery by one tort-feasor against another, where the negligence or legal fault of both contributes to the injury, does not apply to the obstruction of a stream, and the fact that a mill-owner obstructs the flow of water to his own mill does not prevent his recovering damages from those who cause an additional obstruction.<sup>3</sup> In *Lockwood Co. v. Lawrence*,<sup>4</sup> it was held that the claim to discharge waste and debris from different mills into a stream constitutes one common interest, though not a joint right, and, in equity, forms but one cause for a suit, the bill in which, to restrain the nuisance, may join all the mill-owners.

§ 223. **Same — Remedies.**— An action for damages may be maintained by a riparian proprietor for the pollution of a stream; and a perpetual injunction may be granted to restrain the nuisance, if it is of a continuous nature, even when the

<sup>1</sup> *Arimond v. Green Bay Canal Co.*, 35 Wis. 41; 31 Wis. 316.

<sup>2</sup> 19 Wis. 100. See *Wheeler v. Worcester*, 10 Allen, 591; *Miller v. Highland Ditch Co.* (Cal.) 25 Pac. 550; *Wright v. Cooper*, 1 Tyler (Vt.), 425; 2 Thompson on Negligence, 1088. In an action to abate, as a nuisance, a dam which overflows the plaintiff's land, brought against the person who constructed it, the grantees of the right to use the water are not necessary defendants. *Newell v. Smith*, 26 Wis. 582. The owner of a dam exposes himself to as many suits as there are parties whose rights are injuriously affected by his wrongful acts. *Toothaker v. Winslow*, 61 Maine, 123, 133.

<sup>3</sup> *Clarke v. French*, 122 Mass. 419; *Jackman v. Arlington Mills*, 187 Mass. 277; *Brown v. Dean*, 123 Mass. 254; *Williamson v. Yingling*, 80 Ind. 879; s. c. 93 Ind. 42; *Davis v. Munro*, 66 Mich. 485; *ante*, § 218.

<sup>4</sup> 77 Maine, 297. As to joinder of plaintiffs, see *Foreman v. Boyle* (Cal.), 20 Pac. 94; *Churchill v. Lauer*, 84 Cal. 283; *Sullivan v. Phillips*, 110 Ind. 320. In *Austin v. Snyder*, 21 Q. B. (Can.) 299, held that uncertainty as to the amount of defendant's liability, in an action for an interference with a water privilege, formed no ground for disturbing a verdict for \$40, it being impossible to ascertain how much of the obstruction was caused by him and how much by others.

plaintiff could only recover nominal damages at law, because of the inconvenience of repeated and successive actions, and the danger of the acquisition of an adverse right to pollute by the continuance of the act for twenty years.<sup>1</sup> In order to restrain by a *quia timet* action an apprehended injury from fouling, the plaintiff must prove imminent danger of a substantial kind or that the apprehended injury will be irreparable, if it does occur.<sup>2</sup> The court will not, in general, award damages in lieu of an injunction,<sup>3</sup> and if it is established that the mischief complained of is a special injury to a private right, even though it may also amount to a public nuisance,<sup>4</sup> the plaintiff is entitled to an injunction at once, whatever inconvenience or expense it may cause to the defendant.<sup>5</sup> Where, however, the difficulty of removing the nuisance is great, the court will suspend the injunction for a time to render its removal possible.<sup>6</sup> In granting an injunction to restrain pollution by sewage matter, it is the practice in England to grant

<sup>1</sup> *Clowes v. Staffordshire Water Co.*, L. R. 8 Ch. 125, 148; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Swindon Water Co. v. Wilts Canal*, L. R. 7 H. L. 705; *Goldsmith v. Tunbridge Wells*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Crossley v. Lightowler*, L. R. 2 Ch. 478; L. R. 3 Eq. 279; *Harrop v. Hirst*, L. R. 4 Ex. 43; *Attorney General v. Birmingham*, 4 Kay & J. 528; *Nuneaton Local Board v. General Sewage Co.*, L. R. 20 Eq. 127; *Attorney General v. Gee*, L. R. 10 Eq. 131; *Coulson & Forbes on Waters*, 157; *Merrifield v. Lombard*, 13 Allen, 18; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Lewis v. Stein*, 16 Ala. 214; *Reid v. Atlanta*, 73 Ga. 523; *New Boston Coal Co. v. Pottsville Water Co.*, 54 Penn. St. 164. The right to an injunction at suit of a riparian owner is not taken away by a statute which authorizes a state board of health, upon the application of a city or town, to protect water supplies from pollution. *Harris v. Mackintosh*, 133 Mass. 228. See *Porter v. Newton*,

*id.* 56; *Brookline v. Mackintosh*, *id.* 215; *Martin v. Gleason*, 139 Mass. 183.

<sup>2</sup> *Fletcher v. Bealey*, 28 Ch. D. 688.

<sup>3</sup> *Clowes v. Staffordshire Potteries Waterworks Co.*, L. R. 8 Ch. 125; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Imperial Gas Co. v. Broadbent*, 7 H. L. 612; *Kerr on Injunctions* (4th ed.), 44; *Aynsley v. Glover*, L. R. 18 Eq. 544; L. R. 10 Ch. 283; *Dent v. Auction Mart*, L. R. 2 Eq. 283; *Leech v. Schweder*, L. R. 9 Ch. 463.

<sup>4</sup> *Haskell v. New Bedford*, 108 Mass. 216; *Reg. v. Bradford Navigation Co.*, 34 L. J. N. S. (Q. B.) 191.

<sup>5</sup> *Attorney General v. Birmingham*, 4 Kay & J. 520; *Attorney General v. Kingston on Thames*, 34 L. J. Ch. N. S. 481; *Butterfoss v. State*, 40 N. J. Eq. 325.

<sup>6</sup> *Ibid.*; *Spiker v. Banbury*, L. R. 1 Eq. 42; *Attorney General v. Sheffield*, 3 De Gex, M. & G. 304; *Attorney General v. Leeds Corporation*, L. R. 5 Ch. 583; *Attorney General v. Hackney*, L. R. 20 Eq. 631.

an immediate injunction restraining any new communications with the stream, and to suspend the operation of the order for a time to enable the defendants to comply with the order by altering their works.<sup>1</sup> If the injury is caused by the acts of a city in discharging its sewage unlawfully, due regard will be had to the public interests, to existing conditions, and the injury which must ensue if the plaintiff's rights are strictly enforced without time to make other provision for the public needs.<sup>2</sup> An injunction in such cases will not be granted except upon notice and hearing,<sup>3</sup> or upon doubtful evidence.<sup>4</sup> When conditions are imposed upon a public body for the public benefit, it is no excuse for a breach of such conditions that their observance is not necessary for the protection of the public. If a local board makes an outfall beyond their district, and thereby pours noxious matter into a stream, they cannot excuse themselves on the ground that no damage is caused thereby.<sup>5</sup> Where acts of Parliament empowered a water-works company to take water from a stream, and gave them certain rights against mill-owners on the stream with respect to the quantity of water to be taken, but saved all other rights, the company was held to have no power to foul the water so as to interfere with the rights of mill-owners, and an injunction was granted to restrain the pollution.<sup>6</sup>

§ 224. **Non-riparian owners.**—A company which is authorized by the legislature to make a lock navigation in a public

<sup>1</sup> *Ibid.*; *Attorney General v. Colney Hatch*, L. R. 4 Ch. 146; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. 769; *Attorney General v. Halifax*, 29 L. J. Ch. 129; *Goldsmith v. Tunbridge Wells*, L. R. 1 Ch. 163; L. R. 1 Eq. 349; *Attorney General v. Richmond*, L. R. 2 Eq. 306; *Attorney General v. Acton Local Board*, 22 Ch. D. 221; *Charles v. Finchley Local Board*, 23 Ch. D. 767; *Glossop v. Heston Local Board*, 12 Ch. D. 102.

<sup>2</sup> *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71; *Lillywhite v. Trimmer*, 36 L. J. Ch. N. s. 525; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

<sup>3</sup> *Society v. Butler*, 12 N. J. Eq. 498, 264.

<sup>4</sup> *Newark Aqueduct Board v. Passaic* (N. J.), 18 Atl. 106; 20 *id.* 54; *Morgan's Appeal*, 25 W. N. C. (Penn.) 532.

<sup>5</sup> *Attorney General v. Cockermouth Local Board*, L. R. 18 Eq. 172; *Attorney General v. Hackney Local Board*, L. R. 20 Eq. 626; *Hooker v. Rochester*, 37 Hun, 181.

<sup>6</sup> *Clowes v. Staffordshire Waterworks Co.*, L. R. 8 Ch. 125. See *Lea Conservancy Board v. Hartford*, 1 C. & E. 299.

stream, has not the privilege of a riparian owner, and has no right to swell the water at all beyond what it derives from its act of incorporation.<sup>1</sup> So a person who has not yet acquired the fee of riparian land, but has a contract for the purchase thereof, cannot claim the riparian rights connected with such land.<sup>2</sup> The rights of a riparian proprietor with respect to the stream appear not to be affected by rights which non-riparian proprietors may have acquired to use the water by grant or license from other riparian owners. In *Whaley v. Lang*,<sup>3</sup> and *Crossley v. Lightowler*,<sup>4</sup> a non-riparian proprietor, having a right to take water from a stream, was held not to be entitled to maintain an action for its pollution. In *Stockport Waterworks Co. v. Potter*,<sup>5</sup> a riparian proprietor granted to a water company the right to take water from a river for supplying Stockport with water, and the action was brought by the company for polluting such water. The majority of the court held that a riparian proprietor's rights with respect to the water depend upon his possession of the land on the stream, and that a conveyance by him of land not abutting on the stream which affects to grant water rights is valid against the grantor, but does not enable the grantee to sue a third party for an interruption of his rights. Bramwell, B., dissented upon the ground that a man having property may grant to others estates in and enjoyment of it. If the owner of land which does not abut on a river takes water from the river under a riparian owner's license, and, after using it for cooling certain apparatus, returns it to the river unpolluted and undiminished, neither he nor his licensor will be restrained at the suit of a lower riparian owner.<sup>6</sup> In *Nuttall v. Bracewell*,<sup>7</sup>

<sup>1</sup> *Monongahela Navigation Co. v. Coon*, 6 Penn. St. 379. ritt, L. R. 10 Ex. 59; L. R. 8 Ex. 107; 57 L. T. 241; 19 S. J. 511.

<sup>2</sup> *Smith v. Logan*, 18 Nev. 149.

<sup>3</sup> 3 H. & N. 675; 2 H. & N. 476.

<sup>4</sup> L. R. 2 Ch. 476. In *Hill v. Tupper*, 2 H. & C. 121, it was held that the grantee of an exclusive liberty of putting or using pleasure boats on a canal could not maintain an action in his own name against a stranger who interfered with such exclusive right.

<sup>5</sup> 3 H. & C. 300. See *Holker v. Par-*

<sup>6</sup> *Kensit v. Great Eastern Ry. Co.*, 27 Ch. D. 122; 23 Ch. D. 566; *Ormerod v. Todmorden Joint-Stock Mill Co.*, 11 Q. B. D. 155; 27 S. J. 715.

<sup>7</sup> L. R. 2 Ex. 1. In cases of diversion of water, it is not necessary to show actual damages where there is a clear violation of a right and threatened continuance thereof. *Brown v. Ashley*, 16 Nev. 311; *ante*, § 214.



the plaintiff's mill was situate on riparian land, and was supplied with water by an open goit, made in 1804 under a written agreement with the adjoining proprietor above, Mr. Bagshaw, through which water was diverted from the stream, at a little distance from which the mill was situated, by a weir on Bagshaw's land, which was called Tom Milner's Ing, and was returned to the stream below the mill. The defendant, a higher riparian proprietor, was sued by the plaintiff for diverting water from the stream above the weir, and the action was maintained. Martin, B., said: "It would be competent for Mr. Bagshaw, or his successor in ownership of Tom Milner's Ing, to erect a mill upon it, and take the water from the stream to work it, provided he neither penned back the water upon his neighbor above, nor injuriously affected the volume and flow of the water of the stream to his neighbor below. And the law favors the exercise of such a right; it is at once beneficial to the owner and to the commonwealth. And if this be so, why may not the owners of two adjoining closes agree together for their mutual benefit to take the water through a goit from the close of the one into the close of the other, returning the water to the stream in the close of the latter, and thereby doing no injury to any one. In point of fact, very many goits pass through the land of different land-owners between the place where the water is taken from the stream and the mill where it works the machinery." He was of opinion that although the right to the flow of water in a goit was an easement which could bind the grantor only when created by deed, yet the plaintiff's possession of the goit gave him a right of action against a wrongdoer. Pollock, C. B., and Channell, B., held that the diversion of the stream by means of the goit was lawful, and amounted to a division of the stream into two channels; and that the plaintiff, as a riparian owner on the goit, had all the rights which a riparian owner would have had on a natural stream. In *Bristol Hydraulic Co. v. Boyer*,<sup>1</sup> in Indiana, the plaintiff was a non-riparian proprietor whose land and mills were near to but not upon the Little Elkhart River. The mills were propelled by water taken from that river by means of a dam across it higher up the stream, and conducted through a race from his dam to

<sup>1</sup> 67 Ind. 236.

the mills, and thence by a tail-race back into the river a short distance above its confluence with the St. Joseph River. The defendants' dam, which was across the latter river below the junction of the two streams, backed the water in the plaintiff's tail-race to the obstruction of his mill-wheels. The plaintiff had an easement in the land occupied by his dam, head-race, and tail-race, granted for the purpose of authorizing the diversion and flow of the water, but it did not clearly appear whether he had acquired the right to divert the water from all the riparian owners between his dam and the mouth of his tail-race. The defendants were held liable to the plaintiff. A non-riparian owner's right to running water enables him to restrain an upper proprietor from interfering with such right by using<sup>1</sup> or granting<sup>2</sup> the water for purposes which are not riparian.

§ 225. **Artificial watercourses.**— The right to the water of a river flowing in a natural channel, and the right to water flowing through different estates in an artificial channel, such as a canal, aqueduct, or ditch, do not rest on the same principle. In the former case each successive riparian owner is *prima facie* entitled to the unimpeded flow of the water in its natural course and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership thereof; in the latter, any right to the flow of the water must depend upon some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is brought, or upon some other legal origin.<sup>3</sup> A watercourse, though artificial, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural watercourse prescriptively.<sup>4</sup> When the owners of different parcels of land

<sup>1</sup> Williams v. Wadsworth, 51 Conn. 277.

<sup>2</sup> Heilbron v. Fowler Switch Canal Co., 75 Cal. 426.

<sup>3</sup> Rameshur Pershad Narain Singh v. Koonj Behari Pattuk, 4 App. Cas. 121; Wood v. Waud, 8 Ex. 777; Greatrex v. Hayward, 8 Ex. 298;

Magor v. Chadwick, 11 Ad. & El. 571; Nield v. London Ry. Co., L. R. 10

Ex. 4. See § 161, *ante*; Fox River Flour Co. v. Kelley, 70 Wis. 287.

<sup>4</sup> Sutcliffe v. Booth, 32 L. J. Q. B. 136; Ivimey v. Stacker, L. R. 1 Ch. 396, 409; Nuttall v. Bracewell, L. R. 2 Ex. 1; Miner v. Gilmour, 12 Moo.

conduct water across such parcels in an artificial channel, and do not define their respective interests in the water, they have the same right to its use on their respective lots, as between themselves, as would exist if the artificial watercourse were a natural one.<sup>1</sup> In such case, there is an implied obligation upon each proprietor to repair the structure within his premises, unless that method of repairing is impracticable or unreasonable.<sup>2</sup> A person who diverts a stream through an artificial watercourse, for his own benefit, must construct it in such a manner that it will carry off the water that may flow into it from such floods and rains as happen in the locality.<sup>3</sup> If one properly opens on his own land a covered drain, which it is his duty to close again in order to prevent the water from setting back and overflowing the adjoining land, he is not liable for any damage to his neighbor's land caused by the sudden overflow of the drain, if he uses ordinary care in closing it.<sup>4</sup> If a land-owner employs an independent contractor to construct a drain, he is not liable for the negligence of the latter occurring in his own work in the performance of the contract; but if the thing contracted to be done from its nature creates a nuisance, or if, being improperly done, it creates a nuisance and causes mischief to a third person, the employer is liable.<sup>5</sup> When a riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel to the injury of other proprietors along such channel who have erected works or cultivated their lands with reference to the changed condition of the stream,<sup>6</sup> or to the injury of those

P. C. 131; *Van Breda v. Silberbauer*, L. R. 3 P. C. 84; *French Hoek Commissioners v. Hugo*, 10 App. Cas. 386; *Green v. Carotta*, 72 Cal. 267; *Freeman v. Weeks*, 45 Mich. 335; *Murchie v. Gates*, 78 Maine, 800; *Seibert v. Levan*, 8 Penn. St. 383; *Reading v. Althouse*, 93 Penn. St. 400; *Roberts v. Richards*, 44 L. T. N. S. 271; 50 L. J. Ch. 297; 51 id. 944; *Adams v. Manning*, 48 Conn. 477; 51 Conn. 5; *Peter v. Caswell*, 38 Ohio St. 518; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Powell v. Butler*, 5 Ir. C. L. 309 (C. P.).

<sup>1</sup> *Townsend v. McDonald*, 12 N. Y. 881; 14 Barb. 460.

<sup>2</sup> *Winslow v. Fuhrman*, 25 Ohio St. 639.

<sup>3</sup> *Fletcher v. Smith*, 2 App. Cas. 781; *Railroad Co. v. Carr*, 38 Ohio St. 448.

<sup>4</sup> *Rockwood v. Wilson*, 11 Cush. 221.

<sup>5</sup> *Sturges v. Theological Education Society*, 130 Mass. 414.

<sup>6</sup> *Belknap v. Trimble*, 3 Paige, 577; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Middleton v. Gregorie*, 2 Rich. (S. C.) 638; *post*, § 340.

upon the artificial watercourse who have acquired by long user the right to enjoy the water there flowing.<sup>1</sup> Where an artificial watercourse is made solely to get rid of a nuisance to mines, and to enable their proprietors to get the ores lying within the mineral field drained by it, the flow of the water through that channel is, from the nature of the case, of a temporary character, having its continuance only while the convenience of the mine-owner requires it, and a user of the water by others for twenty years, or a longer period, affords no presumption of a grant of any right to the water in perpetuity.<sup>2</sup> But while no right can thus be acquired by prescription against the originator of an artificial stream of a temporary character, yet, so long as he continues to transmit the water, a prescriptive right to the continuance of the flow may be acquired against those through whose land the water has been accustomed to flow.<sup>3</sup> Waters flowing in the canal of a canal company, which by statute is charged with certain duties and made trustee of the canal for the public, stand upon a different footing from waters flowing naturally and from artificial waters of an ordinary character, with respect to the capacity of other persons to acquire a right in them, and if the company cannot make a grant of the water, none can be presumed against them.<sup>4</sup>

<sup>1</sup> *Shepardson v. Perkins*, 58 N. H. 354. 18 Q. B. 287; *Staffordshire Canal Co. v. Birmingham Canal Co.*, 11 Jur.

<sup>2</sup> *Arkwright v. Gell*, 5 M. & W. 203; *Gaved v. Martyn*, 19 C. B. N. s. 732. N. s. 71. A river does not become a "canal" when its navigation is im-

<sup>3</sup> *Ibid.*; *Greatrex v. Hayward*, 8 Exch. 291. proved by artificial means. *People v. Kankakee River Improvement Co.*,

<sup>4</sup> *Rochdale Canal Co. v. Radcliffe*, 103 Ill. 491.

## CHAPTER VII.

### APPROPRIATION AND RIGHTS ACQUIRED BY PRIORITY.

#### SECTION.

- 226. Effect of prior occupation.
- 227. This right under the mill acts of certain States.
- 228. Appropriations of water rights valid in the Pacific States.
- 229. The extent of the right acquired by priority.
- 230. Such right not dependent upon title to the soil.
- 231. It is fixed by the original appropriation.
- 232. Duty to so keep ditch in repair.
- 233. Purpose of the appropriation.
- 234. Sales of water rights.
- 235, 236. What constitutes an appropriation.
- 237. Change of use.
- 238, 239. Prior right how lost.
- 240. The Act of Congress of July 26, 1866 — Mining customs.

§ 226. **Prior occupation — Effect.**— At common law, the right of every riparian proprietor to the use of the stream is an incident to the ownership of the land bordering upon the stream, and arises *ex jure naturæ*.<sup>1</sup> The right exists whether it is exercised or not, and the riparian proprietor may begin to exercise it when he will.<sup>2</sup> It does not depend upon occupancy, and is not limited by the prior occupation of others not amounting to an adverse enjoyment by prescription;<sup>3</sup> but, the rights of the different proprietors being equal, and each being entitled to the reasonable use of the stream for any lawful purpose, it is wholly immaterial who is first in time. The amount of damages to which one proprietor is entitled for a wrongful interference with his riparian rights may, indeed, vary, according to the use to which he has applied the water, and the expenditure which he has made to render it available. If he has lawfully appropriated the water to a beneficial use, he may sue for an injury done to him in respect to such use; and if he has appropriated the stream to the use of a mill newly erected, he may recover from another proprietor upon

<sup>1</sup> *Ante*, §§ 204–209.

<sup>3</sup> *Ibid*.

<sup>2</sup> *Ibid*.

the stream damages for the injury to his mill occasioned by the wrongful use of the stream, although before the mill was built the wrongdoer might have been liable to nominal damages only.<sup>1</sup> This relates, however, to an unlawful interference with an existing right, and has no bearing upon the question whether the use of the stream complained of is or is not lawful.

§ 227. Same — Under mill acts.— The equal right of all the proprietors to the use of the stream in common, being thus an incident to the ownership of the land, and existing *jure naturæ*, cannot be affected by such priority of occupation as does not amount to an adverse prescriptive right.<sup>2</sup> In Massachusetts and some other States there is an important limitation to the rule that no superior right to the stream is acquired by mere occupancy, and the owner of land who first erects a dam for the purpose of operating a mill upon his own land, has the right to maintain it as against proprietors above and below,<sup>3</sup> although it may set the water back to such a dis-

<sup>1</sup> Ibid.; *Mason v. Hill*, 5 B. & Ad. 1; 3 B. & Ad. 304; *Holker v. Porritt*, L. R. 10 Ex. 59, 62; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769, 773; *Attorney General v. Birmingham*, 4 De Gex & J. 528; *Rutland v. Bowler*, Palmer, 290.

<sup>2</sup> *Mason v. Hill*, 5 B. & Ad. 1; 3 B. & Ad. 304; 2 Nev. & M. 747; *Wright v. Howard*, 1 Sim. & Stu. 190; *Sampson v. Hoddinott*, 1 C. B. N. s. 611; *Cocker v. Cowper*, 5 Tyrw. 103; *Chasemore v. Richards*, 2 H. & N. 181; *Holker v. Porritt*, L. R. 10 Ex. 59; *Platt v. Johnson*, 15 Johns. 218; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Palmer v. Mulligan*, 3 Caines, 397; *Campbell v. Smith*, 3 Hal. (N. J.) 140; *Pillsbury v. Moore*, 4 Maine, 154; *Gould v. Boston Duck Co.*, 18 Gray, 450; *Pugh v. Wheeler*, 2 Dev. & Bat. 50. The earlier authorities are to the contrary effect, upon the theory of the civil law, that flowing water belongs to no one, and that the right to use it depends upon possession. Will-

*iams v. Moreland*, 2 B. & C. 910; *Bealy v. Shaw*, 6 East, 208; *Saunders v. Newman*, 2 B. & Ald. 258; *Cox v. Mathews*, 1 Vent. 187; *Liggins v. Inge*, 7 Bing. 692; *Frankum v. Falmouth*, 6 C. & P. 529.

<sup>3</sup> *Hatch v. Dwight*, 17 Mass. 296; *Cary v. Daniels*, 8 Met. 476; *Whitney v. Eames*, 11 Met. 519; *Gould v. Boston Duck Co.*, 18 Gray, 451; *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 44; *Pratt v. Lamson*, 2 Allen, 288; *Smith v. Agawam Canal Co.*, id. 357; *Hapgood v. Brown*, 102 Mass. 451; *Lowell v. Boston*, 111 Mass. 465; *Wood v. Edes*, 2 Allen, 578. In *Storm v. Manchaug Co.*, 18 Allen, 10, 15, Hoar, J., says that the question when the right secured by prior occupancy begins, has always been determined by the express language of the mill acts. The same rule seems to prevail in Maine and Kentucky. *Lincoln v. Chadbourne*, 56 Maine, 197; *Heath v. Williams*, 25 Maine, 44, 209; *Bailey v. Rust*, 15 Maine, 440; *Tinkham v.*



tance and height as to prevent a proprietor above from having a sufficient fall to carry a mill upon his own land, or preclude any subsequent erection below him.<sup>1</sup> "To the extent," says Bigelow, C. J.,<sup>2</sup> "to which the descent or fall of water in a stream is taken up and occupied by the erection of dams for the purpose of carrying mills, the right of other owners on the same stream, who have not improved their sites for the creation of water-power and the driving of mills, is abridged and taken away. In such case prior occupancy gives priority of title." This limitation seems to be peculiar to a few States only, and it is quite generally held in the other States that the right to use the stream for the creation of a water-power is, as in other cases, merely the right to use it in a reasonable manner and to a reasonable extent without regard to the question of priority.<sup>3</sup> Even in Massachusetts a riparian proprietor has no right unreasonably to divert the water or change the use of it, otherwise than in the above manner, to the injury of other proprietors upon the stream, unless such right has been acquired by grant or prescription;<sup>4</sup> and the right which a

Arnold, 3 Maine, 120; Butman v. Hussey, 12 Maine, 407; Tye v. Catching, 78 Ky. 463.

<sup>1</sup> Cary v. Daniels, 8 Met. 466; Pratt v. Lamson, 2 Allen, 288; Wentworth v. Poor, 38 Maine, 243; Fuller v. Chicopee Manuf. Co., 16 Gray, 44; Lincoln v. Chadbourne, 56 Maine, 197; Gould v. Boston Duck Co., 13 Gray, 451.

<sup>2</sup> Fuller v. Chicopee Manuf. Co., 16 Gray, 43, 44.

<sup>3</sup> Keeney Manuf. Co. v. Union Manuf. Co., 39 Conn. 576, 582; Parker v. Hotchkiss, 25 Conn. 321; King v. Tiffany, 9 Conn. 162; Tucker v. Jewett, 11 Conn. 324; Roath v. Driscoll, 20 Conn. 541; Tyler v. Wilkinson, 4 Mason, 397; Whipple v. Cumberland Manuf. Co., 2 Story, 661; Gilman v. Tilton, 5 N. H. 231; Odiorne v. Lyford, 9 N. H. 502; Cowles v. Kidder, 24 N. H. 378; Hooksett v. Amoskeag Manuf. Co., 44 N. H. 106; Snow v. Parsons, 28 Vt. 463; Gibson v. Fischer, 68 Iowa, 29; Dumont v. Kellogg, 29

Mich. 422; Ryerson v. Brown, 35 Mich. 333; Timm v. Bear, 29 Wis. 254; Stout v. McAdams, 2 Scam. 67; Wilcoxon v. McGee, 12 Ill. 381; Bliss v. Kennedy, 48 Ill. 67; Rudd v. Williams, 43 Ill. 385; Hendrick v. Cook, 4 Ga. 241; Pool v. Lewis, 41 Ga. 162; Beavers v. Trimmer, 25 N. J. L. 97; Hartzall v. Sill, 12 Penn. St. 248; Baldwin v. Calkins, 10 Wend. 167; Platt v. Johnson, 15 Johns. 213; Martin v. Bigelow, 2 Aik. (Vt.) 184; Johns v. Stevens, 3 Vt. 308; Davis v. Fuller, 12 Vt. 178; Pugh v. Wheeler, 2 Dev. & Bat. 50; Hoy v. Sterrett, 2 Watta, 327; McCalmont v. Whitaker, 3 Rawle, 84; Strickler v. Todd, 10 S. & R. 63; Whaler v. Ahl, 29 Penn. St. 98; 66 L. T. 256.

<sup>4</sup> Cowell v. Thayer, 5 Met. 253, 256; Boliver Manuf. Co. v. Neponset Manuf. Co., 16 Pick. 241; Williams v. Nelson, 23 Pick. 141; Elliott v. Fitchburg R. Co., 10 Cush. 191.

mill-owner acquires by prior occupation, "is not so absolute," says Merrick, J.,<sup>1</sup> "as to give him the control of the whole stream, or to deprive other proprietors of the reasonable enjoyment of the privileges to which they are naturally entitled."

§ 228. **Same — Pacific States.**—In California,<sup>2</sup> Colorado,<sup>3</sup> Nevada,<sup>4</sup> and other Pacific States and Territories, the common-law rule upon this subject is modified, owing to the peculiar condition and needs of the settlers and miners upon the public lands; and the right to running water exists without private ownership of the soil, upon the ground of prior location upon the land or prior appropriation of the water. When there is no private ownership of the soil, the rights acquired by such priority are as perfect and absolute as if acquired by prescription or by an express grant from riparian proprietors.<sup>5</sup> "The reasons," says Sanderson, C. J.,<sup>6</sup> "which constitute the

<sup>1</sup> *Smith v. Agawam Canal Co.*, 2 Allen, 355, 357; *Dean v. Colt*, 99 Mass. 486; *Gleason v. Assabet Manuf. Co.*, 101 Mass. 72; *Thurber v. Martin*, 2 Gray, 394.

<sup>2</sup> *Lux v. Haggin*, 69 Cal. 255; *Lake-side Ditch Co. v. Crane*, 80 Cal. 181.

<sup>3</sup> In this State, under its constitution, article 16, section 6, the complaint must show an application of the water to some beneficial use. *Farmers' High Line Canal Co. v. Southworth*, 13 Col. 111.

<sup>4</sup> *Reno Smelting Works v. Stevenson*, 20 Nev. 269; *Terrett v. Mahan*, id. 89.

<sup>5</sup> *Kidd v. Laird*, 15 Cal. 161; *Butte T. M. Co. v. Morgan*, 19 Cal. 609; *Lick v. Madden*, 25 Cal. 209.

<sup>6</sup> *Hill v. Smith*, 27 Cal. 476, 482. In *Atchison v. Peterson*, 20 Wall. 507, 512, Field, J., after referring to the common-law rule by which the different riparian proprietors have an equal right to use the water of the stream, said: "This equality of right among all the proprietors on the same stream would have been incompatible with

any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale, and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages, and regula-

groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called to apply them are changed, and not the rules themselves. The maxim, *sic utere tuo ut alienum non lædas*, upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this State, as operative a test of the lawful use of water as at any time in the past, or in any other country." In *Lux v. Haggin*,<sup>1</sup> McKinstry, J., said: "The appropriator does not necessarily act as the agent of the State employing the power of eminent domain for the benefit of the public, but by his appropriation makes the running water his own, subject only to the trust that he shall employ it for some useful purpose." This important case establishes that the rights of riparian owners of lands which were originally public lands of the United States, are determined by the common law; that as riparian owners, they are entitled to reasonably use the waters of natural streams for irrigation; and that, *after* the grant from the general government, the waters of such streams are not subject, without compensation, to appropriation for private purposes. The remainder of this chapter is devoted to the rules applicable in the States above referred to, which are already dependent in each to some extent upon their constitutions and statutes, some of which are fully annotated, and all of which are cited in the notes.<sup>2</sup>

tions everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories."

<sup>1</sup> 69 Cal. 255, 309. It was also held that there is nothing to the contrary in Cal. Civil Code, § 1410. See also *Stanford v. Felt*, 71 Cal. 249; *Tubbs v. Wilhoit*, 73 Cal. 61; *Heilbron v. Last Chance Ditch Co.*, 75 Cal. 117; *Turlock Irrigation District v. Williams*, 76 Cal. 360, 370; *De Necochea v. Curtis*, 80 Cal. 397; *Van Bibber v. Hilton*, 84 Cal. 585; *Alta Land Co. v. Hancock*, 85 Cal. 219, 229; *United*

*Land Ass'n v. Knight*, id. 418, 477; *Judkins v. Elliott* (Cal.), 12 Pac. 116.

<sup>2</sup> ARIZONA: The act of March 21, 1889, No. 34, defines the rights of parties owning private or lateral ditches. CALIFORNIA: The Constitution of this State provides that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner prescribed by law," etc. Political Code, art. 14. The Civil Code (Deering, p. 179) provides as to water easements as incidents or appurtenances.

**§ 229. Prior right — Extent.**— As between persons who claim the water of a stream flowing through the public land, merely by the prior appropriation of the water itself, or by a prior location upon the land, he has the best right who is first

Upon § 801, see *McDaniel v. Cummings*, 83 Cal. 515. Title 8, §§ 1410 *et seq.* regulates the appropriation of water (annotated). See statutes of March 7, 15, 1887, and February 16, and March 16, 1889. The Penal Code provides: by § 347, as to the poisoning of water; by § 499, as to stealing water from pipes, conduits, flumes, etc.; by § 592, as to taking or polluting the waters of canals, ditches, flumes, or reservoirs; and by § 607, as to the destruction of, or injury to, a bridge, dam, canal, flume, aqueduct, levee, embankment or reservoir. As to saw-dust, see statutes of 1889, ch. 65. The statute of 1889, ch. 68, provides as to the joint liability of the owners of ditches or flumes. See also *post*, § 236, note. As to the power of water commissioners appointed under the act of May 15, 1854, see *Charnock v. Rose*, 70 Cal. 189. COLORADO: By § 16 of the Constitution, the water of every natural stream, not previously appropriated, is declared to be public property. See 1 *Mills' Annotated Statutes*, ch. 69, regulating the appropriation and use of water for irrigation. In *Ibid.*, pp. 360-379, notes to art. 16 of the Constitution, will be found valuable notes upon the Constitutional provisions of Western States as to water rights, irrigation, ditches, diversion, appropriation, contracts, etc. IDAHO: Art. 16 of the Constitution declares the use of appropriated waters, etc., to be a public use, etc. Revised Statutes of 1887, § 830 *et seq.* provide as to floating timber, dams, booms, etc.; §§ 1335, 1336, relate to the enclosure of reservoirs, etc.; and §§ 3155 *et seq.* to the appropriation of water, rights

of way for ditches, irrigation, etc.

MONTANA: The Revised Statutes (1887), § 983 *et seq.* provide as to dams and reservoirs, appropriation, and irrigation; §§ 162, 219, 255, 473 *et seq.*, 1244 *et seq.* as to ditches; §§ 1263-66 as to sales of water; §§ 171, 175, as to diversion; § 57, as to venue; §§ 63, 162, as to pollution.

NEBRASKA: The Compiled Statutes of 1885, ch. 16, §§ 158, 159, provide for the right of way of canals for irrigating or water-power purposes, and declare such canals to be works of internal improvement. The statute of 1889, ch. 68, provides as to water-rights and irrigation, and the right of way therefor. As to the power of cities over streams and water-ways, see statutes of 1887, pp. 126, 246. NEVADA: The General Statutes of 1885, § 853 *et seq.* provide as to the obstruction, pollution and diversion of streams. See also §§ 4676, 4690 *et seq.*, 4617, 907, 1065. The statute of February 26, 1887, ch. 80, provides as to ditches, diversion, and right of way. See also statutes of 1889, p. 96, ch. 104; p. 102, ch. 112, and ch. 113, p. 107. As to pollution by saw-dust, see statutes of 1889, ch. 15, p. 24. As to unlawful diversion and waste of water, see *id.* ch. 48, p. 51. As to appropriators' rights in Churchill county, see *id.* 65, ch. 65. NEW MEXICO: By the Compiled Laws of 1884, § 1 *et seq.* the irrigation of fields is preferred to mills and other impediments, and public ditches are defined; by § 192 corporations for irrigating ditches, mining, etc., are authorized; by § 49 natural springs, rivers, etc., are declared to be free. See also §§ 12, 17, 26, 51, as

in time.<sup>1</sup> The first appropriator is entitled to use and enjoy the water to the full extent of his original appropriation, even when this includes all the water of the stream; to have its quality unimpaired so as not to defeat the purpose of such appropriation, and to remove obstructions from the natural channel.<sup>2</sup> The original appropriator of all the water in a stream may increase the amount diverted by enlarging his ditch at pleasure;<sup>3</sup> but even when he appropriates all the water of a stream, a subsequent valid appropriation may be made by another of the surplus during freshets or extraordinary high water.<sup>4</sup> He may apply the water to any beneficial purpose, without any obligation to return it to the stream from which it was taken, or to preserve its purity or quantity,<sup>5</sup> and

to the use of streams. The statute of 1884, ch. 41, confers power to condemn right of way. The statute of 1887, ch. 12, provides for the formation of irrigation and canal corporations. Statute of 1889, ch. 107, requires irrigating wells and pumps to be fenced. See also statutes of 1891, chs. 17, 71, 90. NORTH DAKOTA: By the Constitution, art. 17, § 210, "all flowing streams and natural water-courses shall forever remain the property of the State for mining, irrigating, and manufacturing purposes." SOUTH DAKOTA: Session Laws of 1890, chs. 103, 104, provide for artesian wells and irrigation, and ch. 119 provides for the preservation of lakes and streams. UTAH: 1 Compiled Laws of 1888, pp. 216, 220, provide as to water rights and rights of way therefor. 2 *id.* p. 47, provides as to irrigation. See also pp. 132-136, 640. WASHINGTON: The Constitution, art. 21, 1, makes the use of waters for irrigation, mining and manufacturing purposes a public use. See also Laws of 1890, pp. 21, 25, 38. WYOMING: The Constitution, art. 9, makes the waters of natural streams, springs, and lakes the property of the State.

<sup>1</sup> *Himes v. Johnson*, 61 Cal. 259;

*Butte Canal Co. v. Vaughan*, 11 Cal. 148; *Ortman v. Dixon*, 18 Cal. 38; *McDonald v. Bear River Mining Co.*, 15 Cal. 145; 13 Cal. 220; *Hoffman v. Stone*, 7 Cal. 49; *Irwin v. Phillips*, 5 Cal. 140; *Sims v. Smith*, 7 Cal. 148; *Marius v. Bicknell*, 10 Cal. 217; *Hill v. Newman*, 5 Cal. 445; *Leigh Co. v. Independent Co.*, 8 Cal. 323; *Sullivan v. Beardsley*, 55 Cal. 608; *Atchison v. Peterson*, 20 Wall. 507; 1 Mon. 561; *Basey v. Gallagher*, *id.* 670; 1 Mon. 455; *Stafford v. Hornbuckle*, 8 Mon. 485; *Lobdell v. Simpson*, 2 Nev. 274; *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534; *James v. Goodenough*, 7 Nev. 824; *Dalton v. Bowker*, 8 Nev. 190; *Schilling v. Rominger*, 4 Col. 100; *Thorp v. Woolman*, 1 Mon. 168.

<sup>2</sup> *Ibid.*; *Lobdell v. Simpson*, 2 Nev. 274; *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 543; *Barnes v. Sabron*, 10 Nev. 217; *Nevada Water Co. v. Powell*, 34 Cal. 109; *Gale v. Tuolumne Water Co.*, 14 Cal. 25; *Sims v. Smith*, 7 Cal. 148.

<sup>3</sup> *James v. Williams*, 31 Cal. 211; *Feliz v. Los Angeles*, 57 Cal. 78. See *Lehi Ir. Co. v. Moyle*, 4 Utah, 327.

<sup>4</sup> *Edgar v. Stevenson*, 70 Cal. 286.

<sup>5</sup> *Union Mill Co. v. Ferris*, 2 Sawyer, 184; *Hill v. Smith*, 82 Cal. 166; *Bear River Co. v. York Mining Co.*, 8

he may use the bed of a stream on the public lands, which is not navigable, as a storage basin for water running to waste.<sup>1</sup> He is equally entitled to have his right unimpaired by subsequent locators above as well as below him,<sup>2</sup> and may peacefully abate an obstruction in the stream which interferes with his superior claim, even when by statute an abatement is authorized by legal remedies.<sup>3</sup> When the right to divert is once acquired, the point of diversion and place of use may be changed without loss of the priority, if the legal rights of others are not injuriously affected.<sup>4</sup> Percolating water cannot be permanently appropriated, and the owner of land on which a spring is situated may so use his land as to cut off the water from an irrigating ditch which is supplied from the spring.<sup>5</sup> Subsequent appropriators do not acquire any right to the waters of springs which have been previously appropriated, and which constitute the source of a creek, from the fact that the means by which the waters reach the creek are subterranean and not well understood.<sup>6</sup>

**§ 230. Same — Title to the soil unnecessary.**— The right to thus appropriate water exists without private ownership in the soil as against all persons but the government or its grantees.<sup>7</sup> Possession of public land which has not been surveyed or patented gives rise to no riparian rights in the streams which flow through it.<sup>8</sup> If the water of a stream on the public land is appropriated and the land is afterwards patented, the patentee succeeds, in the absence of statute,<sup>9</sup> to the right of the government, unencumbered by the previous appropriation, and as no prescription runs against the government, it is im-

Cal. 327; *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 185.

<sup>1</sup> *Larimer County Res. Co. v. People*, 8 Col. 614.

<sup>2</sup> *Hill v. King*, 8 Cal. 336.

<sup>3</sup> *Stiles v. Davis*, 5 Cal. 120; *Butts T. M. Co. v. Morgan*, 19 Cal. 609.

<sup>4</sup> *Fuller v. Swan River P. M. Co.*, 12 Col. 12; *Paige v. Rocky Ford Ir. Co.*, 83 Cal. 84; *Junkans v. Bergin*, 67 Cal. 267. As to the right of diversion from a stream which is at times tributary to the plaintiff's stream, see

*Creighton v. Kaweah Canal Co.*, 67 Cal. 221.

<sup>5</sup> *Hanson v. McCue*, 42 Cal. 304.

<sup>6</sup> *Strait v. Brown*, 16 Nev. 317.

<sup>7</sup> *Hill v. Newman*, 5 Cal. 445; *Vansickle v. Haines*, 7 Nev. 249; *Parks v. Barkley*, 1 Mon. 514. See *post*, § 240.

<sup>8</sup> *Ibid.*; *Lake v. Tolles*, 8 Nev. 285; *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44. But see *Crandall v. Woods*, 8 Cal. 136; *Nevada Canal Co. v. Kidd*, 37 Cal. 282, 312.

<sup>9</sup> See *post*, § 240.



material how long the water may have been appropriated and used in a particular manner prior to the issue of the patent.<sup>1</sup> The first appropriator is only required to prove his priority in an action against one who simply denies that he is first in time.<sup>2</sup> The defendant, if he has no patent, cannot defeat the action by proof of the paramount title of the government;<sup>3</sup> and if a prior claim to the water exists in a third person, this fact, to be available in defense, must be pleaded specially.<sup>4</sup> The doctrine of the common law that rights in a flowing stream arise from riparian ownership, apart from appropriation, has full force in these Western States, except as prior appropriation is protected by local customs and statute. A valid appropriation may be made for the irrigation of lands not situated upon or near the stream;<sup>5</sup> and an injunction may issue against a diversion from a ditch which is not the plaintiff's property.<sup>6</sup>

§ 231. **Same — Subsequent locators.**—The right of the first appropriator is fixed by his appropriation, and when others locate upon the stream or appropriate the water, he cannot enlarge his original appropriation or make any change in the channel to their injury.<sup>7</sup> Each subsequent locator or appropriator is entitled to have the water flow in the same manner as when he located, and may insist that the prior appropriators shall be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water.<sup>8</sup> If a portion of the water is appropriated only for certain days, others may not only appropriate the surplus

<sup>1</sup> Ibid.; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Vansickle v. Haines*, 7 Nev. 249; *Pope v. Kinman*, 54 Cal. 3; *Wattier v. Miller*, 11 Oregon, 329.

<sup>2</sup> *Coryell v. Cain*, 16 Cal. 567.

<sup>3</sup> Ibid.

<sup>4</sup> *Humphreys v. McCall*, 9 Cal. 59; *Bird v. Lisbros*, id. 1.

<sup>5</sup> *Hammond v. Rose*, 11 Col. 524; *Coffin v. Left-Hand Ditch Co.*, 6 Col. 443.

<sup>6</sup> *Post*, § 240; *Vansickle v. Haines*, 17 Nev. 249; *Crandall v. Woods*, 8 Cal. 136; *Leigh v. Independent Ditch*

*Co.*, id. 323; *Clifford v. Larrien* (Ariz.), 11 Pac. 397.

<sup>7</sup> *Lobdell v. Simpson*, 2 Nev. 274; *Proctor v. Jennings*, 6 Nev. 83; *Barnes v. Sabron*, 10 Nev. 217; *American Co. v. Bradford*, 27 Cal. 360; *Nevada Water Power Co. v. Powell*, 34 Cal. 109; *Higgins v. Barker*, 42 Cal. 233; *Wixson v. Devine*, 80 Cal. 385; *Byrne v. Crafts*, 73 Cal. 641; *Alder G. M. Co. v. Hayes*, 6 Mont. 81.

<sup>8</sup> Ibid. See *post*, § 236; *Rominger v. Squires*, 9 Col. 327.

in whole or in part, but may use the quantity of water first appropriated, at such times as it is not used or needed by the first appropriator.<sup>1</sup> The right of the first appropriator is not determined by a comparison of the value of the water to him and to subsequent locators;<sup>2</sup> but if he is entitled to all the water of the stream at the point where his ditch starts, others

<sup>1</sup> *McKinney v. Smith*, 21 Cal. 374; *Smith v. O'Hara*, 43 Cal. 371; *Barnes v. Sabron*, 10 Nev. 217. Where one tenant in common receives all the rents and profits from the business of a ditch or mine, his co-tenant may maintain a suit against him to recover his share. *Abel v. Love*, 17 Cal. 233. If one joint owner of a flume used for mining purposes consents to the opening of a ditch above, the water from which injures the flume, damages cannot be recovered for such injury by the other joint owner. *Crary v. Campbell*, 24 Cal. 634. The water flowing in a ditch owned by tenants in common cannot be partitioned, but, in case of dispute as to their respective rights, a sale and distribution of the proceeds may be ordered by the court. *McGillivray v. Evans*, 27 Cal. 92; *Lorenz v. Jones*, 59 Cal. 262. See *Steward v. Stevens*, 10 Col. 440. Where a ditch for mining purposes is owned by several proprietors, and their relation is not otherwise defined, they are to be regarded as tenants in common of real estate, and their rights are determined by the rules of law applicable to such tenants. *Bradley v. Harkness*, 26 Cal. 69; *Jones v. Parsons*, 25 Cal. 100; *Reed v. Spicer*, 27 Cal. 63; *Carpentier v. Webster*, id. 524; *Parke v. Kilham*, 8 Cal. 77. Their relation has some of the incidents of a partnership. *Goodenow v. Ewer*, 16 Cal. 461; *Jones v. Parsons*, 25 Cal. 100; *Duryea v. Burt*, 28 Cal. 569; *Dougherty v. Creary*, 30 Cal. 290; *Chase v. Steell*, 9 Cal. 66;

*Bradley v. Harkness*, 26 Cal. 69; *Bissell v. Foss*, 114 U. S. 252; *Hewitt v. Storey*, 39 Fed. Rep. 719; *Huston v. Bybee*, 17 Oregon, 140; *Bowman v. Ayers (Idaho)*, 21 Pac. 405; *Campbell v. Shivers*, 1 Ariz. 161; *Lytle Creek W. Co. v. Perdew*, 65 Cal. 447; *Fitzell v. Leaky*, 72 Cal. 477; *Henderson v. Nicholas*, 67 Cal. 152; *O'Connor v. North Truckee Ditch Co.*, 17 Nev. 245 (corporation); *Haiku Sugar Co. v. Birch*, 4 Hawaiian, 275. One partner cannot sell and convey the interest of his copartner. *Henderson v. Nicholas*, 67 Cal. 152. When necessary, a majority of them may determine the modes of carrying on the business. *Dougherty v. Creary*, 30 Cal. 290. But no authority is conferred upon one member to bind the company by his contract. *McConnell v. Denver*, 35 Cal. 365. One partner does not forfeit his rights in the common property by failing to pay his proportion of the expenses. *Kimball v. Gearhart*, 12 Cal. 27. An association formed for maintaining a water ditch, keeping it in repair and controlling and dividing the water among the stockholders, is liable to any stockholder injured by the failure to discharge its duty properly, as, *e. g.*, where the injury is caused by other stockholders above diverting more water than they are entitled to under the certificate of incorporation. *O'Connor v. North Truckee Ditch Co.*, 17 Nev. 245.

<sup>2</sup> *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Fabian v. Collins*, 2 Mon. 510.

cannot complain if it is enlarged.<sup>1</sup> When the prior appropriation is for a particular purpose, as for running a mill, it does not include all the water at that point, when there is more than is sufficient for that purpose, but only so much as is actually needed; and the appropriator cannot afterwards extend his appropriation to include more water to the detriment of those who have meanwhile appropriated the surplus,<sup>2</sup> or maintain an action against subsequent claimants whose acts do not impair his use and enjoyment of the water for the original purpose intended.<sup>3</sup> Even when physical and unanticipated changes occur in the stream, whether from natural or artificial causes, one who, by means of a dam and ditch, has first diverted a portion of the water of a stream sufficient for his purpose according to the condition of the stream at the time, is not entitled to raise the height of his dam in order to continue the diversion through the ditch and thereby interfere with the rights of subsequent locators whose acts have not caused the change.<sup>4</sup> The extent of the original appropriation, and the extent to which subsequent acts of appropriation are subordinate to it, are questions of fact for the jury;<sup>5</sup> but if there is no evidence of a more extended right, and the quantity originally appropriated was sufficient for the purpose designed, the use made of the water for a term of years affords a proper test.<sup>6</sup> A temporary or trivial impairment of the regularity of the flow of the stream, or of the purity of the water, which does not cause actual injury to the prior claimant, does not give him a cause of action.<sup>7</sup>

**§ 232. Repair of ditches.**— When water is conducted through an artificial ditch over another's land, the ditch owner is bound to keep it in repair, so that the water will

<sup>1</sup> James v. Williams, 31 Cal. 211.  
See Charnock v. Rose, 70 Cal. 189;  
Edgar v. Stevenson, id. 286.

<sup>2</sup> Ortman v. Dixon, 13 Cal. 33;  
McKinney v. Smith, 21 Cal. 374;  
Atchison v. Peterson, 20 Wall. 507;  
Basey v. Gallagher, id. 607; Kelly v.  
Natoma Co., 6 Cal. 105.

<sup>3</sup> Hill v. Smith, 27 Cal. 476.

<sup>4</sup> Nevada Water Co. v. Powell, 34  
Cal. 109.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.; Ortman v. Dixon, 13 Cal.  
33; Winter v. Fulstone, 20 Nev. 260.

<sup>7</sup> Phoenix Water Co. v. Fletcher, 23  
Cal. 481; Natoma Water Co. v. McCoy,  
id. 490; Bear River Co. v. New York  
Mining Co., 8 Cal. 327; Weaver v.  
Eureka Lake Co., 15 Cal. 271.

not pass the banks and injure the lands of others by washing away the soil or covering it with sand;<sup>1</sup> and it is not material who had the prior right or title.<sup>2</sup> If he uses a ravine or natural watercourse as part of his ditch, he is not responsible for injuries done by the natural waters thereof, but only for such overflow as is caused by his use of the watercourse as part of his ditch.<sup>3</sup> The owner of a ditch or flume who erects a dam above mining claims, which are afterwards damaged by the breaking of the dam, is not liable for the injury, if the dam was constructed with reasonable skill, and no negligence is shown in its repair or management,<sup>4</sup> or if it is wholly in charge of a contractor.<sup>5</sup> So if a ditch is injured without fault on the owner's part, as by burrowing animals or falling trees, he is not liable to subsequent appropriators or locators of adjoining claims which are injured by the breaking of the ditch.<sup>6</sup> If an artificial ditch is constructed across a natural watercourse, which it dams up, and which in a time of flood renders it necessary to cut the embankment of the ditch to preserve it from injury, the owner of the ditch is guilty of negligence if he cuts the embankment at a point where there is no natural watercourse, thereby turning the water upon cultivated lands, and cannot claim that the injury results from the act of God.<sup>7</sup> So

<sup>1</sup> *Richardson v. Kier*, 34 Cal. 63; 37 Cal. 263; *Wolf v. St. Louis Water Co.*, 10 Cal. 541; *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412; 50 Cal. 460; *Darst v. Rush*, 14 Cal. 81; *Campbell v. Bear River Co.*, 35 Cal. 679; *Mathews v. Kinsell*, 41 Cal. 512; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Flickinger v. Shaw*, 87 Cal. 126; *Crisman v. Heiderer*, 5 Col. 589; *McCauley v. McKeig*, 8 Mont. 389.

<sup>2</sup> *Ibid.* The plaintiff's right to damages is not affected by the fact that he was present and could have prevented the injury by committing a trespass. *Wolfe v. St. Louis*, 15 Cal. 319; 10 Cal. 541.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Everett v. Hydraulic Co.*, 23 Cal. 225; *Fraser v. Sears Union Water Co.*, 12 Cal. 555; *Tuolumne County*

*Co. v. Columbia Water Co.*, 10 Cal. 194; *Todd v. Cochell*, 17 Cal. 97.

<sup>5</sup> *Boswell v. Laird*, 8 Cal. 469.

<sup>6</sup> *Tenney v. Miners' Ditch Co.*, 7 Cal. 335; *Greeley Ir. Co. v. House*, 14 Col. 549.

<sup>7</sup> *Turner v. Tuolumne Water Co.*, 25 Cal. 397. The doctrine of lateral support does not apply to "deep diggings" worked by the hydraulic process, where the very purpose of locating the ground is to tear down and wash away the gravel of the located claims. *Hendricks v. Spring Valley Mining Co.*, 58 Cal. 190. Where a lease contained a covenant to keep the demised premises in repair, "damages by the elements or acts of Providence excepted," and near by was a reservoir sufficiently protected by an embankment, which was so injured

the owner of a tail-race or sluicing flume has no right to run it upon the dumping-ground of another, and cannot recover damages from the latter for filling it up, if he does not prevent the owner from dumping on his own ground.<sup>1</sup> But the owner of the servient estate is not bound to keep the ditch in repair, nor is he liable for injury thereto caused by his cattle in crossing over it, or in caving in its sides while feeding near it.<sup>2</sup>

**§ 233. Purpose of appropriation.**—Whether the appropriation is for mining, as originally it was solely, or for mills, for irrigation, or for agricultural, horticultural, domestic or municipal purposes, the rights thereby acquired now stand upon the same footing, and an appropriation or use of the water for one of these purposes is not justifiable when it interferes with a prior appropriation or location for another purpose.<sup>3</sup> The prior possessory rights of settlers on the public lands for agricultural and grazing purposes yield to the rights of miners to enter and extract the precious metals, but this does not authorize the miner to dig ditches and conduct or flow water over the land of the agriculturist without his consent.<sup>4</sup> The prior owner of the right of way for a ditch cannot be lawfully deprived thereof by the decree of a court of equity authorizing the ditch to be washed away by miners upon condition that a suitable aqueduct be built in its place.<sup>5</sup> If the

by strangers that it gave way and the water rushed upon the demised premises, the injury was held not to be within the exception. *Polask v. Pioche*, 35 Cal. 416.

<sup>1</sup> *Ralston v. Plowman*, 1 Idaho, N. S. 595.

<sup>2</sup> *Durfee v. Garvey*, 78 Cal. 546. See *McCarty v. Boise City Canal Co.* (Idaho), 10 Pac. 623.

<sup>3</sup> *McDonald v. Bear River Co.*, 13 Cal. 220; 15 Cal. 145; *Tartar v. Spring Creek Co.*, 5 Cal. 395; *Ramsay v. Chandler*, 3 Cal. 90; *Leigh v. Independent Ditch Co.*, 8 Cal. 328; *Ball v. Kehl*, 87 Cal. 505; *Ortman v. Dixon*, 13 Cal. 34; *Gibson v. Puchta*, 33 Cal. 810; *Felix v. Los Angeles*, 58 Cal. 73;

*Elms v. Same*, id. 80; *Basey v. Gallagher*, 20 Wall. 682; *Jennison v. Kirk*, 98 U. S. 453; *Crane v. Winsor*, 2 Utah, 248; *Munro v. Ivie*, id. 535; *Lehi Ir. Co. v. Moyle*, 4 Utah, 327.

<sup>4</sup> *Stokes v. Barrett*, 5 Cal. 36; *Tarter v. Spring Creek Co.*, 5 Cal. 395; *Burdge v. Underwood*, 6 Cal. 45; *Conger v. Weaver*, 6 Cal. 548; *Weimer v. Lowery*, 11 Cal. 104; *Boggs v. Merced Mining Co.*, 14 Cal. 379; *Henshaw v. Clark*, id. 460; *Gold Hill Mining Co. v. Ish*, 5 Oregon, 104; *Gillan v. Hutchinson*, 16 Cal. 153; *Rogers v. Soggs*, 22 Cal. 444; *Esminge v. McIntire*, 23 Cal. 593; *Courtwright v. Bear River Co.*, 30 Cal. 573.

<sup>5</sup> *Gregory v. Nelson*, 41 Cal. 278.

appropriation is for mining purposes and there are orchards or gardens below on the stream, the appropriated water must be so used as not to injure the trees or gardens;<sup>1</sup> and if a reservoir is constructed across a stream or ravine for the purpose of irrigating a garden, the water cannot be lawfully diverted therefrom, or the reservoir filled with mud and washings, by persons who afterwards enter for mining purposes.<sup>2</sup> So, upon the other hand, the prior right of a person who has diverted the water in a ditch for mining purposes cannot be lawfully impaired by the discharge of refuse from a mill subsequently located on the stream.<sup>3</sup> The first locator of a mining claim in the bed of a stream is not entitled to use the channel below as an outlet for tailings to the material injury of other mining claims subsequently located there, but each person mining in the stream is entitled to use, in a proper and reasonable manner, both the channel and water of the stream, and an injury to subsequent locators is *damnum absque injuria*, if caused by works which are conducted with reasonable care.<sup>4</sup> So, if the construction of dams for the purpose of working mining claims in the bed of a canyon is authorized by local customs, damage occasioned by such structures, by flooding the mining claim of a subsequent locator on the banks of the canyon, is *damnum absque injuria*.<sup>5</sup> The rights of ditch owners against those who work subterranean mines, which cause the bed of the ditch to settle and crack or drain off the water, are governed by the maxim *sic utere tuo ut alienum non laedas* rather than by any consideration of priority.<sup>6</sup>

§ 234. Conveyance of water rights.—The right to water acquired by priority is the subject of property, and may be sold and conveyed; but the transfer of a water claim does not pass a right of action for damages for a previous illegal use of

<sup>1</sup> Wixon v. B. Water Co., 24 Cal. 367; Robinson v. Black Diamond Coal Co., 50 Cal. 460; 57 Cal. 412. Logan v. Driscoll, 19 Cal. 623; Gregory v. Harris, 43 Cal. 38; Nelson v. O'Neal, 1 Mon. 284; Lincoln v.

<sup>2</sup> Rupley v. Welch, 23 Cal. 452; Levaroni v. Miller, 34 Cal. 231. Rogers, id. 217.

<sup>3</sup> Phoenix Water Co. v. Fletcher, 23 Cal. 481; Natoma Water Co. v. McCoy, id. 490. <sup>5</sup> Stone v. Bumpus, 46 Cal. 218; 40 Cal. 428.

<sup>4</sup> Esmond v. Chew, 15 Cal. 137; Clark v. Willett, 35 Cal. 584; Cole Silver Mining Co. v. Virginia Water Co., 1 Sawyer, 470.



the water,<sup>1</sup> and if the plaintiff fails to connect his interest with those who first appropriated the waters of the stream, his own appropriation is to be treated as the inception of his right.<sup>2</sup> If the water is appropriated for a mill, and this is sold together with the possessory right of land on the stream, the vendee becomes the owner of the water right.<sup>3</sup> A person who sells his interest in the water of a stream, to be used in a ditch above him, does not lose his prior right over a subsequent appropriator below to any flow remaining.<sup>4</sup> If a ditch or flume in process of construction be mortgaged, the mortgage will, if such appears to be the intent, include the whole work when completed, and improvements afterwards put thereon, like a mortgage of real estate.<sup>5</sup> The ditch when completed is not a mere easement or appurtenance.<sup>6</sup> One ditch cannot be appurtenant to another ditch and pass by grant as an incident, although it may pass as part and parcel of the subject matter.<sup>7</sup> It can only be sold by deed,<sup>8</sup> although water rights which are merely possessory and appurtenant to land may be secured by a purchase and possession without deed.<sup>9</sup> If possession is taken by the vendee under a verbal sale, his right to the water dates from the time of his entry into pos-

<sup>1</sup> *Kimball v. Gearhart*, 12 Cal. 27. As to covenants and actions relating to irrigation, see *Ferrea v. Chabot*, 63 Cal. 564; *Ft. Reno Canal Co. v. Dunbar*, 80 Cal. 530; *Weill v. Baldwin*, 64 Cal. 476; *ante*, § 217.

<sup>2</sup> *Chiatovitch v. Davis*, 17 Nev. 133.

<sup>3</sup> *McDonald v. Bear River Co.*, 13 Cal. 220; 15 Cal. 145.

<sup>4</sup> *McDonald v. Askew*, 29 Cal. 200.

<sup>5</sup> *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620.

<sup>6</sup> *Reed v. Spicer*, 27 Cal. 57; *Clark v. Willett*, 35 Cal. 534; *Hart v. Plum*, 14 Cal. 148; *Merritt v. Judd*, 14 Cal. 59; *Burnham v. Freeman*, 11 Colo. 601.

<sup>7</sup> *Donnell v. Humphreys*, 1 Mon. 518; *Quirk v. Falk*, 47 Cal. 453. See *Hungarian Hill Mining Co. v. Moses*, 58 Cal. 168; *Bass v. Buker*, 6 Mont. 442.

<sup>8</sup> *Bradley v. Harkness*, 26 Cal. 69; *Smith v. O'Hara*, 43 Cal. 371; *Barkley v. Tieleke*, 2 Mon. 59; *Fabian v. Collins*, 3 Mon. 215; *Hill v. Newman*, 5 Cal. 445. If a ditch extending for several miles is constructed by one person and sold in sections, the purchaser of a lower section does not for all purposes have a legal interest in the water flowing into the ditch at its head. *South Ford Canal Co. v. Gordon*, 6 Wall. 561. *Reynolds v. Hosmer*, 51 Cal. 205. An Indian may, it seems, maintain an action for the diversion of water which he appropriated, and others may succeed to his rights. *Lobdell v. Hall*, 3 Nev. 507.

<sup>9</sup> *Geddis v. Parrish* (Wash. Ter.), 21 Pac. 314, 587; *Coonradt v. Hill*, 79 Cal. 587.

session, and not from that of the vendor's appropriation.<sup>1</sup> The vendor's attempt to convey by an imperfect deed operates as an abandonment of his prior appropriation.<sup>2</sup> General words granting a ditch convey the channel, the right to the water by which it is supplied, and the ditches which convey the water to it.<sup>3</sup> In Colorado, the right of way over others' lands in order to obtain water for irrigation appears to result from custom, necessity and the peculiarity of the climate, and to exist, independently of statute, as a right of local common law.<sup>4</sup>

**§ 235. Appropriation — What is.**— The right to divert water flowing through the public land, so far as it depends upon priority and not upon the ownership of the adjoining land, can only be acquired by actual appropriation.<sup>5</sup> Such appropriation cannot be constructive,<sup>6</sup> and must be made with the intention of devoting the water to some useful purpose.<sup>7</sup> A notice of intention to appropriate the water is not of itself sufficient evidence of possession, although, in connection with other acts, it may be sufficient.<sup>8</sup> An appropriation of riparian

<sup>1</sup> See cases, p. 460, n. 8.

<sup>2</sup> *Barkley v. Tieleke*, 2 Mon. 59.

<sup>3</sup> *Ellison v. Jackson*, 12 Cal. 542; *Sierra Union W. Co. v. Baker*, 70 Cal. 572. Under an agreement to sell a lot of land, which is part of a larger tract, with the water right appurtenant to the lot, and being the *pro rata* share of the water right for the larger tract, a delivery of the water is necessary, this being effected by the delivery of the contract and the possession of the land. *Booth v. Chapman*, 59 Cal. 149.

<sup>4</sup> *Yunker v. Nichols*, 1 Col. 551; *Schilling v. Rominger*, 4 Col. 100; *Crisman v. Heiderer*, 5 Col. 589; *Coffin v. Left Hand Ditch Co.*, 6 Col. 443; *Thomas v. Guiraud*, id. 530; *Knoth v. Barclay*, 8 Col. 300; *Larimer Co. Reservoir Co. v. People*, id. 614; *Golden Canal Co. v. Bright*, id. 149. Public reservoirs for the storage of water for irrigation and do-

mestic uses are "internal improvements," within the act of Congress of March 8, 1875. *Re Senate Resolution*, 12 Col. 285. As to irrigation under the Colorado constitution and statutes, see *Golden Canal Co. v. Bright*, 8 Col. 144; *Knoth v. Barclay*, id. 300; *ante*, § 228, note; *Farmers' High Line C. Co. v. Southworth*, 13 Col. 111.

<sup>5</sup> *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Twist v. Union Canal Co.*, id. 170; *Eddy v. Simpson*, 3 Cal. 249; *Conger v. Weaver*, 6 Cal. 548; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

<sup>6</sup> *Ibid.*; *Coryell v. Cain*, 16 Cal. 567; *Kelly v. Natoma Water Co.*, 6 Cal. 105.

<sup>7</sup> *Macris v. Bicknell*, 7 Cal. 261; *Davis v. Gale*, 32 Cal. 28.

<sup>8</sup> *Thompson v. Lee*, 8 Cal. 275; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Kimball v. Gearhart*, 12 Cal. 27;

land for a mill-site is not made by digging a ditch on public land, and such an appropriation is not an appropriation of water for the use of the mill.<sup>1</sup> Where notice was posted, upon a tree on the bank of a river, of the appropriation of a water right to commence at that point, and of a right of way for a ditch of a certain capacity to a bend in the river below, and this was followed within the space of six months by certain work on the ditch which was insufficient to make it of practical use, and by the erection of a monument at a suitable point for a mill-site below the bend of the river, it was held that there was not such a possession of the land traversed by the ditch or of the mill-site as to avail against an entry and appropriation of them made about eleven months after the posting of the notice.<sup>2</sup> So, the mere digging of a ditch for the purpose of drainage,<sup>3</sup> or claiming the water for speculation,<sup>4</sup> does not give priority over those who construct ditches for the purpose of taking the water and applying it to a beneficial use.

§ 236. **Same.**—The notice of intention to appropriate water must be sufficient to put a prudent man on inquiry;<sup>5</sup> but such notices are liberally construed.<sup>6</sup> If, after notice given, a ditch is begun in good faith, the enjoyment does not commence until its completion, but, as against others, the right dates by relation from the commencement of the work, and the law

*Jones v. Jackson*, 9 Cal. 237; *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44; *Columbia Mining Co. v. Holter*, 1 Mon. 296.

<sup>1</sup> *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44; *Nevada County Canal Co. v. Kidd*, 37 Cal. 282.

<sup>2</sup> *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44.

<sup>3</sup> *Maeris v. Bicknell*, 7 Cal. 261; *McKinney v. Smith*, 21 Cal. 374.

<sup>4</sup> *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Dick v. Caldwell*, 14 Nev. 167; *Bileu v. Paisley*, 18 Oregon, 47.

<sup>5</sup> *Yale on Mining Claims*, 78; *Hess v. Winder*, 30 Cal. 349; *McKinney v. Smith*, 21 Cal. 374; *North Noonday Mining Co. v. Orient Mining Co.*, 6

*Sawyer*, 299, 503. A diversion of water, without compliance with the California Civil Code, §§ 1415, 1419, gives a right to continue the diversion as against a subsequent pre-emptioner of the land who has also not complied with the statute. *De Necochea v. Curtis*, 80 Cal. 397. Upon § 1925 of that Code, see *Conkling v. Pacific Imp.*, 87 Cal. 296. Revised Statutes of Arizona (1887), § 947, makes it a misdemeanor to tear down or destroy any written notice of location erected or placed on any land.

<sup>6</sup> *Osgood v. Eldorado Water Co.*, 56 Cal. 571; *Erhardt v. Boaro*, 113 U. S. 527.

allows a reasonable time for completing the appropriation.<sup>1</sup> No unusual or extraordinary exertions are necessary in prosecuting the work, but it must be carried forward with diligence.<sup>2</sup> It is a question of fact for the jury whether there has been due diligence,<sup>3</sup> the nature of the climate and the soil, the difficulty of obtaining labor, tools, or materials, and the size and extent of the work being proper subjects for their consideration.<sup>4</sup> If the work is not prosecuted diligently, the right to use the water dates only from the time when the appropriation is perfected, and the diversion of the water is actually begun, and does not relate back to the time when the first step to secure it was taken.<sup>5</sup> The same is true if the first acts, from which the appropriator seeks to date his right, do not indicate an intention to appropriate the water.<sup>6</sup> If there is great delay in the work, it is not excused by matters which do not relate directly to the enterprise, such as the illness of the appropriator or his lack of means.<sup>7</sup> If the water is diverted with due diligence, for the purpose of irrigation, the rights of the appropriator are not necessarily limited to the amount of water actually used during the first or second year of the appropriation, or regulated by the number of acres then cultivated, but the object in view at the time when the water was first diverted is to be considered in connection with the appropriation actually made.<sup>8</sup> The quantity of water acquired by the appropriation would appear to be measured by the capacity of the ditch or flume, when fully completed, at its smallest point.<sup>9</sup> But if the general size and capacity of

<sup>1</sup> Ibid.; *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Maeris v. Bicknell*, 7 Cal. 261; *King v. Edwards*, 1 Mon. 235; *Woolman v. Garringer*, 1 Mon. 535; *Atchison v. Peterson*, 1 Mon. 561; *Sieber v. Frink*, 7 Col. 148.

<sup>2</sup> Ibid.; *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534; *Parke v. Kilham*, 8 Cal. 77; *Keeney v. Carillo*, 2 New Mex. 480.

<sup>3</sup> *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

<sup>4</sup> *Kimball v. Gearhart*, 12 Cal. 27; *Elliott v. Whitmore* (Utah), 24 Pac. 673.

<sup>5</sup> Ibid.; *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534; *Irwin v. Strait*, 18 Nev. 436; *Keeney v. Carillo*, 2 New Mex. 480; *Megerle v. Ashe*, 33 Cal. 74; *Smith v. Athern*, 84 Cal. 507; *Daniels v. Lansdale*, 48 Cal. 41; *Lansdale v. Daniels*, 100 U. S. 118.

<sup>6</sup> *Kimball v. Gearhart*, 12 Cal. 27.

<sup>7</sup> *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534.

<sup>8</sup> *Barnes v. Sabron*, 10 Nev. 217; *White v. Todd's Valley Co.*, 8 Cal. 443.

<sup>9</sup> *Ophir Silver Mining Co. v. Carpenter*, 6 Nev. 393; *Barnes v. Sabron*,

the ditch indicate that more water is to be used than is turned into it at first, a reasonable time is to be allowed to remove obstructions or change the grade in order that the ditch may be filled to its proper capacity.<sup>1</sup> The owner of the ditch or flume has the exclusive and absolute control of the water therein, although it does not appear to have been decided whether for all purposes such water is to be regarded as his private property.<sup>2</sup> When collected in reservoirs or pipes, and separated from the source of supply, the water is personal property, like harvested ice or gas in pipes,<sup>3</sup> and is the subject of larceny.<sup>4</sup> While the claimant's dam and canal are in process of construction, or so much out of repair that they are not available for the purpose designed,<sup>5</sup> and until they are in a condition to appropriate the water, the use of the water by others is not an injury to him, and such use affords him no ground for relief, legal or equitable.<sup>6</sup> But the prior claimant has the right to use so much of the water as is necessary to preserve his flume from injury while in the process of construction.<sup>7</sup> A diversion of water which is both wrongful and continuous may be restrained upon a bill in equity for an injunction,<sup>8</sup> but the remedy for the past diversion of a water-course,<sup>9</sup> or for a diversion which is not continuing, or threatened or likely to continue,<sup>10</sup> is in a court of law only. Every con-

10 Nev. 217; *Caruthers v. Pemberton*, 1 Mon. 111.

<sup>1</sup> *White v. Todd's Water Co.*, 8 Cal. 443; *Dougherty v. Haggin*, 56 Cal. 522.

<sup>2</sup> *Kidd v. Laird*, 15 Cal. 161.

<sup>3</sup> *Heyneman v. Blake*, 19 Cal. 579; *Parks Canal Co. v. Hoyt*, 57 Cal. 44.

<sup>4</sup> Water, when severed from land, and artificially stored, is private property and the subject of larceny at common law. *Ferens v. O'Brien*, 11 Q. B. D. 21; W. N. (1883) 88. The Penal Code of California, § 499; the Revised Statutes of Arizona (1887), § 777 (see, also, § 841), etc., made it a misdemeanor to connect, with intent to injure or defraud, any pipe, etc., with any main, pipe, conduit, or flume for conducting water.

<sup>5</sup> *Bear River Co. v. Boles*, 24 Cal. 359; *Brown v. Smith*, 10 Cal. 508.

<sup>6</sup> *Nevada County Canal Co. v. Kidd*, 37 Cal. 282; *Harvey v. Chilton*, 11 Cal. 114; *Union Water Co. v. Crary*, 25 Cal. 504.

<sup>7</sup> *Weaver v. Conger*, 10 Cal. 233; 6 Cal. 548.

<sup>8</sup> *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Stein Canal Co. v. Kern Island Irrigating Canal Co.*, 53 Cal. 563; *Harris v. Shoutz*, 1 Mon. 212; *Fabian v. Collins*, 3 Mon. 215.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Coker v. Simpson*, 7 Cal. 840; *Tuolumne Co. v. Chapman*, 8 Cal. 392.

tinuance of a wrongful diversion gives a new cause of action,<sup>1</sup> and a recovery in one action, in which the plaintiff alleges that he is entitled to a certain quantity of water, is not *res adjudicata* upon the question of quantity.<sup>2</sup> The gravamen of the action is the diversion of the water, and different counts are not necessary when the diversion is accomplished by different means.<sup>3</sup>

§ 237. **Change of use.**—When water has been lawfully appropriated, the priority thereby acquired is not lost by changing the use to which it was first applied or the place at which it was first employed.<sup>4</sup> If the original appropriation was for a saw-mill, the water may be used for a grist-mill subsequently erected.<sup>5</sup> If the water was appropriated for a mining claim, which is worked out and abandoned, the owner may extend his ditch and use the same quantity of water at other points or for a different purpose,<sup>6</sup> or, ceasing to use it, he may hold it for sale.<sup>7</sup> The miner may extend his flume on his own claim for the express purpose of preventing a subsequent appropriator below from constructing a ditch on that claim, even though the extension may not be for a useful purpose.<sup>8</sup> But the mode of the appropriation or the point of diversion cannot be changed by the first appropriator so as to interfere with the rights acquired by subsequent appropriators.<sup>9</sup>

§ 238. **Prior right—How lost.**—The prior right to the use of the water may be lost by abandonment,<sup>10</sup> or by an ad-

<sup>1</sup> Toombs v. Hornbuckle, 3 Mon. 193.

<sup>2</sup> McDonald v. Bear River Co., 13 Cal. 220; 15 Cal. 145.

<sup>3</sup> Gale v. Tuolumne Water Co., 14 Cal. 25; Priest v. Union Canal Co., 6 Cal. 170.

<sup>4</sup> Maeris v. Bicknell, 7 Cal. 261; Hill v. Smith, 27 Cal. 476; Davis v. Gale, 32 Cal. 26; Kidd v. Laird, 15 Cal. 161; Coffin v. Left Hand Ditch Co., 6 Col. 443; Thomas v. Guiraud, id. 530; Sieber v. Frink, 7 Col. 148; Dorr v. Hammond, id. 79.

<sup>5</sup> McDonald v. Bear River Co., 13 Cal. 220.

<sup>6</sup> Davis v. Gale, 32 Cal. 26; Woolman v. Garringer, 1 Mon. 535.

<sup>7</sup> Fabian v. Collins, 2 Mon. 510.

<sup>8</sup> Correa v. Frietas, 42 Cal. 339; McKinney v. Smith, 21 Cal. 374; Fuller v. Swan River P. M. Co., 12 Col. 12.

<sup>9</sup> Columbia Mining Co. v. Holter, 1 Mon. 296; Butte Mining Co. v. Morgan, 19 Cal. 609; *ante*, § 231; Simpson v. Williams, 18 Nev. 432.

<sup>10</sup> Davis v. Gale, 32 Cal. 26; Dodge



verse possession continued uninterruptedly for the statutory period.<sup>1</sup> If by abandonment, the prior right is not revived in the grantee's favor by a sale of the same, though made in good faith;<sup>2</sup> if by adverse possession, the statute is not prevented from running against the prior appropriator by the fact that the possessor permits a portion of the water to flow down the stream for the accommodation of those using the water below,<sup>3</sup> or that the waters of a natural stream, which feed a ditch, were not appropriated in compliance with the statute as to posting notices, etc.;<sup>4</sup> or that an irrigating ditch is used only when needed during the cropping season of each year.<sup>5</sup> Appropriation of water does not give a right to the exclusive use of the bed of the stream; and if the stream is a mere torrent, dry at certain seasons of the year, it may be used when dry as part of a ditch to conduct artificial waters, and such use does not work an abandonment of the waters so conducted, although it gives no right to divert or use the natural water of the stream as against a prior locator.<sup>6</sup> It is not an abandonment of artificial waters to mingle them with the water of a natural watercourse for the purpose of conducting them to the point where they are to be used, but they may be afterwards diverted, if in so doing the prior rights of

*v. Marden*, 7 Oregon, 456; *Platte Water Co. v. Northern Colorado Ir. Co.*, 12 Col. 525; *McCauley v. McKeig*, 8 Mont. 389.

<sup>1</sup> *Alta Land & W. Co. v. Hancock*, 85 Cal. 219; *Last Chance W. D. Co. v. Heilbron*, 86 Cal. 1; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181; *Davis v. Gale*, 32 Cal. 26; *Partridge v. McKinney*, 10 Cal. 181; *Crandall v. Woods*, 8 Cal. 136; *American Co. v. Bradford*, 27 Cal. 360; *Union Water Co. v. Crary*, 25 Cal. 504; *Campbell v. West*, 44 Cal. 646; *Evans v. Ross* (Cal.), 8 Pac. 88; *Oneto v. Restano*, 78 Cal. 374; *Heintzen v. Binniger*, id. 5; *Smith v. Logan*, 18 Nev. 149; *Dick v. Bird*, 14 Nev. 161; *Dodge v. Marden*, 7 Oregon, 456; *Huston v. Bybee*, 17 Oregon, 140; *Cox v. Clough*, 70 Cal. 845.

<sup>2</sup> *Davis v. Gale*, 32 Cal. 26; *Rominger v. Squires*, 9 Col. 327.

<sup>3</sup> *Davis v. Gale*, 32 Cal. 26; *Yankee Jim's Water Co. v. Crary*, 25 Cal. 504. See *McLear v. Hapgood*, 85 Cal. 555; *Rockwell v. Graham*, 9 Col. 36. The fact that numerous persons use an irrigating ditch, constructed, repaired and controlled at private expense, and that their respective rights are not clearly defined, does not show a dedication to the public. *Cate v. Sanford*, 54 Cal. 24.

<sup>4</sup> *Coonradt v. Hill*, 79 Cal. 587. See *Ledu v. Jim Yet Wa*, 67 Cal. 346.

<sup>5</sup> *Hesperia Land Co. v. Rogers*, 83 Cal. 10.

<sup>6</sup> *Hoffman v. Stone*, 7 Cal. 46; *Burnett v. Whitesides*, 15 Cal. 85; *Anaheim W. Co. v. Semi-Tropic W. Co.*, 64 Cal. 185.

others to the natural water of the stream are not impaired.<sup>1</sup> A prescriptive right to water on the public domain is not lost by a change in the stream.<sup>2</sup>

§ 239. **Same.**—An appropriator of water who duly posts his notice, and, while prosecuting the work with diligence, afterwards posts a second notice of the appropriation of the same water, does not abandon his first claim.<sup>3</sup> If water from a ditch supplied from one stream is emptied into another stream, and the owner does not intend to retake it, or if water lawfully diverted flows into the second stream by natural channels from the works of the appropriator, it becomes *publici juris*, and the appropriators of the waters of the stream which receives it are entitled to the increase according to priority.<sup>4</sup> The same is true when water is discharged into a stream as a matter of convenience and without intention to reserve it.<sup>5</sup> In controversies of this character, the person who mingles the water belonging to him with that appropriated by others has the burden of proof to establish his right and the absence of intent to abandon.<sup>6</sup> When the water and tailings passing away from a mining claim are abandoned, others may appropriate them, but cannot insist that the abandonment shall be continued for their benefit on the ground that they have incurred expense to secure the same.<sup>7</sup> Tailings which are permitted to flow upon another's land belong to him, but a stranger is not entitled to take tailings merely because they flow in a mixed mass from different mining grounds.<sup>8</sup>

§ 240. **The Act of Congress of July 26, 1866 — Mining customs.**—Riparian proprietors who own the soil have the rights which attach to riparian ownership at common law, and

<sup>1</sup> Butte Canal Co. v. Vaughn, 11 Cal. 143; Wilcox v. Hausch, 64 Cal. 461; Cal. 143; Brown v. Mullin, 65 Cal. 89; Schulz v. Sweeny, 19 Nev. 359.

<sup>2</sup> Tolman v. Casey, 15 Oregon, 83.

<sup>3</sup> Osgood v. Eldorado Water Co., 56 Cal. 571.

<sup>4</sup> Davis v. Gale, 32 Cal. 26; Eddy v. Simpson, 3 Cal. 249.

<sup>5</sup> McKinney v. Smith, 21 Cal. 374.

<sup>6</sup> Butte Canal Co. v. Vaughn, 11 Cal.

<sup>7</sup> Dougherty v. Creary, 30 Cal. 290; Woolman v. Garringer, 1 Mon. 535.

A possessory title to land may be acquired for the purpose of taking tailings deposited thereon. Rogers v. Cooney, 7 Nev. 213. See Wood v. Richardson, 35 Cal. 149.

<sup>8</sup> Jones v. Jackson, 9 Cal. 237.

each is entitled, as against his neighbors upon the stream, to the use of the water for the supply of natural wants, and to its reasonable enjoyment for manufacturing and other purposes.<sup>1</sup> The United States, as proprietor of the public lands, has the same rights and property in the streams flowing through such lands that would be possessed by any riparian proprietor;<sup>2</sup> and, in the absence of legislation by Congress limiting the effect of the grant, patents for public lands from the general government pass, together with the fee of the soil, and, as incident thereto, the benefit of all natural streams which flow through them.<sup>3</sup> The patentee of land cannot acquire a prescriptive right to flow land above belonging to the United States, and the purchaser of the flooded land may sue for the injury at any time within the statutory period after the conveyance from the United States without regard to the length of time that the flowage may have continued while the land was owned by the government.<sup>4</sup> The ninth section of the important Act of Congress of July 26, 1866,<sup>5</sup> is a volun-

<sup>1</sup> *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Los Angeles v. Baldwin*, 53 Cal. 469; *Pope v. Kinman*, 54 Cal. 3; *Ferrea v. Knipe*, 28 Cal. 340; *ante*, ch. 6.

<sup>2</sup> *Ibid.*; *Vansickle v. Haines*, 7 Nev. 249. It has no power to authorize its grantees of lands within a State to invade private rights of other proprietors. *Woodruff v. North Bloomfield G. M. Co.*, 8 Sawyer, 628; 9 *id.* 441.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Matthews v. Ferrea*, 45 Cal. 51; *Ogburn v. Connor*, 46 Cal. 347; *Wilkins v. McClue*, 46 Cal. 656; *Hutton v. Frisbie*, 37 Cal. 475. Lands claimed are public lands of the United States until the claimant proves up his claim and pays for the land. *Farley v. Spring Valley Mining Co.*, 58 Cal. 142. A mere entry upon such lands gives no vested rights against the government until final proof. *Ellis v. Pomeroy Imp. Co.* (Wash.), 21 Pac. 7.

<sup>5</sup> This section provides that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." 14 Stat. at Large, 253; U. S. Rev. Stats. § 2339; *Basey v. Gallagher*, 20 Wall. 670; *Atchison v. Peterson*, *id.*

tary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, rather than the establishment of a new one, and the priority secured thereby exists, although the three conditions named therein may not all be present in the particular case.<sup>1</sup> A statute upon this subject, like others, is of higher authority than a custom, and prevails over it in case of conflict.<sup>2</sup> Congress alone can control and dispose of the public lands in a Territory, but under the above act of Congress, and the amendatory acts of 1870<sup>3</sup> and of 1872,<sup>4</sup> the legislative assembly of a Territory, or miners, may establish laws or rules defining the extent of mining claims, and regulate the modes of developing and working them.<sup>5</sup> The local customs mentioned in the above act are not judicially noticed by the courts, so far as they create rights differing from those possessed by riparian proprietors at common law, but it is incumbent upon the party relying upon such a custom to allege and prove it.<sup>6</sup> They cease to be oper-

507; *Jennison v. Kirk*, 98 U. S. 453, 462, note; *Mining Co. v. Tarbet*, id. 463; *Thorp v. Freed*, 1 Mon. 651; *Gold Hill Mining Co. v. Ish*, 5 Oregon, 104. See Acts of Congress of July 9, 1870 (16 Stats. at Large, 217), and of May 10, 1872 (17 Stats. at Large, 91).

<sup>1</sup> *Miller, J.*, in *Broder v. Water Co.*, 101 U. S. 276; 50 Cal. 621; *Sparrow v. Strong*, 3 Wall. 97, 777; *Basey v. Gallagher*, 20 Wall. 670; *Barnes v. Sabron*, 10 Nev. 217.

<sup>2</sup> *Ibid.*; *Woodruff v. No. Bloomfield G. M. Co.*, 8 Sawyer, 628; 9 id. 441; *Original Co. v. Winthrop Mining Co.*, 60 Cal. 631.

<sup>3</sup> 16 Stats. at Large, 217.

<sup>4</sup> 17 Stats. at Large, 91. As to the rights of an alien under this statute, see *North Noonday Mining Co. v. Orient Mining Co.*, 1 Fed. Rep. 522.

<sup>5</sup> *Territory v. Lee*, 2 Mon. 124; *Orr v. Haskell*, id. 225; *English v. Johnson*, 17 Cal. 107; *Morton v. Solambo Copper M. Co.*, 26 Cal. 527; *Jackson v. Roby*, 109 U. S. 440; *Tenem Ditch Co. v. Thorpe* (Wash.), 20 Pac. 588. A mining custom cannot be proved by parol, if there are written regula-

tions in force on the subject. *Ralston v. Plowman*, 1 Idaho, N. S., 595.

<sup>6</sup> *Lewis v. McClure*, 8 Oregon, 273; *Esmond v. Chew*, 15 Cal. 137, 143; case in 1 Fed. Rep. 522 (cited, *supra*, note 4). The statute of California, enacted April 1, 1870, providing for the condemnation of a right of way over or through a mining claim for the ditches, tunnels, etc., of another mining claim, is cumulative, and does not prevent the construction of ditches, etc., authorized by local customs. *Bliss v. Kingdom*, 46 Cal. 651. Under section 17 of the act of 1870, the rights of a pre-emptioner, as against appropriators, date only from his patent or certificate of purchase. *Osgood v. El Dorado Water Co.*, 56 Cal. 571; *Lux v. Haggin*, 69 Cal. 255. A patent from the United States does not conclusively limit all a prior appropriator's right, since he may still carry his ditch through the patentee's land to a point higher up the stream, when necessary to give him the full supply to which he is entitled. *Ware v. Walker* (Cal.), 12 Pac. 475; *Judkins v. Elliott* (Cal.), id.

ative upon falling into disuse; but upon proof that they have been in force, they are presumed to continue in force until the contrary is proved.<sup>1</sup> Prior to the statute, rights acquired by appropriation, and supported by the customs, laws, or decisions of the State in which the land was situated, were enforced only between occupants of the public land having no title to the soil,<sup>2</sup> and the effect of the statute is to preserve this priority against those who have received patents to the land since its enactment.<sup>3</sup> The statute is prospective in its operation, and does not affect a patent issued before its passage,<sup>4</sup> or a patent subsequently issued to a person who had paid for the land prior to the act, entered thereon and received a certificate of purchase, since the patent when issued relates to the date of the entry.<sup>5</sup> It does not give rights of way not recognized by the customary law of the State or Territory, and the proviso to the ninth section conferred no additional rights upon the owners of ditches subsequently constructed, but simply rendered them liable to persons on the public domain whose possessions might be injured by such construction.<sup>6</sup> The water rights sustained by this statute are rights belonging to real estate, and are not lost by a non-user, which does not amount to an abandonment and is short of the statutory period for the recovery of real property.<sup>7</sup>

116; *Lytle Creek Water Co. v. Per-dew* (Cal.), 2 Pac. 132; *Kaler v. Campbell*, 13 Oregon, 596. The filing of a homestead entry of land through which a natural stream flows, with no prior right to divert, confers a right to have the stream run in its channel without diversion. *Sturr v. Beck*, 133 U. S. 541.

<sup>1</sup> *Jupiter Mining Co. v. Bodie Consolidated Co.*, 11 Fed. Rep. 666; *Harvey v. Ryan*, 42 Cal. 626.

<sup>2</sup> *Ante*, § 231.

<sup>3</sup> *Union Mill Co. v. Ferris*, 2 Sawyer, 176, 185; *Vansickle v. Haines*, 7 Nev. 249; *Hobart v. Ford*, 6 Nev. 77; *Shoemaker v. Hatch*, 13 Nev. 261; *Rivers v. Burbank*, id. 398; *Jones v. Adams*, 19 Nev. 78; *Hobart v. Wicks*, 15 Nev. 418; *Broder v. Natoma Water Co.*, 50 Cal. 621; 101 U. S.

274; *Titcomb v. Kirk*, 51 Cal. 288; *Cave v. Crafts*, 53 Cal. 135; *Osgood v. El Dorado Water Co.*, 56 Cal. 571; *Himes v. Johnson*, 59 Cal. 259; 61 Cal. 259; *Coffin v. Left Hand Ditch Co.*, 6 Col. 443; *De Necochea v. Curtis*, 80 Cal. 397; *South Yuba Water Co. v. Rosa*, id. 333; *Geddis v. Parrish* (Wash.), 21 Pac. 314; *Lansdale v. Daniels*, 100 U. S. 118; *Daniels v. Lansdale*, 43 Cal. 41; *Megerle v. Ashe*, 33 Cal. 74; *Smith v. Athern*, 34 Cal. 507.

<sup>4</sup> *Union Mill Co. v. Ferris*, 2 Sawyer, 176.

<sup>5</sup> *Ibid.*; *Union Mill Co. v. Dangberg*, 2 Sawyer, 450.

<sup>6</sup> *Jennison v. Kirk*, 98 U. S. 453; *Noteware v. Sterns*, 1 Mon. 311; *Robertson v. Smith*, id. 410; *Alta L. & W. Co. v. Hancock* (Cal.), 24 Pac. 645.

<sup>7</sup> *Dodge v. Marden*, 7 Oregon, 456.

## CHAPTER VIII.

### EMINENT DOMAIN.

#### SECTION.

- 241, 242. The extent of this right as applied to rights in waters.
- 243. Public use.
- 244. Compensation necessary, and when to be made.
- 245. Taking of water for the supply of cities, for canals, etc.
- 246. Rights of riparian owners when public waters are taken.
- 247. Levees and assessments therefor.
- 248, 249. Consequential injuries.
- 250. Damages how obtained for authorized injuries.
- 251, 252. Damages obtainable and how estimated.
- 253. Validity of mill acts.
- 254. Public mills.
- 255. Change in the public use and additional burdens.
- 256, 257. Roads or bridges across streams to be provided with passage-ways for the water.
- 258. No liability for injuries in the absence of negligence.
- 259. Continuing trespasses and effect of judgments.
- 260-262. Liability of municipal corporations for flowage.

§ 241. **Extent of this right.**—The power of the government to affect private rights of property, as the interests of the public may require, which is an incident of sovereignty requiring no constitutional recognition,<sup>1</sup> is frequently so exercised as to materially modify natural or acquired rights in water, and in the lands over which the water flows or is conducted in artificial channels. Private property may be thus appropriated in favor of private persons, either individuals or corporations, when the public service is the object of the grant, as in the case of private canal,<sup>2</sup> ferry,<sup>3</sup> or aqueduct<sup>4</sup> com-

<sup>1</sup> *United States v. Jones*, 109 U. S. Mass. 71; *Dalles L. Co. v. Urquhart*, 513. 16 Oregon, 67; *Chesapeake Canal Co.*

<sup>2</sup> *Varick v. Smith*, 5 Paige, 137; *v. Key*, 3 Cranch C. C. 599; *Willyard Spring v. Russell*, 7 Maine, 273; *v. Hamilton*, 7 Ohio, pt. 2, p. 111; *Briggs v. Cape Cod Ship Canal*, 137 Wabash Canal *v. Spears*, 16 Ind. 440;

<sup>3</sup> *Day v. Stetson*, 8 Maine, 365; *Lowell v. Boston*, 111 Mass. 464; *Talbot v. Hudson*, 24 Law Rep. 228; 16 69 N. C. 165. Gray, 417; *Heyneman v. Blake*, 19

<sup>4</sup> *Lumbard v. Stearns*, 4 Oush. 60; Cal. 579.



panies. For such purposes the legislature may, in its discretion, appropriate the fee of lands;<sup>1</sup> but its enactments will, if possible, be construed to create a servitude only, when that is sufficient to answer the public wants.<sup>2</sup> The use is public when it promotes the interests of a considerable portion of the community, although it may not benefit the community at large or particular individuals in the locality; as in the case of a water supply and land condemned to furnish water-works for a particular city or town;<sup>3</sup> of booms and dams constructed

*Rubottom v. McClure*, 4 Blackf. 505; *Chesapeake Canal Co. v. Young*, 3 Md. 480; *Black v. Delaware Canal Co.*, 22 N. J. Eq. 130; *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479. As to canals in Pennsylvania, see *Craig v. Allegheny*, 53 Penn. St. 477; *Wyoming Coal Co. v. Price*, 81 Penn. St. 156; *Robinson v. West Pennsylvania Railroad Co.*, 72 Penn. St. 316; *Pennsylvania Canal Co. v. Billings*, 94 Penn. St. 40.

<sup>1</sup> *Malone v. Toledo*, 34 Ohio St. 541; *Indianapolis Waterworks Co. v. Burkhardt*, 41 Ind. 364; *Nelson v. Fleming*, 56 Ind. 310; *Cromie v. Trustees*, 71 Ind. 208; *Harlow v. Rogers*, 12 Cush. 291; *Logansport v. Shirk*, 88 Ind. 563; *Western Penn. R. Co.'s Appeal*, 99 Penn. St. 155, 163; *Frank v. Evansville R. Co.*, 111 Ind. 132; *Blair v. Kiger*, id. 193; *Pickman v. Peabody*, 145 Mass. 480; *Woodbury v. Marblehead Water Co.*, id. 509; *Page v. O'Toole*, 144 Mass. 303; *Dingley v. Boston*, 100 Mass. 559; *People v. Haines*, 49 N. Y. 587; *Baker v. Johnson*, 2 Hill, 342. In such case evidence of the value of the fee is inadmissible. *Re Thompson*, 12 N. Y. S. 182.

<sup>2</sup> *Edgerton v. Huff*, 26 Ind. 35; *Harback v. Boston*, 10 Cush. 295; *ante*, § 101; *McCombs v. Stewart*, 40 Ohio St. 647; *Pittsburgh Railroad Co. v. Bruce*, 102 Penn. St. 23; *Holman v. Green*, 2 Hazard & W. (Pr. Edw. Island) 320.

<sup>3</sup> *Wayland v. Middlesex*, 4 Gray, 500; *Boston Water Power Co. v. Boston Railroad*, 16 Pick. 512; *Riche v. Bar Harbor Water Co.*, 75 Maine, 91; *Gilmer v. Lime Point*, 18 Cal. 229; *Reddall v. Bryan*, 14 Md. 444; *Kane v. Baltimore*, 15 Md. 240; *Graff v. Baltimore*, 10 Md. 544; *Badger v. South Yorkshire Ry. Co.*, 5 Jur. N. S. 459; *Haupt's Appeal*, 125 Penn. St. 211; *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123; *Price v. Riverside Co.*, 56 Cal. 431; *Natoma Water Co. v. Clarkin*, 14 Cal. 544; *Attorney General v. Eau Claire*, 37 Wis. 400; *Smith v. Gould*, 59 Wis. 631; *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *San Francisco v. Spring Valley Waterworks*, 48 Cal. 492; *St. Helena Water Co. v. Forbes*, 62 Cal. 182; *People v. Stephens*, id. 209; *Olmsted v. Proprietors*, 46 N. J. L. 495; 47 id. 311; *State v. Morris Aqueduct*, id. 495; *Thorn v. Sweeney*, 12 Nev. 251; *Burden v. Stein*, 27 Ala. 104; 24 Ala. 130; *Memphis v. Memphis Water Co.*, 5 Heisk. 495; *Matter of Middletown*, 82 N. Y. 196; *Re New Rochelle Water Co.*, 46 Hun, 525; *Stamford Water Co. v. Stanley*, 39 Hun, 424. Under 10 & 11 Vic. ch. 17, §§ 37, 43, a supply of water for a workhouse is not for public purposes, the guardians being owners of the house and the inmates one family. *Liskeard Union v. Liskeard Water Co.*, 7 Q. B. D. 505. Land may be condemned for a reservoir. *Lake*

for floating lumber;<sup>1</sup> the reclamation of tracts of land;<sup>2</sup> the drainage of land in order to protect the public health,<sup>3</sup> or to protect a highway by a ditch,<sup>4</sup> or to promote agricultural interests;<sup>5</sup> the laying of common drains and sewers;<sup>6</sup> or the

*Pleasanton W. Co. v. Contra Costa W. Co.*, 67 Cal. 659.

<sup>1</sup>*Lawler v. Baring Boom Co.*, 56 Maine, 443; *Lancaster v. Kennebeck Co.*, 62 Maine, 272; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Cotton v. Mississippi Boom Co.*, 22 Minn. 372; *Finney v. Somerville*, 80 Penn. St. 59; *Patterson v. Boom Co.*, 3 Dillon, 465.

<sup>2</sup>*Tide Water Co. v. Coster*, 18 N. J. Eq. 518; *Avery v. Police Jury*, 12 La. Ann. 554; *Hagar v. Reclamation District*, 111 U. S. 701; *Foster v. Park Commissioners*, 133 Mass. 321.

<sup>3</sup>*Wurts v. Hoagland*, 114 U. S. 606; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Holtz v. Commissioners*, 41 Ohio St. 423; *Thompson v. Woods Co.*, 11 Ohio St. 678; *Donnelly v. Decker*, 58 Wis. 461; *Hagar v. Supervisors*, 47 Cal. 222; *Brown v. Keener*, 74 N. C. 714; *Pool v. Trealer*, 76 N. C. 297; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Tinder v. Duck Pond Co.*, 38 Ind. 555; *Ross v. Davis*, 97 Ind. 79; *Winslow v. Winslow*, 95 N. C. 24; *In re Ryers*, 72 N. Y. 1; 10 Hun, 93; *Re Lower Chatham*, 35 N. J. L. 497.

<sup>4</sup>*Smeaton v. Martin*, 57 Wis. 364.

<sup>5</sup>*Reeves v. Wood County*, 8 Ohio St. 333; *Patterson v. Baumer*, 43 Iowa, 477; *Norfleet v. Cromwell*, 70 N. C. 634; 64 N. C. 1; *Taylor v. Porter*, 4 Hill, 140; *People v. Nearing*, 27 N. Y. 306; *People v. Haynes*, 49 N. Y. 587; *Beekman v. Saratoga R. Co.* 3 Paige, 45; *Clack v. White*, 2 Swan, 540; *Binney's Case*, 2 Bland Ch. 99; *Oregon Cascade R. Co. v.*

*Bailey*, 3 Oregon, 164; *Seely v. Sebastian*, 4 Oregon, 25; *Rutherford's Case*, 72 Penn. St. 82; *Blackman v. Halves*, 72 Ind. 515; *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Chambers v. Kyle*, 67 Ind. 206; *Henry v. Thomas*, 119 Mass. 583; *Dingley v. Boston*, 100 Mass. 544. A reclamation district, or a swamp land district, is a public corporation. *People v. Williams*, 56 Cal. 647; *Hoke v. Perdue*, 62 Cal. 545; *People v. La Rue*, 67 Cal. 526. In general, drains or levees for the reclamation of wet, overflowed or swamp lands can be constructed across the lands of others and the cost assessed thereon, without the owner's assent, and under the police power, only when the welfare of the community will be promoted. *Jenal v. Green Island Co.*, 12 Neb. 163. The storage of debris and the promotion of the drainage of a district are distinct. *People v. Parks*, 58 Cal. 624. In Indiana and other Western States, laws providing for the drainage of wet and overflowed lands, and the assessment of the expense upon those benefited by the work, are within the limits of the police power, especially if the work is of public utility, promotes the public health, or benefits a public highway. *O'Reiley v. Kankakee Valley D. Co.*, 32 Ind. 169; *Anderson v. Baker*, 98 Ind. 587; *Neff v. Reed*, id. 341, 344; *Wishmier v. State*, 97 Ind. 160; *Ross v. Davis*, id. 79; *Fries v. Brier*, 111 Ind. 65; *Coolman v. Fleming*, 82 Ind. 117; *Colfax Tp. Commis-*

<sup>6</sup>*Ibid.*; *Hildreth v. Lowell*, 11 Gray, 345; *O'Reiley v. Draining Co.*, 32 Ind. 169; *State v. Blake*, 36 N. J. L.

442; *Cincinnati v. Penny*, 21 Ohio St. 499.

improvement of the navigation of a river.<sup>1</sup> An act has been held constitutional which authorized the construction and maintenance of a line or lines of tubing for the transportation of petroleum and other oils through pipes to any railroad, navigable stream, etc.;<sup>2</sup> and the condemnation of land for public roads leading to mines, for the erection of mining machinery and shafts,<sup>3</sup> or for a right of way for a water ditch used for mining,<sup>4</sup> is held to be a proper exercise of the right

sioners *v.* East Lake Fork D. District, 127 Ill. 581; Matthias *v.* Cramer, 73 Mich. 5; Callahan *v.* Dunn, 78 Cal. 866. The drain need not be of public utility in all the counties into which it extends. Meranda *v.* Spurlin, 100 Ind. 380. The proceedings are *in rem*. Otis *v.* De Boer, 116 Ind. 531. Under the acts of Illinois assessments can only be supported by benefits. Havana Drainage Commissioners *v.* Kelsey, 120 Ill. 482. And benefits may be offset against damages. Winkleman *v.* Drainage District, 24 Ill. App. 242. See People *v.* O'Hair, 128 Ill. 20. The drainage district, being a mere public, involuntary, *quasi* corporation, is not liable for the negligence or tortious acts of its commissioners. Elmore *v.* Drainage Commissioners (Ill.), 25 N. E. 100. As to taxation, see Clee *v.* Sanders, 74 Mich. 692; State *v.* Smith, 50 N. J. L. 101. County commissioners, unless clearly authorized, cannot establish levee districts beyond their county. Moulton *v.* Parks, 64 Cal. 166. As to drainage in England, see 8 & 9 Vict. ch. 56; *Re Poynder's Settled Estates*, 30 W. R. 7.

<sup>1</sup> People *v.* Allen, 42 N. Y. 378. See *Re County Commissioners*, 143 Mass. 424.

<sup>2</sup> West Virginia Transportation Co. *v.* Volcanic Oil Co., 5 W. Va. 382.

<sup>3</sup> Bankhead *v.* Brown, 25 Iowa, 540; Dayton Mining Co. *v.* Seawell, 11 Nev. 894; Overman Silver Mining Co. *v.*

Corcoran, 15 Nev. 147. But land cannot be condemned for a public road which will merely benefit an individual or corporation. Channel Co. *v.* Railroad, 51 Cal. 269; Reclamation District *v.* Hagar, 4 Fed. Rep. 366; People *v.* Hagar, 52 Cal. 170; State *v.* Diggs Drainage Co., 45 N. J. L. 91; Zimmerman *v.* Canfield, 42 Ohio St. 463; Garrett *v.* Green, 3 Penny. (Pa.) 370; Bryant *v.* Robbins, 70 Wis. 258. Land within the limits of the district only can be assessed for benefits conferred on such lands. Moulton *v.* Parks, 64 Cal. 166, 181. It cannot be taken for the private enterprise of constructing an artificial basin with wharves therein, although incidentally benefiting the public by affording additional accommodations for business, commerce or manufactures. *Re Eureka Basin W. & M. Co.*, 96 N. Y. 42. The use of grain elevators on a wharf is not inconsistent with the condemnation as "a public highway for wharf purposes." Belcher Sugar R. Co. *v.* St. Louis Grain El. Co., 10 Mo. App. 401.

<sup>4</sup> Hand Gold Mining Co. *v.* Parker, 59 Ga. 419; Dalton *v.* Water Commissioners, 49 Cal. 222; Bliss *v.* Kingdom, 46 Cal. 651. The constitution of California provides "that the use of water now appropriated, or that may be hereafter appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the

of eminent domain in the far West. So, a railroad company may be authorized to condemn land for the purpose of changing the channel of a stream where the safety of the traveling public will be promoted thereby.<sup>1</sup> But land cannot be taken for a purely private purpose, without regard to the public good, as for a private drain,<sup>2</sup> road,<sup>3</sup> or mining claim,<sup>4</sup> although compensation is made or tendered. The legislature cannot authorize miners to build a flume on others' lands for the purpose of carrying off their tailings, or of enabling them to deposit them on such lands,<sup>5</sup> or to obtain a right of way for the more convenient mining of coal.<sup>6</sup> It cannot empower voluntary associations to assume, without any necessity arising from an interruption of their own business, the control and management of others' logs floating in public navigable waters, and to enforce a lien against the logs for such control and management.<sup>7</sup> So, canal commissioners, as public agents, cannot appropriate the lands of others for the purpose of compensating those who are injured by the construction of the canal;<sup>8</sup> nor can they be authorized by the legislature to take from private streams more water than is necessary for canal navigation and raise a revenue by resale or other disposition

State in the manner to be prescribed by law." See *Cummings v. Peters*, 56 Cal. 593.

<sup>1</sup> *Reusch v. C. B. & Q. R. Co.*, 57 Iowa, 687. As to successive appropriations, see *Peck v. Louisville Ry. Co.*, 101 Ind. 366.

<sup>2</sup> *Fleming v. Hull*, 73 Iowa, 598.

<sup>3</sup> *Embury v. Conner*, 3 N. Y. 511; *State v. Driggs Drainage Co.*, 45 N. J. L. 91. Land cannot be condemned for a railroad to convey its visitors in summer to see the Niagara river and the whirlpool, there being no other traffic and no habitation on the river. *Re Niagara Falls R. Co.*, 108 N. Y. 375.

<sup>4</sup> *Lorenz v. Jacob*, 63 Cal. 73.

<sup>5</sup> *Consolidated Channel Co. v. Central Pacific R. Co.*, 51 Cal. 269.

<sup>6</sup> *Waddell's Appeal*, 84 Penn. St. 90. See *Brock v. Barnett*, 57 Vt. 172.

<sup>7</sup> *Ames v. Port Huron Log Co.*, 11 Mich. 139; *Butterfield v. Gilchrist*, 53 Mich. 22; *Quimby v. Hazen*, 54 Vt. 132. *Contra*, where a boom company is made bailee of loose logs and renders a service to their owners by keeping them from stranding. *Duluth Lumber Co. v. St. Louis Boom & Improvement Co.*, 17 Fed. Rep. 419.

<sup>8</sup> *McArthur v. Kelly*, 5 Ohio, 139. Property owners may be estopped by their conduct from asserting that a statute authorizing a public improvement is not constitutional. *Tone v. Columbus*, 39 Ohio St. 281. A statute which purports to authorize the issue of bonds by a village to aid in improving a private water-power by a dam is unconstitutional as providing for public taxation for private purposes. *Coates v. Campbell*, 37 Minn. 498.

of the surplus water.<sup>1</sup> There must in all cases be a real necessity for the condemnation.<sup>2</sup> Drainage beneficial to two farms is not a public use.<sup>3</sup> A railroad corporation cannot condemn land for the construction of a store-house for boats of passengers who visit a watering place on the line of its road, or for the purpose of opening a highway from its road to a hotel one-third of a mile distant, where its patrons are entertained.<sup>4</sup> A statute which provides for the taking, for a private purpose, of private property with the owner's consent is constitutional, and such consent may be proved by parol acts and declarations, notwithstanding the statute of frauds, if the act does not require the consent to be in writing.<sup>5</sup>

§ 242. Same — Public use.— Within reasonable and just limits the legislature has the power to determine whether a particular use is public or private, and the statutes which it enacts are presumed to be valid.<sup>6</sup> But in order to give effect

<sup>1</sup> *Buckingham v. Smith*, 10 Ohio, 297; *Cooper v. Williams*, 5 Ohio, 244; *Little Miami Elevator Co. v. Cincinnati*, 30 Ohio St. 629; *Erkenbrecher v. Cincinnati*, 2 Cinn. (Ohio) 412; *Fox v. Cincinnati*, 104 U. S. 783; *Varick v. Smith*, 5 Paige, 187; 9 Paige, 547. So of a water company. *Re Barre Water Co.*, (Vt.) 20 Atl. 109; *Day v. Pittsburg R. Co.*, 44 Ohio St. 406. Surplus water is necessary to canal navigation, and may be sold or leased. But the primary object is not to create a water power, but a navigable highway. *Ibid.* If the water is needed for navigation, the lessee's right must yield. *State v. Board of Public Works*, 42 Ohio St. 607. The State may abandon a leased canal and permit it to be filled up and a railroad built on its site. *Hoagland v. New York Ry. Co.*, 111 Ind. 443. See *Whitney v. State*, 96 N. Y. 240; *Logansport v. Shirk*, 88 Ind. 568; *Burk v. Simonson*, 104 Ind. 173. It is not *ultra vires* for a canal company which is authorized to draw water from a public river for its chartered

purpose, to agree to discharge its waste water at a certain point. *Armstrong v. Pennsylvania R. Co.*, 38 N. J. L. 1; *Hoppock v. United New Jersey R. Co.*, 27 N. J. Eq. 286; 28 id. 261; *Attorney General v. Plymouth*, 9 Beav. 67. There is no dower in the privilege of using the surplus water of a canal. *Kingman v. Sparrow*, 12 Barb. 201.

<sup>2</sup> *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 128.

<sup>3</sup> *McQuillen v. Hatton*, 42 Ohio St. 202.

<sup>4</sup> *Re Rochester & G. H. R. Co.*, 12 N. Y. S. 566.

<sup>5</sup> *Embury v. Conner*, 8 N. Y. 511.

<sup>6</sup> *Secombe v. Railroad Co.*, 28 Wall. 108; *Talbot v. Hudson*, 16 Gray, 417; *Opinion of Justices*, 8 Gray, 21; *Lowell v. Boston*, 111 Mass. 454; *Moore v. Sanford*, 151 Mass. 285; *Booth v. Woodbury*, 32 Conn. 118; *Allen v. Jay*, 60 Maine, 124; *Amoskeag Manuf. Co. v. Head*, 56 N. H. 386; *Twitchell v. Blodgett*, 18 Mich. 127; *Brodhead v. Milwaukee*, 19 Wis. 624; *Varick v. Smith*, 5 Paige,

to the constitutional limitations by which its acts are restrained, the final decision must rest with the courts in determining whether the appropriation has any element of public utility,<sup>1</sup> which will also be guided by the consideration that, as these statutes are in derogation of common right, no powers will be implied beyond what are expressly granted.<sup>2</sup> A constitutional provision authorizing the taking of private property for public use amounts to a declaration that for any other use such property shall not be taken from the owner without his consent and transferred to another.<sup>3</sup> The use is none the less public because a corporation created by the laws of another State is empowered to condemn land for the purpose, or because such corporation derives pecuniary benefit from the use of the land appropriated.<sup>4</sup> A State cannot condemn beyond its own limits; but it may condemn up to the State line when such line is the thread of a boundary river between States, and may thus control the use of the property of a bridge corporation organized under the laws of the State on the other side of the river.<sup>5</sup> The government of the United States may,

187; 9 Paige, 547; *Harris v. Thompson*, 9 Barb. 350; *Bloodgood v. Mohawk R. Co.*, 18 Wend. 56; *Stockton R. Co. v. Stockton*, 41 Cal. 147. All eminent domain statutes are strictly construed, and their requirements must be strictly observed. *Re Amsterdam Water Commissioners*, 96 N. Y. 351; *Whiteford Township v. Probate Judge*, 53 Mich. 130.

<sup>1</sup> *Ibid.*; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 518; *Dayton Mining Co. v. Seawell*, 11 Nev. 394; *Chicago R. Co. v. Lake*, 71 Ill. 333; *Matter of Deansville Cemetery Association*, 66 N. Y. 569; *Indianapolis Waterworks Co. v. Burkhardt*, 41 Ind. 364; *Campbell v. Dwiggins*, 83 Ind. 473; *Tyler v. State*, *id.* 563; *Varner v. Martin*, 21 W. Va. 534.

<sup>2</sup> *Howe v. Norman*, 13 R. I. 488; *Re Amsterdam Water Commissioners*, 96 N. Y. 351.

<sup>3</sup> *Ibid.*; *In re Albany Street*, 11 Wend. 149; *Embury v. Conner*, 8

N. Y. 511; *Concord Railroad v. Greeley*, 17 N. H. 47.

<sup>4</sup> *Matter of Townsend*, 89 N. Y. 171. The legislature, in the exercise of the police power, may prescribe regulations for vessels navigating a canal owned by a corporation in behalf of which the right of eminent domain has been exercised. *Commissioners v. Willamette Transportation Co.*, 6 Oregon, 219.

<sup>5</sup> *Crosby v. Hanover*, 36 N. H. 404. Where power is conferred by statute upon county courts of adjoining counties to construct bridges across boundary streams, at joint expense, this is not exclusive and does not take away the common-law right of either county to erect such bridges at its sole cost. *Washer v. Bullitt County*, 110 U. S. 558. So as to a bridge between this country and Canada. *Att'y Gen. v. Int. Bridge Co.*, 20 Ch. (Can.) 34. Cf. *In re McDonough*, 30 Q. B. (Can.) 288; *Inter-*



upon providing just compensation, authorize the taking of the property of a riparian proprietor for the purpose of affording increased facilities for navigation and commerce between the States;<sup>1</sup> and for this purpose it may proceed in the State as well as the Federal courts.<sup>2</sup> This it may do against the protest of a State;<sup>3</sup> and even defects in a State statute as to providing adequate compensation for a national improvement may be cured by Congress.<sup>4</sup>

§ 243. **Same — Taking.**—In order to constitute a taking for public use, it is not necessary that the property should be absolutely converted to public purposes, but it is sufficient if its value is destroyed or permanently and seriously impaired. When real estate is actually invaded by backing water upon it by means of a dam or by any superinduced additions of water, earth, sand or other material, or by having any artificial structure placed upon it, it is a taking for which the land-owner is entitled to damages,<sup>5</sup> even in the absence of a

national Bridge Co. v. Canada Southern Ry. Co., 28 Grant Ch. (Can.) 114; 7 Ontario App. 226; Attorney General v. International Bridge Co., 6 Ontario App. 537; 28 Grant Ch. 65.

<sup>1</sup> United States v. Jones, 109 U. S. 513; Avery v. Fox, 1 Abb. U. S. 246; Velte v. United States, 76 Wis. 278. The owner's claim for compensation is one arising out of implied contract, within the jurisdiction of the court of claims. United States v. Great Falls Manuf. Co., 112 U. S. 645.

<sup>2</sup> Re United States Petition, 96 N. Y. 227; Kohl v. United States, 91 U. S. 367; Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525; Great Falls Manuf. Co. v. United States, 16 Ct. Cl. 160; United States v. Jones, 109 U. S. 513; 48 Wis. 513; Sweaney v. United States, 62 Wis. 396; United States v. Oregon Ry. & Nav. Co., 16 Fed. Rep. 524; 17 A. G. Op. 109, 137, 279, 453, 455; 18 id. 481, 64, 66, 431; Great Falls Manuf. Co. v. Garland, 25 Fed. Rep. 521; Hawkins Point Light House, 39 id. 77; In re Secretary of

the Treasury, 45 id. 396; 25 U. S. Stats. 357.

<sup>3</sup> Decker v. Baltimore & N. Y. R. Co., 30 Fed. Rep. 723.

<sup>4</sup> Green Bay Canal Co. v. Kaukauna W. R. Co., 70 Wis. 635.

<sup>5</sup> Pumpelly v. Green Bay Co., 18 Wall. 166; Eaton v. Boston R. Co., 51 N. H. 504; Thompson v. Androscoggin Co., 54 N. H. 545; Inman v. Tripp, 11 R. I. 520, 525; Titus v. Boston, 149 Mass. 164; Gulf Ry. Co. v. Jones, 63 Texas, 524; Hollingsworth v. Tensas, 17 Fed. Rep. 109, 118, note; Arimond v. Green Bay Canal Co., 31 Wis. 316; Pettigrew v. Evansville, 25 Wis. 223; Winn v. Rutland, 52 Vt. 481; Jones v. United States, 48 Wis. 404; Cumberland v. Willison, 50 Md. 138; Glover v. Powell, 10 N. J. Eq. 211; Ten Eyck v. Delaware Canal Co., 18 N. J. 200; Morris Canal Co. v. Seward, 28 N. J. L. 219; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 321; Vanderlip v. Grand Rapids, 73 Mich. 522; 16 Am. St. Rep. 597, and note; Lee v. Pembroke Iron Co., 57 Maine,

constitutional provision that private property shall not be taken for public use without compensation.<sup>1</sup> So the diversion, pollution, or other use of a private stream by public authorities, impairing, changing,<sup>2</sup> or destroying the rights of riparian proprietors to the water, is a taking for which compensation must be provided.<sup>3</sup> But an act of the legislature "to prevent the wilful pollution of the waters of any of the creeks, ponds or brooks of the State," if designed to prohibit the pollution of waters supplying any reservoir for distribution for public use, is not such a taking, but a police regulation, forbidding such use of private property as tends to the common injury of the citizens of the State.<sup>4</sup> So a municipal ordinance requiring every owner of a bakery with a well on the premises to have the well filled up to the surface of the land, in order that the water therefrom, used in bread sold to the public, may not be impure, is a police regulation and not a taking.<sup>5</sup> A statute which authorizes a corporation to erect, on its own land, a dam in a river which is a public highway only affords protection against an indictment for obstructing the navigation, and does not protect from liability to an action for flowing others' lands.<sup>6</sup> So, authority to maintain side booms in convenient

481; *Wabash Canal v. Spears*, 16 Ind. 441; *Mabire v. Canal Bank*, 11 La. Ann. 83; *Hollingsworth v. Tensas*, 4 Woods, 280; *McKenzie v. Mississippi Boom Co.*, 29 Minn. 288; *Weaver v. Mississippi Boom Co.*, 28 Minn. 534. See *post*, § 249. "Damaged" in a statute includes more than "taken." *Frankle v. Jackson*, 30 Fed. Rep. 398; *Sheehy v. Kansas City Cable Ry. Co.*, 94 Mo. 574; 4 Am. St. Reps. 396, and note.

<sup>1</sup> *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Sinnickson v. Johnson*, 2 Harr. (N. J.) 129; *Pumpelly v. Green Bay Co.*, 13 Wall. 178; *Ex parte Martin*, 13 Ark. 199; *Cairo R. Co. v. Turner*, 31 Ark. 494.

<sup>2</sup> *Smith v. Gould*, 61 Wis. 31.

<sup>3</sup> *Union Canal Co. v. Stump*, 81 Penn. St. (Pt. 2) 355; *Ex parte Jennings*, 6 Cowen, 518; *Canal Commis-*

*sioners v. People*, 5 Wend. 423; *Commissioners v. Kempshall*, 26 Wend. 404; *Worcester G. L. Co. v. Worcester County Com'rs*, 188 Mass. 289; *Harding v. Stamford Water Co.*, 41 Conn. 87; *Walker v. Board of Public Works*, 16 Ohio, 540; *Avery v. Fox*, 1 Abb. U. S. 246; *Ferrand v. Bradford*, 21 Beav. 412; *Adams v. Slater*, 8 Brad. (Ill.) 72; *Smith v. Gould*, 61 Wis. 31; 59 id. 631.

<sup>4</sup> *State v. Wheeler*, 44 N. J. L. 88.

<sup>5</sup> *State v. Schlemmer*, 42 La. Ann. 1166. See, also, *Barbier v. Connelly*, 113 U. S. 27; *Powell v. Pennsylvania*, 127 U. S. 679; *Harmon v. Chicago*, 110 Ill. 400; *Sweet v. Rechel*, 37 Fed. Rep. 323.

<sup>6</sup> *Crittenden v. Wilson*, 5 Cowen, 165; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 58; *Lee v.*

places in a river does not warrant an entry upon the close of another.<sup>1</sup> The land of a riparian proprietor which is covered with water can no more be appropriated to public use, without just compensation, than any other property, and if the legislature authorizes a dock line to be established which prevents a riparian owner from constructing a dock beyond such line,<sup>2</sup> or from driving piles along the shore,<sup>3</sup> neither of which would interfere with the public right of navigation, he is entitled to be compensated for the right of which he is thus deprived. The fact that land covered by water is held subject to the public right of navigation does not justify a condemnation without compensation, or deprive the owner of the protection of the courts, if compensation is not made.<sup>4</sup> In those States in which the mortgagor of an estate is held at law to be the owner thereof as to all the world, except the mortgagee, the mortgagor is the person entitled to compensation when land previously mortgaged is taken for a public use.<sup>5</sup> A licensee of a well and an hydraulic ram thereon, under a parol license, cannot maintain a petition for damages for a taking of the land and an interference with his right under the right of eminent domain.<sup>6</sup>

Pembroke Iron Co., 57 Maine, 481; Trenton Water Power Co. v. Raff, 36 N. J. L. 335. See Zemlock v. United States, 73 Wis. 363; Whitehead v. Plummer, 76 Iowa, 181.

<sup>1</sup> Perry v. Wilson, 7 Mass. 398.

<sup>2</sup> Walker v. Shepardson, 4 Wis. 486; Yates v. Milwaukee, 10 Wall. 497. When land is taken by the State for a canal, the purpose for which such canal is designed and its practical enjoyment necessarily include the ground covered by water, sufficient banks, a towing path on one side and a berme bank on the other; and the presumption is that the State took land of sufficient width for all such rights. Pennsylvania Canal Co. v. Harris, 101 Penn. St. 80. A State legislature cannot, by contract, bind the State as to matters affecting public health or public morals, so as to limit the future exercise of legislative

power on those matters. Butchers' Union Co. v. Crescent City Co., 111 U. S. 746.

<sup>3</sup> Janesville v. Carpenter, 77 Wis. 288.

<sup>4</sup> Morris Canal Co. v. Jersey City, 26 N. J. Eq. 294.

<sup>5</sup> Isele v. Schwamb, 131 Mass. 337. Under a statute which makes water rents a charge on land paramount to all incumbrances, if a mortgage is afterwards given, and thereafter water is introduced on the land, the lien of the water rent is paramount to that of the mortgage. Provident Institution v. Jersey City, 113 U. S. 506. The amount paid by a mortgagee for water rates due, to prevent the water from being cut off, is properly chargeable to the mortgagor. Donohue v. Chase, 139 Mass. 407.

<sup>6</sup> Clapp v. Boston, 133 Mass. 367. Power conferred upon a corporation

§ 244. **Compensation.**— In exercising the right of eminent domain the government does not necessarily enter into a contract, and is not, therefore, bound to complete a contemplated appropriation.<sup>1</sup> But private property cannot be taken for public use without just compensation, and this must be made in money.<sup>2</sup> It is competent for the legislature to impose the expense of a public improvement, such as the widening or deepening of a navigable channel, or the construction of a canal, upon property peculiarly benefited thereby, by way of taxation, and the excess of such expense over the measure of particular advantage, must be paid by the public at large;<sup>3</sup> but it

by its charter to "use, rent, or sell" its hydraulic powers and privileges, authorizes it to mortgage them. *Willamette Manuf. Co. v. British Columbia Bank*, 119 U. S. 191.

<sup>1</sup> *Lamb v. Schottler*, 54 Cal. 319; *Re Wells Ave. Sewer*, 46 Hun, 534; *Moline Water-power Co. v. United States*, 20 Ct. of Cl. 331; *Curran v. Louisville*, 83 Ky. 628. Statutory provisions in a local and personal act, providing for compensation for injury to A., from the escape of water from the reservoirs, aqueducts or pipes of water-works proprietors, are regarded as a contract, whether made by the parties or forced upon them by the legislature. *Roths v. Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 694. In *United States v. Great Falls Manuf. Co.*, 112 U. S. 645, it was held that a claim for compensation for property taken pursuant to an act of Congress is one arising out of an implied contract within the meaning of the statute defining the jurisdiction of the court of claims. If the compensation is payable by monthly damages, there is no obligation to continue the payments after the public use has ceased. *State v. Administrator of Public Accounts*, 26 La. Ann. 336. But damages caused before the abandonment must be paid. *Leisse*

*v. St. Louis R. Co.*, 72 Mo. 581. Non-user does not always amount to an abandonment. *Curran v. Louisville*, 83 Ky. 628.

<sup>2</sup> *Van Horne v. Dorrance*, 2 Dallas, 313; *Carson v. Coleman*, 11 N. J. Eq. 106; *Ward v. Peck*, 44 N. J. L. 42; *Commonwealth v. Peters*, 2 Mass. 125; *Cobb v. Smith*, 16 Wis. 661; *Livermore v. Jamaica*, 23 Vt. 361; *Butler v. Sewer Commissioners*, 39 N. J. 665; *Hyslop v. Finch* (99 Ill.), 24 Alb. L. J. 156; *Jacob v. Louisville*, 9 Dana, 114; *San Diego L. & T. Co. v. Neale*, 78 Cal. 80; *Organ v. Memphis R. Co.*, 51 Ark. 235; *Wilson v. Baltimore R. Co.*, 5 Del. Ch. 524; *Zimmerman v. Canfield*, 42 Ohio St. 463. See *McMaster v. Commonwealth*, 3 Watts, 296; *Satterlee v. Mathewson*, 16 S. & R. 179; *ante*, § 210.

<sup>3</sup> *Philadelphia v. Scott*, 81 Penn. St. 80; 9 Phila. 171; *Reed v. Erie*, 79 Penn. St. 346; *Schuffletown Fence Co. v. McAllister*, 12 Bush, 312; *Hatch v. Pottawattamie Co.*, 43 Iowa, 442; *James River Co. v. Turner*, 9 Leigh, 313; *Symonds v. Cincinnati*, 14 Ohio, 147; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 518; *State v. Newark*, 34 N. J. L. 236; *Reclamation District v. Hagar*, 6 Sawyer, 567; *Rexford v. Knight*, 15 Barb. 627; *Livingston v. New York*, 8 Wend. 85; *Holton v. Milwaukee*, 81 Wis. 27; *McIntire v. State*, 5 Blackf.

cannot appoint commissioners directly to assess damages without notice to the owner,<sup>1</sup> and the appraisement must be by a jury or impartial tribunal.<sup>2</sup> Those whom it authorizes to condemn lands cannot be empowered to assess damages or benefits.<sup>3</sup> In the absence of express words to that effect in the Constitution, it is not necessary that the compensation should be actually paid before the appropriation is made, but it is sufficient if an adequate remedy is provided by which the owner is sure to obtain compensation without unreasonable delay,<sup>4</sup> or danger of litigation;<sup>5</sup> and if compensation is not first made, it must be secured by some definite pledge or fund.<sup>6</sup> An act which authorizes the flowage of land, and provides for

384; *Murphy v. Wilmington*, 22 Alb. L. Journ. 387. Speculative advantages cannot be set off against the damages. *Palmer Co. v. Ferrill*, 17 Pick. 58. See petition of Mount Washington R. Co., 35 N. H. 134; *Hartwell v. Armstrong*, 19 Barb. 166; *Frederick v. Shane*, 32 Iowa, 254; *Jacob v. Louisville*, 9 Dana, 114.

<sup>1</sup> *Langford v. Commissioners*, 16 Minn. 375; *Heyneman v. Blake*, 19 Cal. 579; *Reclamation District v. Evans*, 61 Cal. 104.

<sup>2</sup> *People v. Nearing*, 27 N. Y. 306. *In re Ryers*, 72 N. Y. 1; 10 Hun, 93; *Tripp v. Overocker*, 7 Col. 72; *Goodwin v. Van Wert County Com'rs*, 41 Ohio St. 399. Commissioners who make void assessments are *functi officio*, in the absence of further legislative authority; but it is not necessary that they should be newly commissioned, if the legislature clothes them with all the authority they could derive from a new appointment. *Miller v. Craig*, 11 N. J. Eq. 175.

<sup>3</sup> *Hessler v. Drainage Commissioners*, 53 Ill. 105. The amount of property required for a public wharf to be constructed by a municipal corporation, may, it seems, be left to the discretion of the corporation. *Iron R. Co. v. Ironton*, 19 Ohio St. 299.

<sup>4</sup> *Pittsburgh v. Scott*, 1 Penn. St. 309; *Nichols v. Somerset R. Co.*, 43 Maine, 356; *Bonaparte v. Camden R. Co.*, Bald. C. C. 205; *Raleigh R. Co. v. Davis*, 2 Dev. & Bat. 464; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Cairo R. Co. v. Turner*, 31 Ark. 503; *Weaver v. Miss. R. Boom Co.*, 30 Minn. 477.

<sup>5</sup> *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Orr v. Quimby*, 54 N. H. 642; *San Francisco v. Scott*, 4 Cal. 114; *Newell v. Smith*, 15 Wis. 101. See *Ash v. Cummings*, 50 N. H. 591.

<sup>6</sup> *Bloodgood v. Mohawk R. Co.*, 18 Wend. 9; 14 Wend. 51; *Lisley v. Lobley*, 7 Ad. & El. 124; *Davidson v. Boston Railroad*, 3 Cush. 91; *Boynton v. Peterboro' R. Co.*, 4 Cush. 466; *Charlestown Branch Railroad v. Middlesex*, 7 Met. 78; *Cushman v. Smith*, 34 Maine, 247; *McAuley v. Western Vermont R. Co.*, 33 Vt. 321; *Foster v. Stafford Bank*, 57 Vt. 128; *Colton v. Rossi*, 9 Cal. 595; *McCauley v. Weller*, 12 Cal. 500; *Powers v. Bears*, 12 Wis. 222; *Brock v. Hishen*, 40 Wis. 681; *Prentice v. Wallis*, 37 Miss. 172; *Hall v. People*, 57 Ill. 316; *Doe v. Georgia R. Co.*, 1 Ga. 524; 2 Kent. Com. 389. The conduct of the owner of land may estop him from demanding the

compensation to the land-owner only by the requirement that he shall be paid the value of the land to be ascertained by verdict in an action of trespass, affords no greater redress than that given by the common law and is invalid.<sup>1</sup> But an act providing for the establishment of a public landing on the banks of a river is not unconstitutional, because it devolves upon the owner the duty to institute proceedings for the ascertainment of his damages.<sup>2</sup> And where compensation is not required before entering upon the land taken and the assessment of damages is to be by application therefor, in the same manner as land taken for highways, the land-owner cannot maintain trespass for the taking within the time limited for such assessment.<sup>3</sup> The omission to make due compensation can be taken advantage of by the owner only, and if he once assents to the taking, it cannot afterwards be availed of by himself or those claiming under him.<sup>4</sup> When the injury is merely consequential, but damages therefor are directed to be paid, it is not a constitutional requirement that they shall be paid or secured before possession taken or the occurrence of the injury.<sup>5</sup> It has been held that where the State, or a county, or town is to be liable for the damages caused by a taking for public use, its property is a fund to which the owner may look without danger of loss, and that the case of a taking by such a body differs in this respect from that of an appropriation in favor of a private corporation.<sup>6</sup> Such a distinction has not, however, been always favorably regarded.<sup>7</sup> There are also

actual payment of the required compensation as a condition precedent. *Pryzbylowicz v. Missouri River R. Co.*, 17 Fed. Rep. 492. Ejectment lies in Pennsylvania if compensation is not secured. *Philadelphia R. Co. v. Cooper*, 105 Penn. St. 239.

<sup>1</sup> *Newell v. Smith*, 15 Wis. 101; *Ash v. Cummings*, 50 N. H. 613; *Foster v. Stafford National Bank*, 57 Vt. 128; *Moody v. Jacksonville R. Co.*, 20 Fla. 597; *Pittsburg Ry. Co. v. Swinney*, 97 Ind. 586.

<sup>2</sup> *Cage v. Trager*, 60 Miss. 568.

<sup>3</sup> *Riche v. Bar Harbor Water Co.*, 75 Maine, 91.

<sup>4</sup> *Gray, J.*, in *Haskell v. New Bed-*

*ford*, 108 Mass. 214, citing *Hildreth v. Lowell*, 11 Gray, 345; *Brown v. Worcester*, 13 Gray, 81; *Embury v. Conner*, 3 N. Y. 511.

<sup>5</sup> *McKinney v. Monongahela Navigation Co.*, 14 Penn. St. 65; *Koch v. Williamsport Water Co.*, 65 Penn. St. 288; *Spangler's Appeal*, 64 Penn. St. 387.

<sup>6</sup> *Bloodgood v. Mohawk R. Co.*, 18 Wend. 9; *Chapman v. Gates*, 54 N. Y. 132; *Ash v. Cummings*, 50 N. H. 621; *Smeaton v. Martin*, 57 Wis. 364; *Loweree v. Newark*, 38 N. J. 151; *McClinton v. Pittsburgh R. Co.*, 66 Penn. St. 404.

<sup>7</sup> *Orr v. Quimby*, 54 N. H. 651; 15



semi-public relations in which the line of divergence between contracts and torts is clearly maintained. Thus an undertaking by a water company to supply water to be used by a city in extinguishing fires, gives no right of action against the company to an individual tax-payer whose property is burned by reason of a breach of such contract, there being no privity between them.<sup>1</sup>

§ 245. *Same — Cities — Canals.*— Under the right of eminent domain, water cannot be diverted from a private stream for the purpose of supplying a city, for canal purposes, or other public use,<sup>2</sup> without making compensation to the riparian proprietors whose rights are thereby injuriously affected. At a time when the constitution of New York contained no express provision against taking private property for public use without compensation, Chancellor Kent enjoined the trustees of a village, authorized by act of the legislature to supply it with water, from diverting a watercourse for this purpose, because the act made no provision for compensation.<sup>3</sup> If the

Am. Law Reg. 199; *Cushman v. Smith*, 84 Maine, 247.

<sup>1</sup> *Fowler v. Athens Waterworks Co.*, 83 Ga. 219.

<sup>2</sup> *Harding v. Stamford Water Co.*, 41 Conn. 87; *Dwight v. Boston*, 122 Mass. 583; *Lund v. New Bedford*, 121 Mass. 286; *Bailey v. Woburn*, 126 Mass. 416; *Nevins v. Peoria*, 41 Ill. 502; *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316; *McCord v. High*, 24 Iowa, 336; *Stein v. Burden*, 24 Ala. 180; 29 Ala. 127; *Stein v. Ashby*, 24 Ala. 521; 30 Ala. 363; *Burden v. Stein*, 27 Ala. 104; *Cooper v. Williams*, 5 Ohio, 391; 4 Ohio, 253; *Commissioners v. Withers*, 29 Miss. 21; *Hough v. Doylestown*, 4 Brewst. 333. A statute which incorporates a company for supplying a village with water, and provides for compensation, is not unconstitutional if it does not require the company to supply all who apply for water. *Lumbard v. Stearns*, 4 Cush. 60. Such a corpo-

ration is not a governmental agency, and its property is subject to taxation. *People v. Forrest*, 97 N. Y. 97. Cf. *Rochester v. Rust*, 80 N. Y. 302. That neither the legislature nor a city can grant to a gas or waterworks company the exclusive right to lay pipes and supply water in a city, see *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Atlantic City Water Works v. Atlantic City*, 39 N. J. Eq. 367, 374. *Contra*, as to the legislature, *State v. Milwaukee Gas Light Co.*, 29 Wis. 454. A statute making water rates a charge upon lands in a municipality prior to the lien of all incumbrances does not violate the 14th Amendment to the United States Constitution, declaring that no State shall deprive any person of property without due process of law. *Provident Institution v. Jersey City*, 113 U. S. 506.

<sup>3</sup> *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Meyers v. St. Louis*, 8 Mo.

water is abstracted by a water-works company under public authority, a riparian owner below is entitled to compensation for the injurious effect upon the stream, as well as for such parts of his land as may be taken;<sup>1</sup> and if a part of the petitioner's land is taken by a city for a storage reservoir, he is entitled to recover not only compensation for the land taken, but also for the diminution in value of the remainder of the lot, and it is competent for him to prove any fact which tends to show that the maintenance of the reservoir will impair the value of the entire lot of which it is a part.<sup>2</sup> The diversion of the water from a natural stream by means of an artificial well, into which the water of the river percolates, is a taking of the water for which damages are recoverable.<sup>3</sup> The fact that a city owns land adjoining a stream does not authorize it to supply itself with water therefrom by means of water-works at a distance of several miles, and it can lawfully take, without compensating the other riparian owners, no more of the water than would supply the family of one such owner.<sup>4</sup> If a statute merely provides a remedy for water taken for public use, it is not to be construed as conferring power to take the water;<sup>5</sup> but a statute which authorizes the taking of lands and water for public use, does not limit the right in extent or to one proceeding, nor is it exhausted by a single exercise of the power conferred.<sup>6</sup> Where an act, which authorized a city to build water-works, provided that no application for damages

App. 266, 275; *Eaton v. Boston Railroad Co.*, 51 N. H. 504, 510.

<sup>1</sup> *Ibid.*; *Wilts Canal Co. v. Swindon Waterworks Co.*, L. R. 9 Ch. 451; *Bush v. Trowbridge Waterworks Co.*, 10 Ch. 459; L. R. 19 Eq. 291; *Stone v. Yeovil*, 1 C. P. D. 691; 2 *id.* 99; *Wayland v. County Commissioners*, 4 Gray, 500; *Fay v. Salem Aqueduct Co.*, 111 Mass. 27.

<sup>2</sup> *Johnson v. Boston*, 130 Mass. 452.

<sup>3</sup> *Bailey v. Woburn*, 126 Mass. 416; *Ætna Mills v. Waltham*, *id.* 422; *Ætna Mills v. Brookline*, 127 Mass. 69; *Cowdrey v. Woburn*, 136 Mass. 409; *Emporia v. Soden*, 25 Kansas, 588; *post*, § 281.

<sup>4</sup> *Swindon Waterworks v. Wilks & Berks Canal*, L. R. 7 H. L. 697; L. R.

9 Ch. 451; *Owen v. Davies*, *Weekly Notes* (1874), p. 195; *Stainton v. Woolrych*, 23 Beav. 225; 26 L. J. (Ch.) 300; *Hall v. Ionia*, 88 Mich. 498. Upon a bill for an injunction in such a case, the silence of the complainant during the erection of the water-works would not constitute an equitable estoppel, as he had a right to presume that the defendant's use of the stream would not exceed the legitimate quantity.

*Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185.

<sup>5</sup> *Howe v. Norman*, 13 R. I. 488; 13 Rep. 155.

<sup>6</sup> *Johnson v. Utica Waterworks Co.*, 67 Barb. 415.

for taking the water should be made until the water was actually diverted, and that any person whose water rights were thus affected might apply for damages within one year from the time when the water was first actually withdrawn, it was held that a mill-owner who suffered no serious inconvenience from the diversion until after the expiration of the year, was not entitled to apply thereafter for damages caused by an additional diversion, being entitled, at the start, to compensation for the entire capacity of the works to take.<sup>1</sup> Damages occasioned by the taking to supply a city are estimated as of the time of the taking, and are occasioned by the quantity of water, the right to divert which is taken, irrespective of the amount actually diverted.<sup>2</sup>

§ 246. **Taking of public waters.**—In the case of public rivers, where the proprietors of the adjacent lands own only to the water's edge, the riparian right to have the water flow past their lands in its natural course and quantity does not depend upon title to the soil under water, and, being itself a right of property, cannot be taken away or impaired without compensation.<sup>3</sup> This rule is supported by recent decisions,<sup>4</sup> and adopted in Missouri.<sup>5</sup> It applies to the navigable fresh rivers of New York,<sup>6</sup> with the exception that the riparian owners upon the Mohawk River are not, by certain decisions, entitled to damages for any diversion or use of the waters of that river by the State.<sup>7</sup> In Pennsylvania, riparian owners of

<sup>1</sup> *Ipswich Mills v. County Commissioners*, 108 Mass. 363. Cf. *Davis v. New Bedford*, 133 Mass. 549. The year begins from the actual taking, not from a vote to take. *Goff v. Pawtucket*, 13 R. I. 471. The water-works of a city, being held for public use, are not liable to executions upon judgments for its ordinary debts. *New Orleans v. Morris*, 105 U. S. 600.

<sup>2</sup> *Howe v. Weymouth*, 148 Mass. 605; *Smith v. Concord*, 143 Mass. 253; *Cowdrey v. Woburn*, 136 Mass. 409; *Ætna Mills v. Waltham*, 126 Mass. 422.

<sup>3</sup> As to public ponds and lakes, see *ante*, § 84.

<sup>4</sup> *Yates v. Milwaukee*, 10 Wall. 504; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Morrill v. St. Anthony Water Power Co.*, 26 Minn. 222.

<sup>5</sup> *Meyers v. St. Louis*, 8 Mo. App. 266; *Myers v. St. Louis*, 82 Mo. 367 (sediment).

<sup>6</sup> *Commissioners v. Kempshall*, 26 Wend. 404; *People v. Canal Appraisers*, 13 Wend. 371; 17 Wend. 616; *Ex parte Jennings*, 6 Cowen, 518; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 8 Hun, 292.

<sup>7</sup> *People v. Canal Appraisers*, 83 N. Y. 461; *Crill v. Rome*, 47 How. Pr. 398; *ante*, § 57.

land adjoining its large navigable rivers have not title to the river or any right to divert its waters without license from the State.<sup>1</sup> A wrongful diversion of the water from these rivers does not affect the title to the bed of the stream, which is public property;<sup>2</sup> and even a grant by the legislature of the exclusive right to the water power of a navigable stream is revocable at the pleasure of the State, when the use of the water is required for the public.<sup>3</sup> The power to control these rivers, retained by the State, is held to be sufficient to enable it to divert, without compensation, the water for public improvements, either by its own act or by corporations created for that purpose.<sup>4</sup> In Massachusetts, riparian proprietors upon a great pond cannot maintain a claim for damages for the diversion of water therefrom by an aqueduct company under legislative authority.<sup>5</sup> And the same is held in Wisconsin with respect to the diversion of water from a navigable fresh river.<sup>6</sup>

§ 247. Levees.—The construction of levees for the protection of navigation, and of districts from overflow, is a public use,<sup>7</sup> and the legislature may impose special assessments<sup>8</sup> on

<sup>1</sup> *Ante*, § 65; *Rundle v. Delaware Canal Co.*, 14 How. 80; 1 Wall. Jr. 275. *La Crosse Booming Co.*, 54 Wis. 659; *ante*, § 75.

<sup>2</sup> *Ibid*.

<sup>3</sup> *Ibid*.; *Mayor v. Commissioners*, 7 Penn. St. 348; and authorities in next note.

<sup>4</sup> *Carson v. Blazer*, 2 Binney, 475; *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *McKeen v. Delaware Division Canal Co.*, 49 Penn. St. 424; *Philadelphia v. Collins*, 68 Penn. St. 106; *Philadelphia v. Gilmartin*, 71 Penn. St. 140; *Rundle v. Delaware Canal Co.*, 14 How. 80; 1 Wall. Jr. 275.

<sup>5</sup> *Fay v. Salem Aqueduct Co.*, 111 Mass. 27.

<sup>6</sup> *Black River Improvement Co. v.*

<sup>7</sup> *Ante*, § 85.

<sup>8</sup> *Baro v. Phillips Co.*, 4 Dillon, 216; *Rouse v. Hampton*, 4 Am. L. T. (U. S. Cts.) 195; *Tide Water Co. v. Coster*, 21 N. J. Eq. 519; *Hoagland v. Wurts*, 41 N. J. L. 175; 42 id. 553; 39 id. 197, 433; 114 U. S. 606; *Teegarden v. Racine*, 56 Wis. 545; *Stillwell v. Glasscock*, 91 Mo. 658; *Chaffe v. Trezevant*, 38 La. Ann. 746. A levee district, which exercises governmental functions within the district, is a public corporation, although the statute may not expressly declare it to be a corporation. *Dean v. Davis*, 51 Cal. 406. Under a statute, the object of which is the drainage of lands for agricultural and sanitary purposes, the construction of a levee several miles along a river is not

districts or individuals,<sup>1</sup> or authorize the issuance of bonds, for the purpose of building them.<sup>2</sup> In Louisiana, where extensive inundations frequently occur, it is held that the State has power to require a riparian proprietor to construct levees without further compensation than the increased value thereby given to his land,<sup>3</sup> and that if he fails to do so, the levee may be kept up at his expense; that it may tax front and rear proprietors in proportion to the benefit received by each from a levee which affords them all protection;<sup>4</sup> and that it may take as much land as is necessary for the construction of these works.<sup>5</sup> In this State, the banks of navigable rivers are sub-

auxiliary to the system of drainage. *Urdike v. Wright*, 81 Ill. 49. The right to proceed under a particular act is jurisdictional, and must be pleaded. *Reclamation District v. Kennedy*, 58 Cal. 124; *Swamp Land District v. Haggin*, 64 Cal. 204. See *State v. Duffel*, 41 La. Ann. 557; *Excelsior Planting Co. v. Green*, 39 id. 455; *Prescott v. McNamara*, 73 Cal. 236; *Lambert v. Mills County*, 58 Iowa, 666; *Richman v. Muscatine County*, 70 id. 627; *Freeman v. Weeks*, 48 Mich. 255; *Chapman v. Clark*, 49 id. 305.

<sup>1</sup>*Chambliss v. Johnson*, 77 Iowa, 611.

<sup>2</sup>*Woodruff v. State*, 66 Miss. 298; *Bunch v. Wolerstein*, 62 Miss. 56.

<sup>3</sup>*Lyons v. Hinckley*, 12 La. Ann. 655; *Cowley v. Copley*, 2 La. Ann. 329. See *Grant v. McDonogh*, 7 La. Ann. 447; *Hanson v. Lafayette*, 18 La. Ann. 285; *Tardos v. Jefferson*, 22 La. Ann. 58; *State v. Clinton*, 26 La. Ann. 564; *Bouligny v. Dornenon*, 2 Martin, N. S. 455; *Bass v. State*, 34 La. Ann. 494. In *Hollingsworth v. Texas*, 4 Woods, 280; 17 Fed. Rep. 109, the case of *Bass v. State* was considered, and it was held that private lands cannot be taken or damaged for levees without compensation, either under the police power or the right of eminent domain.

<sup>4</sup>*De Ben v. Gerard*, 4 La. Ann. 30; *Lepretre v. General Council*, 8 La. Ann. 22; *Police Jury v. McDonogh*, 10 La. Ann. 395; 7 Martin, 8; *Beard v. Morancy*, 2 La. Ann. 347; *Barataria Co. v. Field*, 17 La. Ann. 421; *Lepretre v. New Orleans*, 10 La. Ann. 112; *State v. Merchants' Ins. Co.*, 12 La. Ann. 802; *Jamison v. New Orleans*, id. 346; *Yeatman v. Crandall*, 11 La. Ann. 220; *Matter of New Orleans Draining Co.*, id. 338; *Selby v. Levee Commissioners*, 14 La. Ann. 434; *Wallace v. Sheldon*, id. 498; *Mason v. Police Jury*, 9 La. Ann. 368; *Police Jury v. Huie*, 2 La. Ann. 887; *State v. Maginnis*, 26 La. Ann. 558; *Levee Commissioners v. Lorio*, 33 La. Ann. 276.

<sup>5</sup>*Zenor v. Concordia*, 7 La. Ann. 150; *Yeatman v. Crandall*, 11 La. Ann. 220; *Cash v. Whitmore*, 13 La. Ann. 401; *Hunsicker v. Briscoe*, 12 La. Ann. 169; *Dubose v. Levee Commissioners*, 11 La. Ann. 165; *Police Jury v. Bozman*, 11 La. Ann. 94; *Mithoff v. Carrollton*, 12 La. Ann. 185; *Inge v. Police Jury*, 14 La. Ann. 117; *O'Reilley v. Oakey*, 4 La. Ann. 22; *Smith v. Buhler*, 11 La. Ann. 98; *Levee Commissioners v. Johnson*, 66 Miss. 248. See *New Orleans v. Carondelet Canal Co.*, 42 La. Ann. 6; *Pickles v. McLellan Dry Dock Co.*, 38 La. Ann. 412; *Booksh*

ject to a servitude for the public use,<sup>1</sup> and no prescriptive right can there be gained against the public.<sup>2</sup> Every owner of land adjacent to such rivers is bound to leave sufficient space for levees, roads, and other public works.<sup>3</sup> The law concerning the taking of private property for public use does not apply to such lands upon the banks of navigable rivers as may be found necessary for levee purposes, and no arbitrary limit is fixed by law as to the maximum distance at which a levee may be placed back of a caving bank;<sup>4</sup> but if the public safety requires the construction of a levee upon land on which buildings have been erected at a time when no immediate servitude was due to the public, and the buildings are demolished for that purpose, the land-owner is entitled to compensation for the buildings according to their value at the time they are taken by the public.<sup>5</sup> In Pennsylvania, it is held that the State may, in the interest of navigation, confine the water by erecting embankments between the high and low-water mark of a public river, without compensation to a riparian proprietor; that the private interests of others do not justify embanking at his expense, and that when the State has made the improvement and left it in the land-owner's possession, he is bound to keep it in repair.<sup>6</sup> In California, a reclamation district which maintains a levee along a river bank, is not liable in damages when the effect is to throw the water on land lower down and upon the opposite side of the river.<sup>7</sup> But, in general, in other States, the construction of a levee through private land for the advantage of the public is a matter requiring compensation to the land-owner.<sup>8</sup>

*v. Dardenne*, 38 id. 342; *Eager v. New Orleans*, id. 933; *Levee Commissioners v. Allen*, 60 Miss. 93; *Cage v. Trager*, id. 563; *Levee Commissioners v. Harkleroads*, 62 id. 807.

<sup>1</sup> *Ante*, § 99.

<sup>2</sup> *La. Ice Manuf. Co. v. New Orleans (La.)*, 8 So. 21.

<sup>3</sup> *Hanson v. Lafayette*, 18 La. 295. In Louisiana, the space which is to be left for public use by the adjacent proprietors upon the shores of navigable rivers for roads and levees, is a servitude imposed by law, of which purchasers are bound to know the

existence, and form no cause for refusing to pay the price. *Bourg v. Niles*, 6 La. Ann. 77.

<sup>4</sup> *Dubose v. Levee Commissioners*, 11 La. Ann. 165; *Mithoff v. Carrollton*, 12 La. Ann. 185.

<sup>5</sup> *Mithoff v. Carrollton*, 12 La. Ann. 185.

<sup>6</sup> *Philadelphia v. Scott*, 81 Penn. St. 80; *Rutherford v. Maynes*, 97 Penn. St. 78.

<sup>7</sup> *Lamb v. Reclamation District*, 73 Cal. 125.

<sup>8</sup> *Horton v. Hoyt*, 11 Iowa, 496.



§ 248. **Consequential injuries.**— It is within the power of the legislature to change or obstruct the course of public waters as the public convenience may require.<sup>1</sup> Those upon whom authority is conferred for this purpose are not liable for consequential injuries resulting from their acts,<sup>2</sup> but cannot trespass upon or cut a channel through private lands without making compensation for the land so taken.<sup>3</sup> When the work is of a purely public character, such as the protection of the country from inundation, the agents of the public, when acting within the scope of their powers, are not liable for mere errors of judgment or for injuries which do not amount to a taking of property for public use.<sup>4</sup> The Bristol Dock Company, being authorized by act of Parliament to improve and complete the harbor of Bristol, caused such a deterioration of the water of the public river Avon, in the execution of their works, that the owners of a brewery, who had been accustomed to use the water in their business, were deprived

<sup>1</sup> *Spring v. Russell*, 7 Maine, 273; *Carson v. Coleman*, 11 N. J. Eq. 106, 525; *People v. St. Louis*, 5 Gilman, 351; *McKernan v. Indianapolis*, 38 Ind. 233; *McMahon v. Council Bluffs*, 12 Iowa, 268; *Green v. Swift*, 47 Cal. 536; *Commissioners v. Withers*, 29 Miss. 21.

<sup>2</sup> *Ibid.*; *Alexander v. Milwaukee*, 16 Wis. 247; *Thompson v. Androscoggin Co.*, 54 N. H. 545; *Arnold v. Hudson River R. Co.*, 49 Barb. 108; *Clark v. Saybrook*, 21 Conn. 313; *Rogers v. Kennebec R. Co.*, 35 Maine, 319; *Sumner v. Richardson Lake Co.*, 71 id. 106; *Brooks v. Cedar Brook Imp. Co.*, 82 id. 17; *Tyson v. Commissioners*, 28 Md. 510; *Radcliff v. Brooklyn*, 4 N. Y. 195; *People v. Albany*, 5 Lans. 524; *St. Louis Ry. Co. v. Walbrink*, 47 Ark. 330. *Cf.* *Young v. Grand River Nav. Co.*, 12 Q. B. (Can.) 75; *Phelps v. Same*, id. 245; *Neally v. Bradford*, 145 Mass. 561; *Whetton v. Clayton*, 111 Ind. 360.

<sup>3</sup> *Carson v. Coleman*, 11 N. J. Eq. 106, 525; *Hamilton v. Fond du Lac*, 40 Wis. 47; *Woodward v. Webb*, 65

*Penn. St.* 254; *Freeland v. Penn. R. Co.*, 66 id. 91. A corporation has been held not liable for damages resulting from an act which is *ultra vires*. *Wheeler v. Essex Public Road Board*, 39 N. J. L. 291. *Sed quære*, see *post*, § 260. "The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." *Field, J., in Baltimore R. Co. v. First Baptist Church*, 108 U.S. 317, 332.

<sup>4</sup> *Rex v. Pagham*, 8 B. & C. 355; *Green v. Swift*, 47 Cal. 536; *Hollister v. Union Co.*, 9 Conn. 436. A county is not liable for the act of a road

of this benefit. It was held that the injury was common to all the king's subjects, and that the only remedy was by indictment, which in this case was taken away by the act of Parliament.<sup>1</sup> In *Dixon v. Metropolitan Board of Works*,<sup>2</sup> the defendants, under the powers conferred upon them by Parliament, properly constructed a sewer, having its outfall into a certain creek above the plaintiff's wharf, which it was the duty of the person in charge of it to open when the water rose to a certain height reached only in heavy rainfalls. At the time of an exceptionally heavy rain, the gates were opened in order to prevent the flooding of a large district, and, the rain increasing in violence, the rush of water from the sewer carried away a part of the plaintiff's wharf with a barge moored thereto and the cargo on board. It was held that, though the injury was caused by opening the water-gates, and not by the act of God, and the defendants were *prima facie* liable for the damage done, yet as they were a public body acting in the discharge of a public duty, and the injury was the inevitable result of the authority given by Parliament, they were not liable. Where the legislature authorized the channel of a river to be turned or straightened for the protection of a city, and this being done at a point where the river emptied into another river, the current of the first stream destroyed land upon the opposite side of the river into which it emptied, it was held that such land was not taken for public use, and that the commissioners charged with the execution of the work were not liable for the injury.<sup>3</sup>

§ 248a. Same.—If the piers of a bridge, which is authorized by the legislature, change tidal currents, a littoral proprietor is not entitled to recover the expense of structures necessary

overseer in so placing the abutment of a bridge that riparian land is washed away. *Crowell v. Sonoma County*, 25 Cal. 313.

<sup>1</sup> *King v. Bristol Dock Co.*, 12 East, 429.

<sup>2</sup> 7 Q. B. D. 418. See *Nitro-Phosphate Co. v. London Docks Co.*, 9 Ch. D. 503; *ante*, § 161.

<sup>3</sup> *Green v. Swift*, 47 Cal. 536. This was prior to the California constitu-

tion of 1879. *Green v. State*, 73 Cal. 29; *Hoagland v. State*, 80 Cal. 500; 22 Pac. 142; *Todhunter v. State* (Cal.), 11 Pac. 604. If a city, by statute, extends a dike into a boundary river between States, uninjured land-owners on the opposite shore cannot complain. *Rutz v. St. Louis*, 3 McCrary, 261; 2 *id.* 344; *St. Louis v. Rutz*, 138 U. S. 226.

to protect his land.<sup>1</sup> "It is incident," says Shaw, C. J.,<sup>2</sup> "to the power of the legislature to regulate a navigable stream, so as best to promote the public convenience; and if, in so doing, some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria*." It is also held in Vermont that if necessary erections by a railroad company upon the bed of a fresh-water stream cause such a change in the current that the land of a riparian proprietor below is gradually washed away, such proprietor cannot maintain an action for this injury, whether the erections were skilfully made or not;<sup>3</sup> but in view of the decisions elsewhere this doctrine would appear to be doubtful, if applied to a case where the injury could be well avoided and is clearly the result of unskilfulness or negligence.<sup>4</sup> In *Transportation Co. v. Chicago*,<sup>5</sup> the Supreme Court of the United States held that acts done in making public improvements, which do not invade upon private property, are not a taking for which compensation must be made, and that the plaintiff company which owned a lot in Chicago, with dock and wharf privileges, was not entitled to recover from the city damages caused by obstructing a neighboring street and the Chicago River by the construction of a bridge or tunnel across the river.

§ 249. **Same.**—Mr. Justice Story doubted whether for an injury to private property the owner can be denied compensation upon the ground that it is merely consequential,<sup>6</sup> and

<sup>1</sup> *Fitchburg R. Co. v. Boston & Maine Railroad*, 3 Cush. 58, 88; *Hollister v. Union Co.*, 9 Conn. 436; *Borchardt v. Wausau Boom Co.*, 54 Wis. 107.

<sup>2</sup> *Fitchburg R. Co. v. Boston & Maine Railroad*, 3 Cush. 58, 88; *Davidson v. Boston & Maine Railroad*, 3 Cush. 91; *Thayer v. New Bedford R. Co.*, 125 Mass. 253; *O'Brien v. Norwich Railroad*, 17 Conn. 372.

<sup>3</sup> *Henry v. Vermont Central R. Co.*, 30 Vt. 638; *Norris v. Vermont Central R. Co.*, 28 Vt. 99; *Chicago R. Co. v. Moffitt*, 75 Ill. 524. The case is to be distinguished from direct injuries

like the flooding of land by back-water or diversion. *Ante*, § 122.

<sup>4</sup> See *Fowle v. New Haven Co.*, 107 Mass. 352; 112 Mass. 334; *Evansville R. Co. v. Dick*, 9 Ind. 433, and note; *Cobb v. Illinois & St. Louis R. Co.*, 68 Ill. 233; *Spencer v. Hartford R. Co.*, 10 R. I. 14; *Stone v. Augusta*, 46 Maine, 127; *Topsham v. Lisbon*, 65 Maine, 449; *McOsker v. Burrell*, 51 Ind. 425; *Easton v. Boston R. Co.*, 51 N. H. 504.

<sup>5</sup> 99 U. S. 635; *Weis v. Madison*, 75 Ind. 241.

<sup>6</sup> *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.

the doctrine, as sometimes applied, has since been declared by the Supreme Court of the United States to have been carried to the utmost limit.<sup>1</sup> Where an embankment erected on the Delaware River, under authority from the legislature, for the purpose of preventing the flooding of neighboring meadows, obstructed a right of fishery which included the right to draw nets upon the shore, the Supreme Court of Pennsylvania held the injury to be merely consequential and not ground for an action.<sup>2</sup> This would appear to be in conflict with those decisions in which it is held that the right of access to and from navigable waters is a private right which cannot be impaired without compensation.<sup>3</sup> In that State it is held that damages are not recoverable for the destruction of a ford by a public improvement,<sup>4</sup> or the loss of a spring between the high and low-water mark of a tidal river;<sup>5</sup> and that the erection of a dam for the purpose of improving the navigation of a river which is public property, and thereby causing the water to flow back into the plaintiff's mill-race and to injure his fall and water power, are injuries which must be suffered without compensation, upon the ground that every one who buys property upon a navigable stream purchases subject to the superior right of the State to regulate and improve it for the public benefit.<sup>6</sup> In New York, if the improvement of the navigation of a public river causes the water of a tributary stream to be so much raised as to destroy a valuable mill-site

<sup>1</sup> *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

<sup>2</sup> *Tinicum Fishing Co. v. Carter*, 90 Penn. St. 85; 61 id. 21; 77 id. 310; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Zimmerman v. Union Canal Co.*, 1 Watts & S. 346. Acts of incorporation are valid which do not provide for the payment of consequential damages, but if the terms of a statute authorizing a public improvement provide for the allowance of such damages, they are to be included. *Hoffer v. Pennsylvania Canal Co.*, 87 Penn. St. 221; *Reitenbaugh v. Chester Valley R. Co.*, 21 Penn. St. 100; *Re Cooling*, 19 L. J. (Q. B.) 25.

<sup>3</sup> *Ante*, § 149.

<sup>4</sup> *Zimmerman v. Union Canal Co.*, 1 Watts & S. 346.

<sup>5</sup> *Commonwealth v. Fisher*, 1 Penn. 462; *ante*, § 65.

<sup>6</sup> *McKeen v. Delaware Canal Co.*, 49 Penn. St. 424; *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Ueberoth v. Lehigh Coal Co.*, 8 Haz. Pa. Reg. 292; *Holyoke Waterpower Co. v. Connecticut River Co.*, 20 Fed. Rep. 71. The right to maintain an action for consequential damages against a corporation possessed of the right of eminent domain is re-

situate thereon, and the stream is generally navigable, although not so at the mill-site, the owner is not entitled to damages under the canal laws, which provide that compensation shall be made for private property taken for public use.<sup>1</sup> Consequential as well as direct damages are recoverable when the injury is caused by a common nuisance.<sup>2</sup> The grantee of a ferry franchise from the legislature of a State acquires, by such franchise, no property in the flow of the river, and has no claim to compensation for injuries caused to him by an improvement of the river by the United States.<sup>3</sup>

§ 250. **Authorized injuries — Damages.**— With respect to injuries which are not the result of negligence or bad faith in the execution of the powers conferred, a corporation acting under public authority is presumed to act within the scope of the powers granted by its charter, and the only redress for such injuries is in the mode and by the means provided by statute.<sup>4</sup> If, for example, it is essential to divert a stream in the construction of a railroad within the lines of the land condemned, this may be done without an express grant of such

versed by the new constitution of Pennsylvania. *Reading v. Althouse*, 93 Penn. St. 400; *Lycoming Gas Co. v. Moyer*, 99 Penn. St. 615.

<sup>1</sup> *Canal Appraisers v. People*, 17 Wend. 571; 5 Wend. 423; 13 Wend. 355; *People v. Canal Appraisers*, 83 N. Y. 461.

<sup>2</sup> *Hughes v. Heiser*, 1 Binney, 463; *Pittsburgh v. Scott*, 1 Penn. St. 309.

<sup>3</sup> *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508; 2 McCrary, 451. The prospective value of land, useful for a ferry landing but otherwise worthless, may be allowed in estimating damages. *Little Rock Railway v. McGehee*, 41 Ark. 202. The impairment of a ferry is an incident of the land appropriation, forms a part of the damages, and should not be presented as a separate claim. *Mark v. State*, 97 N. Y. 572.

<sup>4</sup> *Attorney General v. Conservators of the Thames*, 1 H. & M. 1; *Attor-*

*ney General v. Metropolitan Board of Works*, 1 H. & M. 298; *Mellen v. Western Railroad*, 4 Gray, 301; *Lathrop v. Grosvenor*, 10 Gray, 52; *Ashby v. Eastern Railroad*, 5 Met. 868; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Brewer v. Boston R. Co.*, 113 Mass. 52; *Hull v. Westfield*, 133 Mass. 433; *Boston Belting Co. v. Boston*, 149 Mass. 44; *Spring v. Russell*, 7 Maine, 273; *Woods v. Nashua Manuf. Co.*, 4 N. H. 527; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Steele v. Western Island Co.*, 2 Johns. 283; *Bellinger v. New York Central Railroad*, 23 N. Y. 42; *Water Commissioners v. Clark*, 3 N. Y. S. 347; *Re Thompson*, 45 Hun. 261; *Eisenmenger v. St. Paul W. Board*, 44 Minn. 457; *Terre Haute R. Co. v. McKinley*, 33 Ind. 274; *Pittsburgh v. Scott*, 1 Penn. St. 309; *Dyer v. Tuscaloosa Bridge Co.*, 2 Porter, 296; *McCann v. Otoe County Commissioners*, 9 Neb.

right, and if the attention of the jury of inquest was called to the diversion, they are presumed to have included it in the award of damages, and the owner of the land through which the road passes has no further redress by suit at law or in equity.<sup>1</sup> In such case, evidence is admissible of the profits received from a mill after the water was withdrawn.<sup>2</sup> An assignment which is void for uncertainty is not a bar to an action. In *McCord v. Sylvester*,<sup>3</sup> commissioners appointed in pursuance of a statute decided that the plaintiff was not entitled to damages for the diversion of a creek from his premises, "provided sufficient water shall be suffered to flow in the channel of said creek for ordinary and necessary farm purposes." This was held to be void as not properly showing the amount of water to which the plaintiff would be entitled, and an action on the case against the defendants who had caused the diversion was maintained. If a man deals with a public body having power to take his property, claiming compensation, and afterwards contends that they have no right to take the property, a court of equity will not relieve him.<sup>4</sup> But where the occupier of a wharf on a public creek, who claims compensation against town commissioners for having arched over the creek and so interrupted his navigation, believed, at the time of the claim, that the commissioners had the power to act, but afterwards, learning that they had acted illegally, at once filed his bill for a mandatory injunction, it was held that he was not estopped by his claim for compensation, and a reference was made to chambers to assess damages.<sup>5</sup> So an action of trespass will lie for taking soil from a river bottom or upland outside of the land appropriated.<sup>6</sup> If land is appropriated or injured by the construction of a canal

324; *McOsker v. Burrell*, 55 Ind. 425; road, 43 Iowa, 26; *Denver City Ir. Cumberland v. Willison*, 50 Md. 138; Co. v. Middaugh, 12 Col. 434.

*West Branch Canal Co. v. Mullinger*, 68 Penn. St. 357; *McIntire v. Western R. Co.*, 67 N. C. 278; *Lafayette Plankroad Co. v. New Albany R. Co.*, 13 Ind. 90; *Little v. Dublin Ry. Co.*, 7 Ir. C. L. 82.

<sup>2</sup> *Norwalk Borough v. Blanchard*, 56 Conn. 491.

<sup>3</sup> 32 Wis. 451. See *Harris v. Social Manuf. Co.*, 9 R. I. 99.

<sup>4</sup> *Pentney v. Lynn Paving Commissioners*, 13 W. R. 983.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Doud v. Mason City Ry. Co.*, 76 Iowa, 438.



without authority of law, the legislature cannot, by retroactive legislation, authorize the appointment of commissioners for the appraisement of damages, and thereby deprive the land-owner of his right to maintain an action.<sup>1</sup> An act which provides no means for ascertaining and paying the damages sustained, is invalid, and the land-owner is remitted to his remedy at law;<sup>2</sup> and the common-law remedy for breach of a statutory duty is not defeated by the fact that the statute which imposes the duty, but contains no provision for compensation, provides a mode of enforcing the duty.<sup>3</sup> Compulsory powers, conferred by a special act, must be expressed clearly; if doubtful, they will be construed in favor of the land-owner.<sup>4</sup> An act which provides that any canal company "shall have the free use of the waters and streams of the State" can apply only to streams upon the public lands of the State, and the right to appropriate water from a natural stream must still be acquired from its riparian proprietors by purchase or condemnation.<sup>5</sup> No separate award can be made for a water-power which is an appurtenance of the land taken, nor for acts done after the taking,<sup>6</sup> nor for riparian rights belonging to the land condemned and not expressly mentioned in the petition for condemnation.<sup>7</sup>

<sup>1</sup> *Matter of Townsend*, 89 N. Y. 171. In *Harding v. Stamford Water Co.*, 41 Conn. 87, it was held that, under the provision for compensation in an amendment to the charter of a corporation which authorized the diversion of water from a stream, a reasonable time should be allowed to make the compensation before issuing a perpetual injunction. See, also, *Bonaparte v. Camden R. Co.*, Bald. C. C. 205; *Bailey v. Philadelphia R. Co.*, 4 Harr. (Del.) 389.

<sup>2</sup> *Stevens v. Middlesex Canal*, 12 Mass. 466; *Cogswell v. Essex Mill Corporation*, 6 Pick. 94; *Thatcher v. Dartmouth Bridge Co.*, 18 Pick. 501; *Lee v. Pembroke Iron Co.*, 57 Maine, 481; *Sinnockson v. Johnson*, 17 N. J. L. 129.

<sup>3</sup> *Ross v. Rugge Price*, 1 Ex. D.

269; *Atkinson v. Newcastle Waterworks Co.*, L. R. 6 Ex. 404; *Reg. v. Darlington Board of Health*, 33 L. J. N. S. (Q. B.) 305; 13 W. R. 79.

<sup>4</sup> *Simpson v. South Staffordshire Waterworks Co.*, 11 Jur. N. S. 453. A statute which authorizes an aqueduct corporation to take the waters of certain ponds, and provides that the damages shall be determined and recovered in the same manner as when land is taken for highways, makes adequate provision for compensation and is valid. *Brickett v. Haverhill Aqueduct*, 142 Mass. 394.

<sup>5</sup> *Mud Creek Ir. Co. v. Vivian*, 74 Texas, 170.

<sup>6</sup> *Re Department of Public Parks*, 58 Hun, 280.

<sup>7</sup> *Hanford v. St. Paul R. Co.*, 48 Minn. 104. An act which provides

§ 251. **Damages.**—A land-owner who sustains injury from the construction of works authorized by statute is not entitled to compensation, under the provisions of the statute, unless the injury is such as to give a right of action had the works not been authorized;<sup>1</sup> but it does not follow, because a person might have maintained an action before the statute, that he would, in respect of the same cause, have a claim to compensation after it.<sup>2</sup> When land is taken for the construction of a canal or other public works, its value is to be fixed at what it was worth at the time of the taking.<sup>3</sup> Where the water commissioners of a city took certain land for the purpose of making a reservoir, and afterwards, requiring more land, took that of the petitioners, to whom the land first taken did not belong, it was held that the value of their land was to be estimated as of the time of the condemnation and not of the location of the improvement.<sup>4</sup> A statutory provision that, in the assessment of damages in such cases, the benefits resulting to the owner of the land from the construction of the work shall be considered, is valid,<sup>5</sup> but the inquiry as to the enhanced value of the land is to be confined to the benefits accruing, at the time of the taking, to such of the owner's land as adjoins that taken, and not to include the advantages resulting to him generally.<sup>6</sup> If the benefits from a State canal are found to be

for the assessment of the entire expense of a sewer, which is to receive the drainage from several towns, upon such towns in proportion to the benefits received by the land in each, is not void as a delegation of legislative power. *State v. Reed*, 43 N. J. L. 186.

<sup>1</sup> *New River Co. v. Johnson*, 2 El. & El. 435; *Chamberlain v. West of London Ry. Co.*, 2 B. & S. 605; *Beckett v. Midland Ry. Co.*, L. R. 3 C. P. 82; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; L. R. 8 C. P. 191; L. R. 7 C. P. 508. See *ante*, § 124, note.

<sup>2</sup> *Ricket v. Metropolitan Ry. Co.*, L. R. 2 H. L. 175; *Pittsburgh v. Scott*, 1 Penn. St. 309; *Geddis v. Bann Reservoir*, 3 App. Cas. 430.

<sup>3</sup> *Parks v. Boston*, 15 Pick. 198; *Moulton v. Newburyport W. Co.*, 139 Mass. 163; *McIntire v. State*, 5 Blackf. 384. In Pennsylvania the value is to be estimated as of the date when the injury is complete. *Philadelphia v. Linnard*, 97 Penn. St. 242. Proceedings for *ad quod damnum*, superseded by a lease of the desired right of flowage, held to give a vested right, in *Culver v. Garbe* (Neb.), 43 N. W. 237.

<sup>4</sup> *Stafford v. Providence*, 10 R. I. 567.

<sup>5</sup> *McIntire v. State*, 5 Blackf. 384; *Atlanta v. Green*, 67 Ga. 386.

<sup>6</sup> *Vanblaricum v. State*, 7 Blackf. 209; *State v. Digby*, 5 Blackf. 543; *San Diego L. & T. Co. v. Neale*, 78 Cal. 63; *Austin Ry. Co. v. Anderson* (Texas), 15 S. W. 484.

equal to the damages, the State can acquire only a conditional fee in the lands taken, the condition being that the benefits shall be actually received by the land-owners; and if the canal is abandoned immediately after its construction, the fee in its beds and banks reverts to the former owners and does not pass to the grantees of the State.<sup>1</sup> When a company builds a railroad across land through which it has previously made a canal, the fact that the canal was a cheap and sufficient means of conveying the land-owner's products is to be considered in assessing the damages, and it is immaterial that the company owned and might abandon the canal.<sup>2</sup> The measure of the damages is the value, for any use, of that which is appropriated. The value of a pond taken for the purpose of supplying a village with water is not limited to its use as a mill or ice pond, but the fact that there are no other ponds in the neighborhood which would answer the purpose may be shown in evidence.<sup>3</sup> So, if an island is taken in a State where the floating of logs down streams is a regular business, the fact that the island is adapted, in connection with the river bank, to form booms for holding logs should be considered.<sup>4</sup> The fact that the plaintiff's lot is subject to inundation from a public river, at high water, does not deprive him of the right to compensation.<sup>5</sup> After the lapse of many years it will be presumed that the damages were assessed and tendered, or were waived.<sup>6</sup>

<sup>1</sup> *Kennedy v. Indianapolis*, 11 Biss. 18. Cf. *Logansport v. Shirk*, 88 Ind. 563.

<sup>2</sup> *Pennsylvania R. Co. v. Burnell*, 81 Penn. St. 414. Cf. *Burbank v. Fay*, 65 N. Y. 64; *Whitney v. Stone*, 96 N. Y. 240; *Willey v. Norfolk So. R. Co.*, 98 N. C. 263; *Wichita R. Co. v. Kuhn*, 38 Kansas, 104.

<sup>3</sup> *Trustees v. Dennett*, 5 Thomp. & Cook (N. Y.), 217; 3 Hun, 669. See *New Britain v. Sargent*, 42 Conn. 137; *Pingree v. County Com'rs*, 102 U. S. 76.

<sup>4</sup> *Boom Co. v. Patterson*, 98 U. S. 403. In *Eddings v. Seabrook*, 12

Rich. 504, it was held that the value of land condemned for a public wharf is not to be determined by its value if a wharf were already thereon. If an embankment made to protect land is used by a railroad, and its usefulness for that purpose is not impaired, the owner's damages are not the cost of the embankment, but only indemnity for the injury. *Gear v. C. C. & D. R. Co.*, 89 Iowa, 28. See *Little Ry. Co. v. McGehee*, 41 Ark. 202.

<sup>5</sup> *Enos v. Chicago Ry. Co.*, 78 Iowa, 28.

<sup>6</sup> *Blair v. Kiger*, 111 Ind. 198. The period was here forty years.

§ 252. *Same.*—In general, only the injuries to the land through which the works are constructed are included in the assessment of damages. The appraisal of damages for land taken for a canal cannot include damages for trespasses on other lands of the same claimant by the workmen employed in constructing the canal;<sup>1</sup> and if it is necessary to dig ditches for the proper drainage and protection of a railroad or other public work, the land should be condemned for that purpose.<sup>2</sup> But as the grant of power to execute a public work carries with it authority to do whatever is strictly and necessarily incident to the prosecution of the work, the grantee is not liable as a wrongdoer, but only in the mode provided by statute, for injuries to adjacent lands, which are reasonably necessary to the maintenance of the work, whether caused by draining water upon them by means of a culvert, or by widening or changing the bed of a stream, or by conducting the waters of a spring, opened in the construction of the work, upon land not condemned, by means of an artificial channel.<sup>3</sup> Where the owner of land taken by a railway company had built a reservoir on other land belonging to him for the purpose of supplying mills to be erected on the land taken, it was held that the land not taken was “injuriously affected” within the meaning of the statute providing for compensation, and that evidence of the prospective profits to be derived from supplying the water to the proposed mills was rightly considered in the estimate of damages.<sup>4</sup> The assessment of damages to the owners of land through which a railroad is located, may and

<sup>1</sup> *People v. Schuyler*, 69 N. Y. 242. See *Munkwitz v. Chicago Ry. Co.*, 64 Wis. 403.

<sup>2</sup> *State v. Armell*, 8 Kansas, 288; *Chicago Ry. Co. v. Cosper*, 42 Kansas, 561; *Hooker v. New Haven Co.*, 15 Conn. 812.

<sup>3</sup> *Curtis v. Eastern R. Co.*, 14 Allen, 55; *Babcock v. Western Railroad*, 9 Met. 553; *Dodge v. County Commissioners*, 8 Met. 380; *Ashby v. Eastern Railroad*, 5 Met. 371; *Brown v. Providence Railroad*, 5 Gray, 35; *Van Buren v. Fishkill W. Co.*, 50 Hun, 448. As to the liability of a consolidated

company, see *Sappington v. Little Rock R. Co.*, 37 Ark. 23.

<sup>4</sup> *Ripley v. Great Northern Ry. Co.*, L. R. 10 Ch. 435; *Palmer v. Wellington*, 9 App. Cas. 699; *Reg. v. Essex*, 33 W. R. 214; *Re Stockport Ry. Co.*, 33 L. J. Q. B. 741; *Re Wadham Ry. Co.*, 14 Q. B. 747. Cf. *Wilder v. Commissioners*, 41 Ohio St. 601. See *ante*, § 124, note. As to the meaning of the words “taken or damaged,” see *Omaha v. Kramer*, 25 Neb. 489; *Texas Ry. Co. v. Meadows*, 73 Texas, 32.

should include such injuries as the following: the expense of ditches rendered necessary by the road upon parts of the land not taken;<sup>1</sup> the loss of a water power, even when it has not been utilized,<sup>2</sup> or of a permanent easement in a canal;<sup>3</sup> a decrease in the quantity of sediment deposited on agricultural land and by which it is enriched;<sup>4</sup> injury and inconvenience as to water caused by a division of farm lands;<sup>5</sup> and interference with drainage and the flow of natural waters.<sup>6</sup> It is also presumed to include damages for the loss of springs upon the lands through which the road passes, even though such injury could not be anticipated.<sup>7</sup> In assessing damages for land appropriated for a reservoir, it is to be assumed that the land will be used in a skillful and proper manner, yet reasonable apprehension of incidental injury to the part of the land not condemned, arising from inherent defects or unavoidable accidents, may be considered.<sup>8</sup> A grantor of land who has reserved the privilege of a water power, and the right to enter upon so much of the land as may be necessary for an abutment on the bank of the river, has such an interest in the land that it cannot be appropriated by a railroad company

<sup>1</sup> *St. Louis R. Co. v. Mollett*, 59 Ill. 235; *Kankakee R. Co. v. Horan*, 23 Ill. App. 145.

<sup>2</sup> *Dorlan v. East Brandywine R. Co.*, 46 Penn. St. 520; *Haslem v. Galena R. Co.*, 64 Ill. 353; *Lake Superior R. Co. v. Greve*, 17 Minn. 322.

<sup>3</sup> *Whitman v. Boston & Maine Railroad*, 3 Allen, 133.

<sup>4</sup> *Concord Railroad v. Greeley*, 23 N. H. 237.

<sup>5</sup> *Rockford R. Co. v. McKinley*, 64 Ill. 338; *Brooks v. Davenport R. Co.*, 37 Iowa, 99; *Kostendader v. Pierce*, id. 645; *Mississippi Bridge Co. v. Ring*, 58 Mo. 491; *Springfield Railway v. Rhea*, 44 Ark. 258; *Springfield Railway v. Henry*, id. 360, 362. See *Schuylkill River R. Co. v. Kersey*, 25 W. N. C. (Penn.) 455; *Sutliff v. Johnson*, 17 Neb. 575.

<sup>6</sup> *Jones v. St. Louis Ry. Co.*, 84 Mo. 151; *Moss v. St. Louis Ry. Co.*, 85 Mo. 86.

<sup>7</sup> *Peoria Ry. Co. v. Bryant*, 57 Ill. 473; *Lafayette Plank Road v. New Albany Railroad*, 13 Ind. 90; *Wabash Canal v. Spears*, 16 Ind. 441; *Robbins v. Milwaukee R. Co.*, 6 Wis. 363; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359. A grant to a railroad company of "the right of way over and through the land for all purposes connected with the construction, use, and occupation of its railway," gives the legal right to dig a well upon such right of way, and to use the water supplied by percolation for railway purposes, although such use may materially diminish the supply of water in a spring upon the grantor's land. *Hougan v. Milwaukee Ry. Co.*, 35 Iowa, 558.

<sup>8</sup> *Alloway v. Nashville*, 88 Tenn. 510. See *Thompson v. River Co.*, 58 N. H. 108.

without ascertaining, in the mode indicated by statute, what damages he will sustain;<sup>1</sup> and a tenant for years is as much entitled to damages for the injuries caused as the owner in fee.<sup>2</sup> One who has a mere parol license from the land-owner to use a well and hydraulic ram thereon cannot maintain a petition for damages for interference with his use, if the land is taken by a city by eminent domain.<sup>3</sup>

§ 253. **Mill acts.**—These acts have been sometimes regarded as a proper exercise of the right of eminent domain by private persons for their exclusive private benefit, and it has been considered that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare as to justify the invocation of this principle in their behalf as a public use.<sup>4</sup> This exercise of legislative authority does not deprive the owners of the flowed lands of their property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution,<sup>5</sup> and has been so long continued in many States, with the acquiescence of the courts, as to practically preclude the latter from denying that these laws are in harmony with their constitutions.<sup>6</sup> “That mills,” says the Supreme Judicial Court of Massachusetts,<sup>7</sup> “for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their estab-

<sup>1</sup> *Galena R. Co. v. Haslem*, 73 Ill. 494.

<sup>2</sup> *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Matter of Water Commissioners*, 4 Edw. Ch. 545.

<sup>3</sup> *Clapp v. Boston*, 133 Mass. 367.

<sup>4</sup> *Great Falls Manuf. Co. v. Fernald*, 47 N. H. 444; *Amoskeag Manuf. Co. v. Head*, 56 N. H. 386; *Amoskeag Manuf. Co. v. Worcester*, 60 N. H. 522; *Same v. Goodale*, 62 N. H. 66; *Olmstead v. Camp*, 33 Conn. 532, 551; *Todd v. Austin*, 34 Conn. 78; *Tyler v. Beacher*, 44 Vt. 648; *Beekman v. Saratoga Railroad Co.*, 3 Paige, 45, 73; *Scudder v. Trenton Falls Co.*, 1 N. J. Eq. 694; *Venard v. Cross*, 8 Kansas,

248; *Harding v. Funk*, id. 815; *Harding v. Goodlett*, 3 Yerger, 41; *Newcomb v. Smith*, 1 Chand. 71; 2 Pin. 131; *Thien v. Voegtlander*, 3 Wis. 461; *Pratt v. Brown*, 3 Wis. 603; *Babb v. Mackey*, 10 Wis. 371; 16 Wis. 661; *Eason v. Perkins*, 2 Dev. Eq. 38; *Daughtry v. Warren*, 85 N. C. 136.

<sup>5</sup> *Head v. Amoskeag Manuf. Co.*, 113 U. S. 9. The principal statutes are here collected. p. 17, note.

<sup>6</sup> *Burnham v. Thompson*, 35 Iowa, 421; *Fisher v. Horicon Iron Co.*, 10 Wis. 351.

<sup>7</sup> *Lowell v. Boston*, 111 Mass. 454, 464; *Olmstead v. Camp*, 33 Conn. 552.



lishment a provision for a public service, we do not question. It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may be properly exercised; as in the case of the Boston & Roxbury Mill Corporation, and the Salem Mill-dam Corporation. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the legislature, it is needless now to inquire. We are satisfied that the mill acts are not founded upon that power, and do not authorize its exercise." In *Boston & Roxbury Mill Corporation v. Newman*,<sup>1</sup> the plaintiffs were authorized by their act of incorporation to erect and maintain a dam or dams for the purpose of obtaining a head and fall of the waters of a navigable arm of the sea, whereby to work grist mills, iron manufactories, and mills for other useful purposes, and also to make an avenue over the dams for the accommodation of all persons at a fixed rate of toll. This was held to be so far an enterprise of a public nature as to authorize the legislature to appropriate the property of an individual to carry it into effect. According to the view adopted in the case from which the quotation is taken, statutes which authorize the maintenance of a dam to raise a head of water and thereby to overflow the land of another proprietor, do not confer any right upon the mill-owner in the overflowed land by creating an easement, or take any right from the land-owner, but are merely provisions of law for the regulation of the rights of the different riparian proprietors upon the same stream, both in respect to the stream itself, from its rise to its outlet, and their adjacent lands liable to be effected by its use, in a manner best calculated to promote and secure their common rights as such proprietors.<sup>2</sup> This is not a taking of the property of an owner of the land

<sup>1</sup> 12 Pick. 467; *Boston Water Power Co. v. Boston and Worcester Railroad*, 23 Pick. 360.

<sup>2</sup> *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68; *Williams v. Nelson*, 23 Pick. 141; *Andover v. Sutton*, 12 Met. 182; *Bates v. Weymouth Iron Co.*, 8 Cush. 553; *Murdock v. Stickney*, 8

*Cush.* 113; *Hazen v. Essex Co.*, 12 Cush. 475; *Storm v. Manchaug Co.*, 13 Allen, 10; *Lowell v. Boston*, 111 Mass. 466; *Hunt v. Whitney*, 4 Met. 603; *Talbot v. Hudson*, 16 Gray, 417; *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 450.

flowed, nor is any compensation awarded by the public.<sup>1</sup> Upon a similar principle, the privilege of fishing in streams and ponds not navigable is a private right which is constantly controlled or partially taken away by statutory regulations intended for the benefit of all those whose lands adjoin the stream or pond.<sup>2</sup> In Michigan,<sup>3</sup> Alabama,<sup>4</sup> Georgia,<sup>5</sup> and New York,<sup>6</sup> mill acts have been pronounced unconstitutional upon the ground that they authorize the taking of private property for other than public uses, and the current of modern authority, even on the part of those courts which sustain the statutes, is adverse to their validity if regarded as an exercise of eminent domain.<sup>7</sup> These acts, if they do not so provide expressly, are not applicable to cases where dams are built across navigable streams.<sup>8</sup> They have no extraterritorial effect, and do not apply to dams built out of the State.<sup>9</sup>

§ 254. Public mills.—In some States certain mills, especially grist mills, are made public mills by statute, being required by law to grind for all in due turn for regulated tolls. Laws of this character have been enacted in Virginia, North Carolina, Nebraska,<sup>10</sup> Kentucky, Tennessee, Alabama, and

<sup>1</sup> Shaw, C. J., in *Murdock v. Stickney*, 8 Cush. 113.

<sup>2</sup> *Cottrill v. Myrick*, 12 Maine, 222; *Commonwealth v. Essex Co.*, 13 Gray, 249. Compensation for an injury to a private right of fishery does not relieve the owner of a dam authorized by the legislature from the duty to provide fish-ways. *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446; *Holyoke Co. v. Lyman*, 15 Wall. 500.

<sup>3</sup> *Ryerson v. Brown*, 35 Mich. 333. See *Hardwell, Petitioner*, 2 Mich. N. P. 97; *McClary v. Hartwell*, 25 Mich. 139.

<sup>4</sup> *Sadler v. Langham*, 34 Ala. 311; *Bottoms v. Brewer*, 54 Ala. 288.

<sup>5</sup> *Loughbridge v. Harris*, 42 Ga. 500.

<sup>6</sup> *Hay v. Cohoes Co.*, 3 Barb. 42; 2 N. Y. 159.

<sup>7</sup> *Jordan v. Woodward*, 40 Maine,

317; *Jones v. Skinner*, 61 Maine, 25; *Powers v. Bears*, 12 Wis. 213; *Fisher v. Horicon Iron Co.*, 10 Wis. 351; *Newcomb v. Smith*, 1 Chand. 71; *Pratt v. Brown*, 3 Wis. 603; *Miller v. Troost*, 14 Minn. 365; *Harding v. Funk*, 8 Kansas, 315; *Occum Co. v. Sprague Co.*, 35 Conn. 496; *Finney v. Somerville*, 80 Penn. St. 59.

<sup>8</sup> *Cobb v. Smith*, 16 Wis. 661; *Clay v. Pennoyer Creek Improvement Co.*, 34 Mich. 204; *Fox v. Holcomb*, id. 298.

<sup>9</sup> *Salisbury Mills v. Forsaith*, 57 N. H. 124; *Wooster v. Great Falls Manuf. Co.*, 39 Maine, 246.

<sup>10</sup> Under the statutes of this State it is not the exercise of the right of eminent domain, but the grinding for toll, that makes a mill a public one. *Getchell v. Benton* (Neb.), 47 N. W. 468.

Georgia; and the power of the legislature to exercise the right of eminent domain in behalf of mills that grind grain for toll, and are compellable by law to render impartial service for all, appears not to have been denied.<sup>1</sup> In Vermont it has been held that a statute which required that all grain received at grist mills should be well and sufficiently ground at certain fixed rates of toll, but which did not require that any grain should be received at such mills, could not constitutionally confer the right to flow the lands of others for the purposes of such a mill.<sup>2</sup> A State statute which authorizes towns or counties to issue bonds "to aid in the construction of railroads, water power, or other works of internal improvement," includes grist mills, whether run by water or steam, when these are made public mills by statute;<sup>3</sup> but a steam grist mill is not, in general, a work of internal improvement within the meaning of a statute which merely authorizes the issue of municipal and county bonds to aid in the construction and completion of such works.<sup>4</sup>

§ 255. **Change of use — Additional burdens.**— When property is taken for a particular public use, it does not become public for all purposes.<sup>5</sup> The first taking does not withdraw it from

<sup>1</sup> *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433; *Burgess v. Clark*, 13 Ired. 109; *Bottoms v. Brewer*, 54 Ala. 288; *McAfee v. Kennedy*, 1 Litt. 92; *Shackelford v. Coffee*, 4 J. J. Marsh. 40; *Harding v. Goodlet*, 3 Yerger, 41; *Sadler v. Langham*, 34 Ala. 811, 825; *Hankins v. Lawrence*, 8 Blackf. 266.

<sup>2</sup> *Tyler v. Beacher*, 44 Vt. 648.

<sup>3</sup> *Burlington v. Beasley*, 94 U. S. 310; *Traver v. Merrick Co.*, 14 Neb. 327.

<sup>4</sup> *Osborne v. Adams County*, 106 U. S. 181; 109 U. S. 1; 7 Fed. Rep. 441; *Blair v. Cuming County*, 111 U. S. 363; *State v. Adams County*, 15 Neb. 568; *State v. Clay County*, 20 Neb. 452; *Getchell v. Benton (Neb.)*, 47 N. W. 468.

<sup>5</sup> *Grand Rapids R. Co. v. Grand*

*Rapids & Indiana R. Co.*, 35 Mich. 265; *West Boston Bridge v. Middlesex*, 10 Pick. 270; *Worcester Railroad v. Railroad Commissioners*, 118 Mass. 561; *State v. Noyes*, 47 Maine, 189. Property acquired by grant from the State can only be taken by the State under the right of eminent domain and upon making compensation. *Langdon v. New York*, 93 N. Y. 129. When the State condemns the fee of land for a canal, and afterwards devotes the land to the purposes of a highway, a cessation of the latter use does not revert the title to the former owner. *Haldeman v. Pennsylvania R. Co.*, 50 Penn. St. 425; *Wyoming Coal Co. v. Price*, 81 Penn. St. 156; *Birdsall v. Cary*, 66 How. Pr. 358. So of the tow-path of a State canal, where the same is disused and the canal, with all its appendages, is

liability to be taken for another public use, and if an appropriation has been made for one such use under statutory authority, it may, under like authority, be devoted to another use, without additional compensation to the owner, as when land taken and used for a canal is used for a road by authority of the legislature.<sup>1</sup> So the erection, by authority of the legislature, of a toll-bridge in the highway across a stream where a ferry has previously been operated by the riparian owner, imposes no new servitude upon the land, and entitles its owner to no compensation.<sup>2</sup> So the laying of water-pipes under a city street imposes no additional burden upon the abutting estates.<sup>3</sup> But the appropriation by a railroad of land previously occupied as the bank of a canal is an additional easement for which the owner of the soil in fee would be entitled to recover damages.<sup>4</sup> So if a railroad is built across a right of flowage,<sup>5</sup> or a landing,<sup>6</sup> it is an additional burden, and if by the change from one use to another, increased injury is done,<sup>7</sup> or easements are impaired to a greater extent than before,<sup>8</sup> or access to the land is made more difficult,<sup>9</sup> compensation must be made for the injury. Injury done by a

transferred to trustees for the benefit of creditors of the State. *Fleming v. Nelson*, 56 Ind. 310; *Mason v. Lake Erie Ry. Co.*, 1 Fed. Rep. 712.

<sup>1</sup> *Malone v. Toledo*, 28 Ohio St. 643; *Hatch v. Cincinnati R. Co.*, 18 Ohio St. 92; *Cincinnati R. Co. v. Zinn*, 18 Ohio St. 417; *Shanklin v. Evansville*, 55 Ind. 240; *Stoudinger v. Newark*, 28 N. J. Eq. 187, 446; *Chase v. Sutton Manuf. Co.*, 4 Cush. 152; *Chicago R. Co. v. Lake*, 71 Ill. 333. But special sanction from the legislature is necessary in such case, and general laws are insufficient. *Prospect Park R. Co. v. Williamson*, 91 N. Y. 552.

<sup>2</sup> *Jones v. Keith*, 37 Texas, 394; *Hudson v. Cuero Land Co.*, 47 Texas, 56.

<sup>3</sup> *Crooke v. Flatbush W. Co.*, 29 Hun, 245. See *Bass v. Fort Wayne*, 121 Ind. 389.

<sup>4</sup> *Lafayette R. Co. v. Murdock*, 68

Ind. 187; *Harrington v. St. Paul R. Co.*, 17 Minn. 215; *State v. Laverack*, 34 N. J. L. 201; *Pittsburgh R. Co. v. Bruce*, 102 Penn. St. 23. The owners of lots abutting on a city street are entitled to compensation for the use of the streets for railroad purposes, whether the title to the street is in them or in the city. *Mollandin v. Union Pacific Ry. Co.*, 14 Fed. Rep. 394; *Rigley v. Chicago*, 102 Ill. 64.

<sup>5</sup> *Davidson v. Boston Railroad*, 3 Cush. 91.

<sup>6</sup> *Railroad Co. v. Schurmeir*, 7 Wall. 272; *post*, § 257.

<sup>7</sup> *Gordon v. Pennsylvania R. Co.* (Penn. 1878), 6 Rep. 727.

<sup>8</sup> *Whitman v. Boston & Maine Railroad*, 7 Allen, 313.

<sup>9</sup> *Chicago Railroad v. Stein*, 75 Ill. 41; *Hatch v. Cincinnati Railroad*, 18 Ohio St. 92; *Gordon v. Pennsylvania Railroad*, 6 Rep. 727.

railroad in obstructing a mill-race, and that done by a water company in diverting water from the stream above the race, are distinct, and compensation must be made for each.<sup>1</sup> Property which is already held for a public use cannot be condemned to another public use without legislative authority, and the subsequent grant will not be construed as authorizing the subversion or destruction of the former, unless such intent appears by express words or necessary implication.<sup>2</sup> Thus, the board of public works of the State of Ohio has been held to have no authority to grant to a railroad corporation the right to lay its track along the berme-bank of a navigable canal belonging to the State.<sup>3</sup> A railroad company, which is authorized by statute to select a route for its road, cannot take land which is already occupied, under authority from the legislature, by a canal,<sup>4</sup> or by a reservoir erected by a city,<sup>5</sup> if a public trust is already impressed upon the land.<sup>6</sup> A water company cannot condemn land which is in use as a public street, when there are other means of carrying its powers into effect,<sup>7</sup> and a public ditch cannot be constructed along land already appropriated for a railroad.<sup>8</sup> The authority given by mill acts to flow land, does not justify the flooding of a public road<sup>9</sup> or bridge,<sup>10</sup> and land occupied by the United States for an armory cannot be flowed under these statutes.<sup>11</sup> A private corporation, which is authorized by its charter to construct a canal, sluice, or raceway, and which cuts or digs it

<sup>1</sup> *Lycoming Gas Co. v. Moyer*, 99 Penn. St. 615.

<sup>2</sup> *Little Miami R. Co. v. Dayton*, 23 Ohio St. 510; *Hickock v. Hine*, id. 522; *Bridgeport v. New York Railroad*, 36 Conn. 255; *Re Buffalo*, 68 N. Y. 167; *Locks and Canals v. Lowell*, 7 Gray, 223; *Sharon Railway's Appeal*, 122 Penn. St. 583; *Oregon Ry. Co. v. Portland*, 9 Oregon, 231.

<sup>3</sup> *State v. Cincinnati Central R. Co.*, 37 Ohio St. 157. See *State v. Newark*, 28 N. J. L. 529.

<sup>4</sup> *Hudson Canal Co. v. New York R. Co.*, 9 Paige, 323; *Tuckahoe Canal v. Tuckahoe Railroad*, 11 Leigh, 42; *Housatonic Railroad v. Lee Railroad*, 118 Mass. 391.

<sup>5</sup> *State v. Montclair Ry. Co.*, 35 N. J. L. 328.

<sup>6</sup> *In re N. Y., L. E. & W. R. Co.*, 99 N. Y. 12; *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 589.

<sup>7</sup> *Ex parte Manhattan Co.*, 22 Wend. 653; *Bradshaw v. Rogers*, 20 Johns. 103, 735; *Springfield v. Connecticut R. Co.*, 4 Cush. 63.

<sup>8</sup> *Baltimore & O. R. Co. v. North*, 103 Ind. 486.

<sup>9</sup> *Commonwealth v. Stevens*, 10 Pick. 247; *Venard v. Cross*, 8 Kansas, 218.

<sup>10</sup> *Hooksett v. Amoskeag Manuf. Co.*, 44 N. H. 105.

<sup>11</sup> *United States v. Ames*, 1 Wood. & M. 76.

across an existing highway, is bound to provide a bridge for the public passage along the highway, without an express provision in its charter to that effect;<sup>1</sup> but if, after the construction of the canal, a highway is laid out across it, its owner is not bound to erect or maintain a bridge.<sup>2</sup> While a corporation, under a general power of eminent domain, cannot, without special authority, deprive another corporation with a like power of lands held by it for a public use, yet an easement may be acquired, *in invitum*, by legislative authority, in lands so held and occupied for a public use when such easement may be enjoyed without detriment to the public or interfering with the use to which the lands are devoted.<sup>3</sup> When a ferry franchise is held by a municipal corporation, it does not lose its character of private property, and cannot be resumed by the public without making just compensation.<sup>4</sup> But if the legislature authorizes a bridge to be built at a point where there was an ancient ferry, and provides for compensation to the owner of the ferry, which is accepted, the ferry is abolished, and such taking for public use does not transfer the ferry franchise to the proprietors of the bridge.<sup>5</sup> The fact that property is held under a covenant of quiet enjoyment from a city does not prevent its board of aldermen, if authorized by statute, from taking such property in laying out a street over tide-waters;<sup>6</sup> but private property condemned for public use cannot be appropriated or leased for private use.<sup>7</sup> Land which is merely dedicated to the public use as a levee or public landing may be devoted by the legislature to the use of a railroad company, subject to the restriction that no wharfage is to be

<sup>1</sup> *Re Trenton Water Power Co.*, Spencer (N. J.), 659.

<sup>2</sup> *Morris Canal Co. v. State*, 24 N. J. L. 62.

<sup>3</sup> *New York Central R. Co. v. Metropolitan Gaslight Co.*, 63 N. Y. 326; *Matter of Rochester Water Commissioners*, 66 N. Y. 413; *Re New York Central R. Co.*, 77 N. Y. 248; *Boston Water Co. v. Boston & Worcester Railroad*, 23 Pick. 360, 397; *Matter of Main and Hamburg Street Canal*, 50 How. Pr. 70; *James River Co. v. Anderson*, 12 Leigh, 278.

<sup>4</sup> *Benson v. New York*, 10 Barb. 223. So the property rights of a county, though acquired by donation from the State, are protected by the constitutional guaranties which protect the property of individual citizens. *Milam County v. Bateman*, 54 Texas, 153.

<sup>5</sup> *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 352.

<sup>6</sup> *Brimmer v. Boston*, 102 Mass. 19.

<sup>7</sup> *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121.



exacted,<sup>1</sup> and if the charter of a navigation company does not make it a common carrier, or impose a public trust upon its land, its wharf or dock may be condemned by a railroad corporation.<sup>2</sup>

§ 256. **Roads — Bridges — Passages for water.**— When individuals or corporations construct and maintain roads or bridges across streams under authority conferred by the legislature, they are bound to provide suitable passage ways for the water<sup>3</sup> or ice<sup>4</sup> of the stream, and to keep them unobstructed by drift or mud,<sup>5</sup> and are liable to the owners of private lands adjoining, which are injured in consequence of their insufficiency. Thus, a railroad company which neglects to construct sluices or culverts over streams crossed by its road, or which constructs them so imperfectly as to flood the adjoining lands, is liable to an action for the injury whether any portion of such lands is taken for the purposes of the road or not.<sup>6</sup> Such injury is not one that is taken into account in

<sup>1</sup> *Portland & W. Valley R. Co. v. Portland*, 14 Oregon, 188.

<sup>2</sup> *Re New York Ry. Co.*, 99 N. Y. 12.

<sup>3</sup> *New Castle R. Co. v. McChesney*, 85 Penn. St. 522; *Oregon R. Co. v. Barlow*, 8 Oregon, 311; *Whitehouse v. Birmingham Canal Co.*, 5 H. & N. 928; *Perley v. Chandler*, 6 Mass. 454; *Rowe v. Granite Bridge*, 21 Pick. 344; *Blood v. Nashua Railroad*, 2 Gray, 137; *Mellen v. Western Railroad*, 4 Gray, 301; *Jones v. West Vermont R. Co.*, 27 Vt. 399; *Addison v. Rowe*, 34 N. H. 396; *Manser v. Northern Counties Ry. Co.*, 2 Rail. Cas. 380; *Taylor v. Baltimore R. Co.*, 33 W. Va. 39; *Wallace v. Columbia R. Co. (S. C.)*, 12 S. E. 815; *Austin v. Emanuel*, 74 Tex. 621; *Archibald v. Mississippi R. Co.*, 66 Miss. 424; 67 Miss. 38; *Brink v. Kansas City R. Co.*, 17 Mo. App. 177.

<sup>4</sup> *Omaha R. Co. v. Brown*, 14 Neb. 170.

<sup>5</sup> *West v. Louisville R. Co.*, 8 Bush, 404; *Chicago R. Co. v. Moffitt*, 75 Ill. 524.

<sup>6</sup> *Bagnall v. London Ry. Co.*, 1 H. & C. 544; 7 H. & N. 723; *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643; *Hatch v. Vermont Central R. Co.*, 25 Vt. 49, 68; *Norris v. Vermont Central R. Co.*, 28 Vt. 102; *King v. Iowa Midland R. Co.*, 34 Iowa, 458; *Mississippi Central Railroad v. Caruth*, 51 Miss. 77; *Mississippi Central R. Co. v. Mason*, id. 234; *Baughton v. Carter*, 18 Johns. 405; *Cott v. Lewiston Railroad*, 36 N. Y. 214; *Brown v. Cayuga R. Co.*, 12 N. Y. 486; *Robinson v. N. Y. R. Co.*, 27 Barb. 512; *Beaty v. Baltimore R. Co.*, 6 W. Va. 388; *Houston R. Co. v. Knapp*, 51 Texas, 592; *Young v. Chicago Ry. Co.*, 28 Wis. 171; *Chicago R. Co. v. Carey*, 90 Ill. 514; *Locks & Canals v. Nashua R. Co.*, 10 Cush. 385; *Estabrooks v. Peterborough Railroad*, 12 Cush. 224; *March v. Portsmouth R. Co.*, 19 N. H. 372; *Hooker v. New Haven R. Co.*, 14 Conn. 146; 15 Conn. 313; *Nicholson v. New York R. Co.*, 22 Conn. 74; *Selma R. Co. v. Keith*, 53 Ga. 178; *Toledo Ry. Co. v. Hunter*, 50 Ill. 325;

measuring the compensation to the owner of land through which the road is located, but the company is answerable in damages by a repetition of suits, or if the flooding is permanent and unnecessary, the obstruction may be abated by a court of equity.<sup>1</sup> So, if a railroad company, in building its road, finds it necessary to divert a stream, and for that purpose to construct a new channel, it is bound to keep the new channel in a suitable condition so as to preserve the usefulness of the stream for those entitled to it.<sup>2</sup> Except in cases of strict necessity, a railroad company has no right to divert a stream of water from its natural channel to the injury of the land-owner,<sup>3</sup> and if the diversion is merely convenient and not necessary, it may be restrained by injunction,<sup>4</sup> or by a suit distinct from the assessment of damages.<sup>5</sup> By voluntarily granting a right of way for a railroad, the grantor does not license the building of the road so as to overflow his other land not on the right of way,<sup>6</sup> and his damages for the flowage of such other land will not be diminished because of the enhanced value given by the road to his land, in common with others in the vicinity.<sup>7</sup> But by virtue of such a grant the cor-

*Alton R. Co. v. Deitz*, 50 Ill. 210; *Louisville R. Co. v. Hodge*, 6 Bush, 141; *Louisville R. Co. v. McAfee*, 30 Ind. 291; *Union Trust Co. v. Cuppy*, 26 Kansas, 754; *Van Orsdol v. B. R. Co.*, 56 Iowa, 470.

<sup>1</sup> *Raleigh Air Line R. Co. v. Wicker*, 74 N. C. 220; *Brown v. Carolina Central R. Co.*, 83 N. C. 128; *Easterbrook v. Erie Ry. Co.*, 51 Barb. 94; *Selma R. Co. v. Keith*, 53 Ga. 178; *Evansville R. Co. v. Dick*, 9 Ind. 433; *Noe v. C. B. & Q. Ry. Co.*, 76 Iowa, 360.

<sup>2</sup> *Cott v. Lewiston R. Co.*, 36 N. Y. 214; *Morrell v. Long Island R. Co.*, 3 N. Y. S. 928; *Lefurgy v. New York R. Co.*, id. 302; *Hannaher v. R. Co.*, 5 Dak. 1; *Hatch v. Vermont Central R. Co.*, 25 Vt. 29. See *Denslow v. New Haven Co.*, 16 Conn. 98; *Oursler v. Baltimore R. Co.*, 60 Md. 358; *Hodge v. Lehigh V. R. Co.*, 39 Fed. Rep. 449.

<sup>3</sup> *Stodghill v. C. B. & Q. R. Co.*, 43

*Iowa*, 26; *Young v. Chicago Ry. Co.*, 28 Wis. 171; *Baltimore R. Co. v. Magruder*, 84 Md. 79; *St. Louis Ry. Co. v. Harris*, 47 Ark. 340.

<sup>4</sup> *Pugh v. Golden Valley Ry. Co.*, 12 Ch. D. 274; 15 Ch. D. 330.

<sup>5</sup> *Jackman v. Mo. Pac. R. Co.*, 15 Neb. 524.

<sup>6</sup> *Norris v. Vermont Central R. Co.*, 28 Vt. 99; *St. Louis Ry. Co. v. Morris*, 35 Ark. 622; *Chicago R. Co. v. Carey*, 90 Ill. 514; *Jacksonville R. Co. v. Cox*, 91 Ill. 500; *St. Louis Ry. Co. v. Harris*, 47 Ark. 340; *Hoffeditz v. So. Penn. Ry. Co.*, 18 Atl. 125; 129 Penn. St. 264; *St. Louis Ry. Co. v. Hurst*, 25 Ill. App. 98. See *Hutchinson v. Chicago Ry. Co.*, 37 Wis. 582; *Peden v. Chicago Ry. Co.*, 78 Iowa, 181; *Lawrence v. Great Northern Ry. Co.*, 20 L. J. N. S. (Q. B.) 293.

<sup>7</sup> *Ibid.* A purchaser of a mill cannot sue on a covenant made by a railroad company with its former

poration would be authorized to extend ditches from its culverts in the grantor's land, and beyond the limits of the location, or to deepen and widen the channel of a watercourse beyond such limits, when these acts are necessary to prevent the flooding and washing away of the land and to preserve the road from damage.<sup>1</sup> A railroad being a public highway, the doctrine of dedication or of estoppel *in pais* applies to the right of way therefor. Where a land-owner verbally gave to a railroad company the right of way over his premises, free of charge, if it would construct ditches to carry off water, and the road was constructed and the ditches dug, it was held that, after the lapse of seventeen years, the land-owner was to be regarded as having dedicated the right of way to the public use, and that the company had acquired a vested right thereto, which was not forfeited by its failure to maintain sufficient ditches.<sup>2</sup>

§ 257. Same.— A railroad company is liable in damages if an excavation made for its road drains a well or spring on land adjacent to but not crossed by its line;<sup>3</sup> if the road injuriously affects a right of flowage,<sup>4</sup> a water power,<sup>5</sup> or a landing,<sup>6</sup> or causes a deposit of sand<sup>7</sup> or injury to crops;<sup>8</sup> if it is

owner to dig a new channel for the mill stream, if the covenant was already broken at the time of the purchase. *Junction R. Co. v. Sayers*, 28 Ind. 818.

<sup>1</sup> *Babcock v. Western Railroad*, 9 Met. 553; *McCarty v. St. Paul Ry. Co.*, 31 Minn. 278. *Contra*, under condemnation proceedings as to the right to dig ditches. *State v. Armell*, 8 Kansas, 288.

<sup>2</sup> *Texas Ry. Co. v. Sutor*, 56 Texas, 496; 59 id. 29.

<sup>3</sup> *Parker v. Boston & Maine Railroad*, 3 Cush. 107; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Peoria Railroad v. Bryant*, 57 Ill. 473. As to the right of a railway company to appropriate a spring of water, which is private property, to supply a tank, see *Strohecker v. Alabama R. Co.*, 42 Ga. 509; *Hussner v. Brooklyn City R. Co.*,

30 Hun, 409; *Winklemans v. Des Moines N. W. Ry.*, 62 Iowa, 11. As to springs taken by a water company to supply its reservoir and consequent injury to the land not taken, see *Finn v. Providence Gas Co.*, 99 Penn. St. 631.

<sup>4</sup> *Davidson v. Boston & Maine Railroad*, 3 Cush. 91; *Hot Spring Ry. Co. v. Tyler*, 36 Ark. 205.

<sup>5</sup> *Colorado M. Ry. Co. v. Brown (Col.)*, 25 Pac. 87.

<sup>6</sup> *Railroad Co. v. Schurmeir*, 7 Wall. 272; *ante*, § 255.

<sup>7</sup> *Trinity Ry. Co. v. Schofield*, 72 Texas, 496; *Wright v. Syracuse R. Co.*, 49 Hun, 445.

<sup>8</sup> *Chicago R. Co. v. Carey*, 90 Ill. 514; *Houston R. Co. v. Knapp*, 51 Texas, 592; *Sabine Ry. Co. v. Wood*, 69 Texas, 679; *Gulf Ry. Co. v. McGowan*, 73 Texas, 355; *Gulf Ry. Co.*

constructed through a mill-pond which the legislature has authorized to be raised in a navigable river, although the conditions of the statute giving such authority have not been complied with;<sup>1</sup> or if it removes a natural barrier which is not on the land taken, but which protects it from floods in a neighboring river, even after the land-owner has released all damages on account of the construction of the road through his land.<sup>2</sup> If a canal company, under the power granted to take land by paying the value thereof, pays for a definite quantity to be overflowed by a dam and works to be erected by them, and the works when erected cause more land to be overflowed than was paid for, the land-owner may maintain an action therefor, even though he fails to prove satisfactorily any raising of the dam.<sup>3</sup> And if such a company enters upon land before acquiring title thereto, either under their charter or by the assent of the land-owner, and erects dams and works necessary for its own purposes, and the land, with the works so constructed, is afterwards conveyed by the owner to the company, the latter is not thereby exempted from liability to an action for damages to other land of the same owner from the want of proper care and skill in the construction or repair of the works.<sup>4</sup> A railroad corporation which is authorized to construct its road across the pond of a mill corporation, formed by damming a natural stream, is bound to so construct

*v. Preston*, 74 Texas, 181; *Emry v. Raleigh R. Co.*, 102 N. C. 209; *Omaha Ry. Co. v. Standen*, 22 Neb. 343.

<sup>1</sup> *White v. South Shore R. Co.*, 6 Cush. 412. In Pennsylvania the right given by the act of March 23, 1808, to construct a mill-dam in a navigable stream, is a revocable license, and the mill-owner cannot recover for a subsequent interference with this right by the construction of a railroad under legislative authority. *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Bigler v. Antes*, 21 Penn. St. 288; *New York R. Co. v. Young*, 33 Penn. St. 175; *West Branch Canal Co. v. Mulliner*, 68 Penn. St. 357.

<sup>2</sup> *Eaton v. B. C. & M. R. Co.*, 51 N. H. 504; *Delaware Canal Co. v. Lee*, 23 N. J. 243. *Contra*, *Alexander v. Milwaukee*, 16 Wis. 247, which appears to be now overruled. See *Arimond v. Green Bay Co.*, 31 Wis. 316; *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

<sup>3</sup> *Morris Canal Co. v. Seward*, 23 N. J. 219; *Den v. Morris Canal Co.*, 24 N. J. 588; *Plum v. Morris Canal Co.*, 2 Stock. 257.

<sup>4</sup> *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457; 28 id. 97; *Trenton Water Power v. Raff*, 36 N. J. L. 335; *Lehigh Valley Railroad v. McFarlan*, 48 N. J. L. 615; *Valentine v. Central R. Co.*, 29 N. J. L. 60, 561; *St. Louis Ry. Co. v. Walbrink*, 47 Ark. 330.

the road as to permit the passage of the waters both of the stream and the pond; and a joint action of tort for the entire injury may be maintained against both corporations, if the negligence of both combined to produce the injury.<sup>1</sup> A person who purchases land adjacent to a railroad after its construction can recover for damages to his crop from the overflow of streams for the passage of which no sufficient drains or culverts are provided.<sup>2</sup>

§ 258. **Same — Negligence.**— A railroad company, or other corporation acting in pursuance of legislative authority, is only required to exercise reasonable diligence and precaution in constructing passage-ways for the water through its bridges and embankments,<sup>3</sup> and is entitled to select a safe and massive structure in preference to a lighter one which would less obstruct the water.<sup>4</sup> It is not liable to an action for damages if it fails to construct a culvert or bridge so as to pass extraordinary floods;<sup>5</sup> if without negligence an accumulation of water is set free by the breaking of a culvert in an embankment and the land below is flooded;<sup>6</sup> if it has taken reasonable

<sup>1</sup> *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491; *Illinois Ry. Co. v. Switzer*, 117 Ill. 399.

<sup>2</sup> *Atlantic & D. R. Co. v. Peake* (Va.), 12 S. E. 348.

<sup>3</sup> *Bellinger v. New York Central R. Co.*, 23 N. Y. 42.

<sup>4</sup> *McCleneghan v. Omaha R. Co.*, 25 Neb. 523.

<sup>5</sup> *Pittsburgh Railway v. Gilleland*, 56 Penn. St. 445; *Baltimore R. Co. v. Sulphur Spring School District*, 96 Penn. St. 65; s. c. 3 Penny. (Pa.) 518; *Sullens v. Railroad Co.*, 74 Iowa, 659; *Moore v. Railway Co.*, 75 Iowa, 263; *Noe v. Chicago Ry. Co.*, 76 Iowa, 360; *Chicago R. Co. v. Schaffer*, 26 Ill. App. 280; *Central R. Co. v. Kent*, 84 Ga. 351; *Gulf Ry. Co. v. Holliday*, 65 Texas, 512; *Sabine Ry. Co. v. Hadnot*, 67 Texas, 503; *Gulf Ry. Co. v. Pomeroy*, id. 498; *Bellinger v. New York Central R. Co.*, 23 N. Y. 42; *Houston R. Co. v. Parker*, 50 Texas, 380. It is

liable to its servants for personal injuries caused by the improper condition and washing out of a culvert. *Davis v. Central Vermont R. Co.*, 55 Vt. 84. So, as to personal injuries caused by a defect in the road which results from ditches and drains, along its sides, being insufficient to protect it from unprecedented floods. *Ellet v. St. Louis Ry. Co.*, 76 Mo. 518; *Ely v. St. Louis R. Co.*, 77 Mo. 34. Loss of a passenger's baggage by a sudden and extraordinary flood is an act of God. *Strouss v. Wabash Ry. Co.*, 17 Fed. Rep. 209. So of the passage-ways in a bridge, drain, or gutter maintained by a city. *Sprague v. Worcester*, 13 Gray, 193; *Allen v. Chippewa Falls*, 52 Wis. 430; *Illinois Central R. Co. v. Bethel*, 11 Brad. (Ill.) 17; *Hopkins v. Rush River*, 70 Wis. 10.

<sup>6</sup> *Mills v. Greenville R. Co.*, 13 S. C. 97. See § 161, *ante*; *Indiana Ry. Co.*

precautions in constructing a bridge across a stream to prevent unnecessary damage to the adjacent lands by flooding those which are above,<sup>1</sup> or washing away the banks of those below;<sup>2</sup> if the road is constructed without a culvert across a cranberry marsh, one side of which afterwards becomes dry;<sup>3</sup> if, in a case of strict necessity, it closes a watercourse and floods other portions of the land than the part which it has taken;<sup>4</sup> if it causes lands to be flowed by the necessary and proper elevation of its road-bed on its own land and not in the channel of the stream;<sup>5</sup> nor is it liable for interest on the damages annually sustained by the plaintiff.<sup>6</sup>

**§ 259. Continuing trespasses.**— If a railroad embankment is so constructed as to divert the water of a stream from its natural channel, the injury to a riparian proprietor below is a permanent one, and if he recovers judgment, it is a bar to future actions for the same cause, although the jury were erroneously instructed in that action not to consider future injuries by reason of the maintenance of the embankment.<sup>7</sup> So, a recovery of prospective damages, in an action for so constructing the road as to unnecessarily wash away the plaintiff's land by turning the current of the stream against it, is a bar to an action for subsequent damage, though caused by an unusual freshet.<sup>8</sup> If a railroad company commits a trespass by digging a ditch on another's land, it does not acquire the right to re-enter and fill up the ditch. The continued existence of the ditch is not always a continuing trespass, and if,

*v. Adamson*, 114 Ind. 282; *Kankakee R. Co. v. Horan*, 22 Ill. App. 145; 23 id. 259; 30 id. 552; 23 N. E. 621; *Ohio Ry. Co. v. Wachter*, id. 415.

<sup>1</sup> *Mellen v. Western Railroad*, 4 Gray, 301.

<sup>2</sup> *Ante*, § 248a.

<sup>3</sup> *Lyon v. Green Bay Ry. Co.*, 42 Wis. 538; *Old Colony R. Co. v. Miller*, 125 Mass. 1.

<sup>4</sup> *Johnson v. Atlantic R. Co.*, 85 N. H. 569; *Mason v. Kennebec Railroad*, 31 Maine, 217.

<sup>5</sup> *Moyer v. New York Central R. Co.*, 88 N. Y. 351; 24 Hun, 138; *Rider v. New York R. Co.*, 65 How. Pr. 419.

<sup>6</sup> *Lamar v. Charlotte R. Co.*, 10 S. C. 476.

<sup>7</sup> *Stodghill v. C., B. & Q. R. Co.*, 53 Iowa, 341; *Powers v. Council Bluffs*, 45 Iowa, 652; *East St. Louis Ry. Co. v. Eisentraut* (Ill.), 24 N. E. 760; *Bird v. Hannibal R. Co.*, 30 Mo. App. 365; *Chicago R. Co. v. Henneberry*, 28 Ill. App. 110. See *Great Laxey Mining Co. v. Clague*, 4 App. Cas. 115.

<sup>8</sup> *Fowle v. New Haven Co.*, 112 Mass. 334; 107 Mass. 352; *ante*, § 210. See *Manson v. Maffra*, 7 Vict. L. R. (L.) 364.



after the recovery of a judgment for the injury, new and unforeseen damage results, this does not give a new cause of action.<sup>1</sup> If a railway embankment ponds back the water on the plaintiff's land, doing injury to a certain amount, and the water would have reached the plaintiff's land in another way had the embankment not been constructed, but would have done damage to a less amount, the plaintiff is entitled to recover only the difference between the two amounts.<sup>2</sup> A railroad corporation is required to pay for injured works as it finds them, and not for increased works, but if the road causes injury to an unused surplus water power it is liable therefor at the market value of the water power for any useful purpose.<sup>3</sup>

**§ 260. Municipal corporations — Flowage by.**— A city or town which constructs a street across a watercourse without proper culverts or drains,<sup>4</sup> or which negligently constructs or maintains the bridges or culverts in a highway across a natural stream, so as to cause the water to flow back upon and injure the land of another, is liable to an action of tort to the same extent that any corporation or individual would be liable for doing similar acts.<sup>5</sup> So, if a municipal corporation changes the grade of a street and thereby diverts a natural stream,<sup>6</sup> or causes the drainage to flow into a mill-race and corrupt the water,<sup>7</sup> it is liable to an action unless a mode of assessing the

<sup>1</sup> *Kansas Pacific Railway v. Muhlman*, 17 Kansas, 224. See *Cumberland Canal v. Hitchins*, 65 Maine, 140; *Rosenthal v. Taylor Ry. Co.* (Texas), 15 S. W. 268.

<sup>2</sup> *Workman v. Great Northern Ry. Co.*, 32 L. J. N. S. (Q. B.) 279. See § 161, *ante*.

<sup>3</sup> *Dorlan v. East Brandywine R. Co.*, 46 Penn. St. 520; *Haslam v. Galena Railroad*, 64 Ill. 353; *Young v. Harrison*, 17 Ga. 30; 9 Ga. 359; *Patterson v. Boom Co.*, 3 Dillon, 465; *Willamett Falls Co. v. Kelly*, 3 Oregon, 99. See *King v. C., B. & Q. R. Co.*, 71 Iowa, 696.

<sup>4</sup> *Spelman v. Portage*, 41 Wis. 144; *Barden v. Portage* (Wis.), 48 N. W. 210.

<sup>5</sup> *Anthony v. Adams*, 1 Met. 284, 285; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 Gray, 544; *Parker v. Lowell*, 11 Gray, 353; *Sprague v. Worcester*, 13 Gray, 193; *Wheeler v. Worcester*, 10 Allen, 591; *Hill v. Boston*, 122 Mass. 358; *Drew v. Westfield*, 124 Mass. 461; *Barns v. Hannibal*, 71 Mo. 449; *Mootry v. Danbury*, 45 Conn. 550; *Haynes v. Burlington*, 38 Vt. 350; *Stone v. Augusta*, 46 Maine, 127.

<sup>6</sup> *Helena v. Thompson*, 29 Ark. 569; *State v. Hanna*, 97 Ind. 469; *Conniff v. San Francisco*, 67 Cal. 45.

<sup>7</sup> *Columbus v. Hydraulic Woollen Mills Co.*, 83 Ind. 435.

damages is provided by statute. It is important to distinguish between natural streams, flowing within defined banks, and surface water, for the powers of a municipality are much greater with respect to the latter than the former.<sup>1</sup> It is liable when, without express legislative powers, changing what would otherwise be the legal rights of the parties, it deprives others of their rights in a natural watercourse, or floods their lands by insufficient passage ways, although the watercourse may not form a natural stream.<sup>2</sup> But it would not necessarily be liable for similar injuries caused by surface water.<sup>3</sup> If the land-owner opens an artificial watercourse across a highway already established through his land, he is bound to maintain a way for the use of the public over the watercourse, but the public, in locating a highway, cannot shut up a watercourse, whether artificial or natural, but may make a way over it by means of bridges.<sup>4</sup> A town is not responsible for backwater caused by an obstruction placed in a culvert by a mere wrongdoer.<sup>5</sup> The platting of a city or town is a deed in fee simple, and a reservation of the right to construct and use a mill-race across a street included therein gives only an easement in the street to the owners, who are bound to maintain a bridge across the street at this point.<sup>6</sup>

§ 261. Same.— When the legislature confers upon a municipal corporation authority to lay out and construct common sewers and drains, and provision is made by statute for the

<sup>1</sup> *Helena v. Thompson*, 29 Ark. 569, 574.

<sup>2</sup> *Rose v. St. Charles*, 49 Mo. 509; *Burton v. Chattanooga*, 7 Lea (Tenn.), 739; *Allentown v. Kramer*, 78 Penn. St. 406; *Blakely v. Devine*, 36 Minn. 53. A city which attempts to change the channel of a stream, must substantially comply with the requirements of its charter. *McKernan v. Indianapolis*, 38 Ind. 223.

<sup>3</sup> *Ibid.*; *Pflegar v. Hastings Ry. Co.*, 28 Minn. 510.

<sup>4</sup> *Perley v. Chandler*, 6 Mass. 454; *Lowell v. Locks & Canals*, 104 Mass. 18; *Woodruff v. Neal*, 28 Conn. 165;

*Moran v. McClearn*, 68 Barb. 185; *Woodring v. Fords Township*, 28 Penn. St. 355; *Fleming's Appeal*, 65 Penn. St. 444; *Merrill v. Kalamazoo*, 85 Mich. 211; *Nobles v. Langly*, 66 N. C. 287; *Bolling v. Mayor*, 3 Rand. 563; *Eyber v. County Commissioners*, 49 Md. 257.

<sup>5</sup> *Peck v. Ellsworth*, 36 Maine, 393; *Steele v. Southeastern Ry. Co.*, 16 Q. B. 550; *Hoagland v. Sacramento*, 52 Cal. 142.

<sup>6</sup> *Waterloo v. Union Mill Co.*, 59 Iowa, 437; *Wood v. N. Y. Nat. W. Co.*, 33 Kansas, 590.

assessment, under special proceedings, of damages to persons whose estates are thereby injured, an action at law or bill in equity may be maintained by an individual suffering special damage from the nuisance, if caused by an excess of the powers granted, or by negligence in planning,<sup>1</sup> or in the mode of carrying out the system legally adopted,<sup>2</sup> or omission to take due precaution to guard against the consequences of its operation;<sup>3</sup> but not for injuries which are caused by a defect or insufficiency in the plan or system of drainage adopted under the authority conferred by the legislature, or which are the necessary result of the exercise of the authority so conferred.<sup>4</sup> The corporation is liable in an action of tort, if, without authority of law, it collects surface or other waters in a public sewer, and empties them upon the land of an individual to his injury,<sup>5</sup> either immediately or by the force of

<sup>1</sup> *Terre Haute v. Hudnut*, 112 Ind. 542.

<sup>2</sup> *Stonehouse v. Enniskillen*, 82 Q. B. (Can.) 562; *Scroggie v. Guelph*, 36 id. 534; *Evansville v. Decker*, 84 Ind. 325; *Hardy v. Brooklyn*, 90 N. Y. 435; *Johnson v. District of Columbia*, 1 Mackey, 427; *State v. Portland*, 74 Maine, 268; *Perkins v. Lawrence*, 136 Mass. 305; *Seifert v. Brooklyn*, 15 Abb. N. Cas. 97; *Van Rensselaer v. Albany*, id. 457.

<sup>3</sup> *Child v. Boston*, 4 Allen, 41; *Emery v. Lowell*, 104 Mass. 13; 109 Mass. 197; *Washburn & Moen Manuf. Co. v. Worcester*, 116 Mass. 458; *Hill v. Boston*, 122 Mass. 358; *Ashley v. Port Huron*, 35 Mich. 296; *Mills v. Brooklyn*, 82 N. Y. 489; *Hardy v. Brooklyn*, 90 N. Y. 435. It is presumable that the Legislature intended, when practicable, that the work authorized should be done without creating a nuisance. *Morse v. Worcester*, 139 Mass. 389; *Seymour v. Cummins*, 119 Ind. 148.

<sup>4</sup> *Ibid.*; *Johnston v. District of Columbia*, 118 U. S. 19.

<sup>5</sup> *Post*, § 272; *Cator v. Board of Works*, 84 L. J. (Q. B.) 74; *Winn v.*

*Rutland*, 52 Vt. 481; *Ashley v. Port Huron*, 35 Mich. 296; *Burford v. Grand Rapids*, 53 Mich. 98, 102; *Rowe v. Portsmouth*, 56 N. H. 291; *Rochester v. White Lead Co.*, 3 N. Y. 463; *Mayor v. Bailey*, 2 Denio, 433; *Lewenthal v. Mayor*, 61 Barb. 511; 5 Lans. 532; *Bradt v. Albany*, 5 Hun, 591; *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 Ill. 132; *Jacksonville v. Lambert*, 62 Ill. 519; *Hildreth v. Lowell*, 11 Gray, 345; *Manning v. Lowell*, 130 Mass. 21; *Pettigrew v. Evansville*, 25 Wis. 223; *Alexander v. Milwaukee*, 16 Wis. 248; *Smith v. Milwaukee*, 18 Wis. 63; *Vincennes v. Richards*, 23 Ind. 381; *Weis v. Madison*, 75 Ind. 241; *Niles' Works v. Cincinnati*, 2 Disney, 400; *Cotes v. Davenport*, 9 Iowa, 227; *Kobs v. Minneapolis*, 22 Minn. 159; *Simmer v. St. Paul*, 23 Minn. 408; *Phinizy v. Augusta*, 47 Ga. 260; *Troy v. Coleman*, 58 Ala. 570; *Union Springs v. Jones*, 58 Ala. 654. In such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it was intended, but it is the doing of

gravitation;<sup>1</sup> if it drains water through sewers and drains into a canal owned by a private corporation and thereby causes injury to the canal;<sup>2</sup> if, in like manner, it obstructs a mill-race;<sup>3</sup> if it discharges mud and filth into a private dock so as to interfere with the access thereto and the right to lay vessels thereat;<sup>4</sup> if it causes disease,<sup>5</sup> or the destruction of a natural water-course by impure discharges and overflows;<sup>6</sup> if it constructs the sewer unskillfully,<sup>7</sup> or negligently suffers it to be out of repair,<sup>8</sup> or makes a change in the structure, or has notice that such change is made by others, by means of which the passage of the water or sewage is obstructed.<sup>9</sup> If the au-

a wrongful act, causing a direct injury to the property of another outside the limits of the public work. *Hill v. Boston*, 122 Mass. 358. The corporation is liable for injuries caused by sewers of which it has assumed the control and management as well as those which it has itself constructed. *Taylor v. Austin*, 32 Minn. 247; *Crawfordsville v. Bond*, 96 Ind. 236.

<sup>1</sup> *Woodward v. Worcester*, 121 Mass. 245; *Drexel v. Lake*, 127 Ill. 54.

<sup>2</sup> *Locks and Canals v. Lowell*, 7 Gray, 223.

<sup>3</sup> *Columbus v. Woolen Mills*, 33 Ind. 485; *Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433.

<sup>4</sup> *Haskell v. New Bedford*, 108 Mass. 208; *Clark v. Peckham*, 9 R. I. 455; *Richardson v. Boston*, 19 How. 263. A city is also liable for diverting a natural stream which deposits sand and earth in front of the plaintiff's wharf and impairs its value. *Barron v. Baltimore*, 4 Am. Jur. 203; *ante*, § 123.

<sup>5</sup> *Eufaula v. Simmons*, 86 Ala. 515; *Randolph v. Bloomfield*, 77 Iowa, 50; *Edmondson v. Moberly*, 98 Mo. 523.

<sup>6</sup> *Butler v. Edgewater*, 6 N. Y. S. 174; *Stoddard v. Saratoga Springs*, 4 id. 745.

<sup>7</sup> *Winon v. Rutland*, 52 Vt. 481; *Thurston v. St. Joseph*, 51 Mo. 510;

*Edmondson v. Moberly*, 98 Mo. 523; *Indianapolis v. Hunter*, 30 Ind. 235; *Child v. Boston*, 4 Allen, 41; *Emery v. Lowell*, 104 Mass. 13; *Merrifield v. Worcester*, 110 Mass. 216; *Lewenthal v. New York*, 5 Lans. 532; 61 Barb. 511; *Fleming v. Manchester*, 44 L. T. 517; reversed in C. A. (see 3 Fisher's C. L. Dig. 2135); *Jacksonville v. Lambert*, 62 Ill. 519; *Savannah v. Spears*, 66 Ga. 304; *Frostburg v. Hitchins*, 70 Md. 56; *Frostburg v. Duffy*, id. 47; *Gross v. Lampasas*, 74 Texas, 195; *Nashville v. Comer*, 88 Tenn. 415.

<sup>8</sup> *Ibid.*; *McCarthy v. Syracuse*, 46 N. Y. 194; *Barton v. Syracuse*, 36 N. Y. 54; 37 Barb. 292; *New York v. Furze*, 3 Hill, 612; *Gilman v. Laconia*, 55 N. H. 130; *Lloyd v. New York*, 5 N. Y. 369; *Hudson v. New York*, 9 N. Y. 163; 5 Sand. 289; *Wilson v. New York*, 1 Denio, 595; *South Bend v. Paxton*, 67 Ind. 228; *Hammond v. Vestry of St. Pancras*, L. R. 9 C. P. 316; *Fleming v. Manchester*, 44 L. T. N. S. 517; *Simmer v. St. Paul*, 23 Minn. 408; *Vanderslice v. Philadelphia*, 103 Penn. St. 102; *Buchanan v. Duluth*, 40 Minn. 403; *Pearson v. Duluth*, 40 Minn. 438; *Pottner v. Minneapolis*, 41 Minn. 73; *Sherwood v. Judge*, 40 Minn. 22; *Taylor v. Austin*, 32 Minn. 247.

<sup>9</sup> *Nims v. Mayor*, 59 N. Y. 500;

thorities of a city change the channel of a drain so as to throw the water flowing therein upon the land of A, A cannot obstruct the channel so as to cause the water to flow back upon the land of B lying above his own.<sup>1</sup> The rule that a municipal corporation is not required to supply means of escape for drainage or sewage does not apply when the necessity for the drainage is caused by the act of the corporation itself.<sup>2</sup> It is competent for the legislature to authorize a city to turn a natural stream into a sewer,<sup>3</sup> and the plaintiff must show special injury to entitle him to relief otherwise than as provided by the statute.<sup>4</sup>

§ 262. *Same.*—Cities have been held not liable for injury to others caused by the overflow of their sewers in the following cases: where the sewer became choked with sand and mud from the streets, and it did not appear that it was liable to become obstructed under ordinary circumstances, or that the city had knowledge of the obstruction, or that there was any fault in the construction of the sewer;<sup>5</sup> where the city omits to construct a sewer, or fails to make it of sufficient size, the duty of determining the location and dimensions of sewers being in its nature judicial;<sup>6</sup> where the injury is caused by an

*Donohue v. New York*, 3 Daly, 65; *Niles' Works v. Cincinnati*, 2 Disney (Ohio), 400. As to injunction, see *Paine v. Delhi*, 116 N. Y. 228; *Boston Belting Co. v. Boston*, 149 Mass. 44; 152 Mass. 307; *Kranz v. Baltimore*, 64 Md. 491.

<sup>1</sup> *Amick v. Tharp*, 13 Gratt. 564.

<sup>2</sup> *Byrnes v. Cohoes*, 67 N. Y. 204; 5 Hun, 602; *post*, § 270. See *Cochrane v. Madden*, 152 Mass. 365.

<sup>3</sup> *Butler v. Worcester*, 112 Mass. 541; *Diamond Match Co. v. New Haven*, 55 Conn. 510.

<sup>4</sup> *Washburn & Moen Co. v. Worcester*, 116 Mass. 458; *Workman v. Worcester*, 118 Mass. 168. An interference with private rights not necessarily affected by the public needs may be the ground of an action; as where the workmen of the defendant, a city, in digging a sewer in one of its

streets uncover, and negligently leave exposed, a water-pipe leading to a greenhouse, so that the water freezes and the owner loses his supply. *Stock v. Boston*, 149 Mass. 410.

<sup>5</sup> *Smith v. Mayor*, 66 N. Y. 295; 4 Hun, 637; *Wheeler v. Worcester*, 10 Allen, 591. There is no Massachusetts general law authorizing towns, in their corporate capacity, to lay out or construct drains or sewers. See *Lemon v. Newton*, 134 Mass. 476.

<sup>6</sup> *Mills v. Brooklyn*, 32 N. Y. 489; *Kosmak v. New York*, 53 Hun, 329; *Flagg v. Worcester*, 13 Gray, 601; *Carr v. Northern Liberties*, 35 Penn. St. 324; *Little Rock v. Willis*, 27 Ark. 572; *Fair v. Philadelphia*, 88 Penn. St. 309; *Collins v. Philadelphia*, 93 Penn. St. 272; *Harper v. Milwaukee*, 30 Wis. 365.

error of judgment, as to the required capacity of the sewer, on the part of the officers of or a competent engineer employed by the city;<sup>1</sup> where extraordinary and exceptional floods cause the overflow, and the structure is of sufficient capacity for all ordinary purposes and for such floods as have previously occurred;<sup>2</sup> where a public sewer overflows by the negligence of the city, but discharges through a private drain of the plaintiff which he has connected with the sewer without the permit required by an ordinance,<sup>3</sup> or when surface water flows into a cellar which is not connected by a drain with the public sewer,<sup>4</sup> or where an injury is caused by water accumulated in a square left below grade in making a public improvement.<sup>5</sup> Where a canal boat moored to a city wharf alongside and beneath the opening of a large main sewer was sunk during a heavy shower by the water issuing from the sewer, the city was held not liable.<sup>6</sup> A county, being an arm or branch of the State government, is not, in the absence of statute, liable for the neglect or wrongful acts of its officers, such as the flooding of land in the erection of a county jail.<sup>7</sup>

<sup>1</sup> *Van Pelt v. Davenport*, 42 Iowa, 308; *Rozell v. Anderson*, 91 Ind. 591. But see *Helena v. Thompson*, 29 Ark. 569; *Leeds v. Richmond*, 102 Ind. 372; *Atchison v. Challis*, 9 Kans. 612; *Detroit v. Corey*, 9 Mich. 165; *Philadelphia R. Co. v. Anderson*, 94 Penn. St. 351. In *Van Pelt v. Davenport*, just cited, held also that the city is not released by the fact that the money for the construction of the culvert was appropriated by the board of supervisors of the county.

<sup>2</sup> *Watson v. Kingston*, 114 N. Y. 88; *Madison v. Ross*, 3 Ind. 236; *Coldwater v. Tucker*, 36 Mich. 474; *Powers v. Council Bluffs*, 50 Iowa, 197; *German Theological School v. Dubuque*, 64 Iowa, 736; *Haney v. Kansas City*, 94 Mo. 334; *Allen v. Chip-*

*pewa Falls*, 52 Wis. 430; *Savannah v. Cleary*, 67 Ga. 153. So of personal injuries caused by a washout. *McPherson v. St. Louis Ry. Co.*, 97 Mo. 253; *Murphy v. Indianapolis*, 83 Ind. 76.

<sup>3</sup> *Ranlett v. Lowell*, 126 Mass. 431. See *Terry v. New York*, 8 Bosw. 504; *Stoddard v. Saratoga Springs*, 4 N. Y. S. 745; *Sheridan v. Salem*, 148 Mass. 196; *Henderson v. Minneapolis*, 32 Minn. 319.

<sup>4</sup> *Barry v. Lowell*, 8 Allen. 127; *Dewein v. Peoria*, 24 Ill. App. 396.

<sup>5</sup> *Herring v. District of Columbia*, 3 Mackey, 572.

<sup>6</sup> *Behan v. New York*, 24 Fed. Rep. 239.

<sup>7</sup> *Downing v. Mason County*, 87 Ky. 208.



## CHAPTER IX.

### SURFACE AND SUBTERRANEAN WATERS — MINES.

#### SECTION.

- 263, 264. Surface water defined.
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- 266. The rule of the civil law.
- 267. Rights in surface water not analogous to rights in watercourses.
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- 274. Land-owner may drain into a watercourse by artificial channels.
- 275. He may, at common law, shut out surface water by embanking.
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- 277. Exclusion of surface water flowing in highways.
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- 288. Pollution of wells and percolating waters actionable.
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- 296. *Fletcher v. Rylands*.
- 297, 298. Proximate and remote cause.

§ 263. Surface water — Defined. — Water spread over the surface of land, or gathering into natural depressions,<sup>1</sup> or into

<sup>1</sup> *Jeffers v. Jeffers*, 107 N. Y. 650; 482; *West v. Taylor*, 16 Oregon, 165; *Bloodgood v. Ayers*, 108 N. Y. 400; *Pyle v. Richards*, 17 Neb. 180; *Jones* 37 Hun, 356; 2 Am. St. Rep. 443. *v. Wabash Ry. Co.*, 18 Mo. App. 251; note; *Kelly v. Dunning*, 89 N. J. Eq. *Kansas v. Swope*, 79 Mo. 446; *Kansas*

swamps,<sup>1</sup> or bayous, or percolating the soil beneath the surface, if flowing in no definite channel, does not constitute a watercourse, and is not subject to the principles of law regulating the rights of riparian owners.<sup>2</sup> Surface water may be said to form a watercourse at the point where it begins to form a reasonably well-defined channel with bed, banks or sides, and current,<sup>3</sup> although the stream itself may be very small, and the water may not flow continuously;<sup>4</sup> and surface water ceases to be such after entering within the banks of a watercourse,<sup>5</sup> or forming a lake.<sup>6</sup> Mere surface drainage through a ditch extending across different tracts of land does not form a watercourse.<sup>7</sup> By the common law no rights can be claimed *jure naturæ* in the flow of surface water, and its detention, expulsion, or diversion is not an actionable injury, even when injury results to others. If the gist of a cause of action is the diversion of the water of a brook or watercourse, this is an essential and material averment which the plaintiff must prove in order to maintain his action; and it is a variance to show that the defendant's act drained mere surface water, or water from a swamp, without any proof to sustain the allegation of

City R. Co. v. Riley, 33 Kans. 374; 26 Cent. L. J. 26; 17 id. 42, 62; 29 id. 289.

<sup>1</sup> Warmack v. Brownlee, 84 Ga. 196; St. Louis Ry. Co. v. Schneider, 30 Mo. App. 620. Sewage flowing through a populous city is not a natural watercourse. Murphy v. Wilmington, 5 Del. Ch. 281.

<sup>2</sup> Swett v. Cutta, 50 N. H. 439; Morrison v. Railroad Co., 67 Maine, 353; Stanchfield v. Newton, 142 Mass. 110, 116; Wagner v. Long Island R. Co., 5 Thomp. & C. (N. Y.) 163; 2 Hun, 633; 70 N. Y. 614; Earl v. De Hart, 12 N. J. Eq. 280; 72 Am. Dec. 395, note; Shields v. Arndt, 3 Green Ch. 234; Carlisle v. Cooper, 21 N. J. Eq. 576, 581; 19 id. 256; Curtis v. Ayrault, 47 N. Y. 73; Livingston v. McDonald, 21 Iowa, 160; Boynton v. Gilman, 53 Vt. 17; Thunder Bay Booming Co. v. Speechley, 31 Mich. 336; Chicago Ry. Co. v. Henneberry, 28 Ill. App. 110;

Wadsworth v. Smith, 11 Maine, 278; Gibbs v. Williams, 25 Kans. 214; Palmer v. Waddell, 22 Kan. 352; Schlichler v. Phillipy, 67 Ind. 201; Hoyt v. Hudson, 27 Wis. 656; Fryer v. Warne, 29 Wis. 511; Eulrich v. Richter, 37 Wis. 226; 41 Wis. 318; Luther v. Winnisimmet Co., 9 Cush. 171; Barnes v. Sabron, 10 Nev. 217; ante, § 41; McKinley v. Union Co., 42 Wis. 203; 47 Wis. 324; Green v. Carotto, 72 Cal. 267; Ferris v. Wellborn, 64 Miss. 29; Benson v. Chicago R. Co., 78 Mo. 504; Hahn v. Miller, 68 Iowa, 745; 23 Am. L. Rev. 372.

<sup>3</sup> Hebron Gravel Road Co. v. Harvey, 90 Ind. 192.

<sup>4</sup> Churchill v. Lauer, 84 Cal. 283.

<sup>5</sup> Ibid.; Jones v. Hannovan, 55 Mo. 462; Lux v. Haggin, 69 Cal. 255.

<sup>6</sup> Schaefer v. Marthaler, 34 Minn. 487.

<sup>7</sup> Stanchfield v. Newton, 142 Mass. 110.

a diversion of water from a brook.<sup>1</sup> But if a well-defined, natural stream empties into a swamp or lake, where all definite channel is lost, and emerges again into a well-defined channel below, it is a question of fact dependent upon the extent of the swamp or lake, whether it is the same stream; and if it is, the owners of land upon the lower stream have riparian rights, and an owner of land upon the stream above the swamp or lake is not entitled to divert water therefrom to their injury.<sup>2</sup>

§ 264. *Same.*—A stream does not cease to be a watercourse and become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel.<sup>3</sup> In broken regions of country, intersected by long, deep ravines, or surrounded by high, steep hills or bluffs, down which large quantities of water from rain or melting snow rush rapidly, often attaining the volume of a small river, and usually following a well-defined channel, the common-law rules applicable to ordinary surface water do not necessarily apply. In many respects such waters partake more of the nature of natural streams than of ordinary surface water, and, to a certain extent, are governed by the same rules; and no one has a right to obstruct or divert such waters so as to cast them upon the property of others to their injury.<sup>4</sup> But in general, in order to constitute a watercourse, the channel and banks formed by the flowing of the water must present to the eye, on a casual glance, the unmistakable evidences of the frequent action of running water.<sup>5</sup>

<sup>1</sup> *Griffith v. Jenkins*, 2 Allen, 589; *Munkers v. Kansas City R. Co.*, 60 Mo. 834.

<sup>2</sup> *Mansford v. Ross*, 4 N. Z. L. R. (S. Ct.) 290; 5 *id.* (Ct. of App.) 33; *Byrne v. Minneapolis Ry. Co.*, 38 Minn. 212; *Warmack v. Brownlee*, 84 Ga. 196; *St. Louis Ry. Co. v. Schneider*, 80 Mo. App. 620.

<sup>3</sup> *Ante*, § 41; *Macomber v. Godfrey*, 108 Mass. 219; *Gillett v. Johnson*, 30 Conn. 180; *Briscoe v. Drought*, 11 Ir. C. L. 250; *Munkres v. Kansas City*

*R. Co.*, 72 Mo. 514; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192; *Robinson v. Shanks*, 118 Ind. 125; *Alcorn v. Sadler*, 66 Miss. 221.

<sup>4</sup> *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 488; *Bowlsley v. Speer*, 31 N. J. L. 351; *Kelly v. Dunning*, 89 N. J. Eq. 482; *McClure v. Red Wing*, 28 Minn. 186; *Ramsdale v. Foote*, 55 Wis. 557, 561; *post*, § 271.

<sup>5</sup> *Palmer v. Waddell*, 22 Kans. 852; *Gibbs v. Williams*, 25 Kans. 214; *Union Pacific Ry. Co. v. Dyche*, 81

§ 265. **Same—The common-law rule.**—According to the rule of the common law, which is accepted in England, Massachusetts, Maine, Vermont, New York, New Hampshire, Rhode Island, New Jersey, Michigan, Minnesota, Wisconsin, etc., a land-owner may appropriate to his own use or expel from his land all mere surface water or superficially percolating waters, in draining his soil for agriculture,<sup>1</sup> in collecting it for domestic purposes,<sup>2</sup> or for the sole purpose of depriving an adjoining owner of it,<sup>3</sup> and any person, from whose land it is withheld or whose water supply is depleted, will, in the absence of an express grant,<sup>4</sup> have no right of action for such diversion or obstruction.<sup>5</sup> In New Hampshire, a land-owner may disturb the natural drainage only to the degree necessary in the reasonable use of his own land, and what is such reasonable use is ordinarily for the jury to determine under appropriate instructions.<sup>6</sup>

§ 266. **Same—The civil-law rule.**—By the civil law, the lower of two adjacent estates owes a servitude to the upper to receive all the natural drainage; and the lower owner cannot

Kansas, 120; *Chicago R. Co. v. Morrow*, 42 Kans. 339; *Drewett v. Sheard*, 7 C. & P. 465; *Dudden v. Guardians of the Poor*, 11 Exch. 627; *Rex v. Trafford*, 8 Bing. 204; *Staffordshire Canal v. Birmingham Canal*, L. R. 1 H. L. 254, 272; *Rochdale Canal v. Radcliffe*, 18 Q. B. 287; *Reynolds v. McArthur*, 2 Peters, 417, 438; *Bangor v. Lansil*, 51 Maine, 521; *Arnold v. Foot*, 12 Wend. 330; *Earle v. De Hart*, 12 N. J. Eq. 283; *Kauffman v. Griese-mer*, 26 Penn. St. 407; *Lessard v. Stram*, 62 Wis. 112.

<sup>1</sup> *Greatrex v. Hayward*, 3 Exch. 291; *Wood v. Waud*, 3 Exch. 748; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, 11 Exch. 369; *Buffum v. Harris*, 5 R. L. 243; *Benthall v. Seifert*, 77 Ind. 302; *Cairo R. Co. v. Houry*, id. 364; *Wilson v. Duncan*, 74 Iowa, 491; *Davison v. Hutchinson*, 44 N. J. Eq. 474.

<sup>2</sup> *Rawstron v. Taylor*, 11 Exch. 369.

<sup>3</sup> *Chatfield v. Wilson*, 28 Vt. 49.

<sup>4</sup> *Rawstron v. Taylor*, 11 Exch. 369.

<sup>5</sup> *Greatrex v. Hayward*, 3 Exch. 291; *Wood v. Waud*, 3 Exch. 748; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, 11 Exch. 369; *Barkley v. Wilcox*, 86 N. Y. 140; 19 Hun, 320; *Buffum v. Harris*, 5 R. L. 243; *Chatfield v. Wilson*, 28 Vt. 49; *Hoyt v. Hudson*, 27 Wis. 656; *Ramsdale v. Foote*, 55 Wis. 557, 561; *Rowe v. St. Paul Ry. Co.*, 41 Minn. 884. See *Ennor v. Barwell*, 2 Giff. 410, 423 *et seq.*; *Curtis v. Ayrault*, 47 N. Y. 73; 35 L. T. 362.

<sup>6</sup> *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 459. See *Hoyt v. Hudson*, 27 Wis. 656, and *Hurdman v. North Eastern Railway*, 3 C. P. D. 168, 173, as to reasonable use. See also *Williamson v. Lock's Creek Canal Co.*, 76 N. C. 478; 78 N. C. 156.

reject nor can the upper withhold the supply, although either, for the sake of improving his land, according to the ordinary modes of good husbandry, may somewhat interfere with the natural flow of the water.<sup>1</sup> Interference with the natural flow of surface water is regarded as a nuisance, for which nominal damages may be recovered without proof of actual damage,<sup>2</sup> and which may be restrained by injunction, when the injury, as in the case of an embankment obstructing the flow of the water, is permanent and continuing.<sup>3</sup> The courts of Pennsylvania, Illinois, North Carolina, Alabama, Tennessee, California, and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri.<sup>4</sup>

§ 267. **Same — Watercourses.**— A land-owner may change the grade of its surface, and if, in the absence of grant, prescription, or mutual stipulation,<sup>5</sup> mere surface water or the

<sup>1</sup> *Martin v. Jett*, 12 La. 561; 32 Am. Dec. 120, and note; *Lattimore v. Davis*, 14 La. 161; *Hays v. Hays*, 19 La. 351; *Adams v. Harrison*, 4 La. Ann. 165; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hooper v. Wilkinson*, 15 La. Ann. 497; *Barrow v. Laundry*, 15 La. Ann. 681; *Minor v. Wright*, 16 La. Ann. 151; *Gillis v. Nelson*, id. 275; *Bowman v. New Orleans*, 27 La. Ann. 502; *Kauffman v. Griesemer*, 26 Penn. St. 407; *Martin v. Riddle*, 26 Penn. St. 415 n.; *Miller v. Laubach*, 47 Penn. St. 147; *Hayes v. Hickelman*, 68 Penn. St. 324; 8 Watts & S. 40; *Butler v. Peck*, 16 Ohio St. 334; *Tootle v. Clifton*, 22 Ohio St. 247; *Gillham v. Madison County R. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 158; *Hicks v. Silliman*, 93 Ill. 255; *Overton v. Sawyer*, 1 Jones (Law), 308; *Porter v. Durham*, 74 N. C. 767; *Crabtree v. Baker*, 75 Ala. 91; *Farris v. Dudley*, 78 Ala. 124; *Laumier v. Francis*, 23 Mo. 181; *Jones v. Han-novan*, 55 Mo. 462; *Arn v. City of Kansas*, 4 McCrary, 558; *Livingston v. McDonald*, 21 Iowa, 160; *Ogburn v. Connor*, 46 Cal. 346; *Brown v.*

*McAllister*, 39 Cal. 573; *McDaniel v. Cummings*, 83 Cal. 515; 22 Pac. 216; *Goldsmith v. Elsas*, 53 Ga. 186; *McCormick v. Kansas City R. Co.*, 70 Mo. 359.

<sup>2</sup> *Ibid.*; *Tootle v. Clifton*, 22 Ohio St. 247.

<sup>3</sup> *Nininger v. Norwood*, 72 Ala. 277; *Ross v. Mackeney*, 46 N. J. Eq. 140.

<sup>4</sup> *Ibid.*; *Barkley v. Wilcox*, 86 N. Y. 140, 145; 19 Hun, 320; *Carriger v. East Tenn. R. Co.*, 7 Lea, 388; *Louisville R. Co. v. Hays*, 11 Lea, 382. In Arkansas and South Carolina, a modified doctrine is maintained, following neither the strict rule of the common or the civil law, but applying the law to the circumstances of each case. See *Little Rock Ry. Co. v. Chapman*, 39 Ark. 463; *Waldrop v. Greenwood R. Co.*, 28 S. C. 157; 28 Am. L. Rev. 387.

<sup>5</sup> *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Dickinson v. Worcester*, 7 Allen, 19; *Rawstron v. Taylor*, 11 Exch. 369; *Bigelow, C. J.*, in *Gannon v. Hargadon*, 10 Allen, 106; *Jordan v. St. Paul Ry. Co.*, 42 Minn. 172.

natural drainage is displaced, obstructed, or caused to accumulate upon adjoining land,<sup>1</sup> or upon a street or highway,<sup>2</sup> no right of action arises.<sup>3</sup> In *Adams v. Walker*,<sup>4</sup> the Supreme Court of Connecticut decided that a person cannot grade his lot and thereby turn surface water upon another's land to prevent it from flowing into his well, or for any other lawful purpose. But the general common-law rule<sup>5</sup> is that "the right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow." In *Hurdman v. North Eastern Railway*,<sup>6</sup> it was held that a claim that rain-water, by reason of the defendant raising the surface of its land by earth deposits, made its way through the defendant's wall into the adjoining house of the plaintiff and caused substantial damage, disclosed a good cause of action. Cotton, L. J., in delivering the judgment of the court of appeal, distinguished *Wilson v. Waddell*<sup>7</sup> as applying to damage resulting from surface water in the natural user of land, and said that "if any one, by artificial erection on his own land, causes water, even though arising from natural rain-fall only, to pass into his neighbor's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at

<sup>1</sup> *Luther v. Winnisimmet Co.*, 9 Maine, 521; *Goodale v. Tuttle*, 29 N. Y. Cush. 171; *Goodale v. Tuttle*, 29 N. Y. 451.

<sup>4</sup> 34 Conn. 466.

<sup>2</sup> *Bangor v. Lansil*, 51 Maine, 521.

<sup>5</sup> *Gannon v. Hargadon*, 10 Allen,

<sup>3</sup> *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Morrill v. Hurley*, 120 Mass. 99; *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Bangor v. Lansil*, 51

106, 109; *ante*, § 265.

<sup>6</sup> 3 C. P. D. 168; *Crabtree v. Baker*, 75 Ala. 91, 94. See *Broder v. Saillard*, 2 Ch. D. 692, 700.

<sup>7</sup> 2 App. Cas. 95.



the suit of him who is so injured." It is a question of negligence whether one who opens a covered drain in his land is liable for injury to his neighbor, caused by the sudden overflow of the drain after he had reclosed it.<sup>1</sup>

§ 268. **Same — Excluding.**— According to the rule established in Massachusetts and New Jersey, an owner of land may erect structures upon it of any size, height, or depth, irrespective of their effect upon mere surface water or the natural drainage.<sup>2</sup> So he may cultivate his soil in the ordinary way for garden purposes and bring thereon manure and ashes, although his neighbor's mill-pond is encroached upon by the large amount of solid matter carried thence into the pond by surface drainage.<sup>3</sup> In States where the rule of the civil law prevails, it appears that the owner of city property may be held to a stricter liability respecting surface water than the owner of an estate in an agricultural district. *Bentz v. Armstrong*,<sup>4</sup> in Pennsylvania, decided that the owner of a city lot must so improve it as to prevent its surface water from annoying an adjoining owner. It is held in Illinois that the owner of an inferior estate in the country is not bound to receive the surface water coming to his land in larger quantities or at different times than it would come but for the voluntary act of his neighbor; that the collecting and discharging of surface water upon such estate in streams is a continuous trespass, for which successive actions will lie;<sup>5</sup> but that the upper

<sup>1</sup> *Rockwood v. Wilson*, 11 Cush. 221.

<sup>2</sup> *Parks v. Newburyport*, 10 Gray, 28; *Bates v. Smith*, 100 Mass. 181; *Bowlsby v. Speer*, 2 Vroom, 851; *Gannon v. Hargadon*, 10 Allen, 106; *Peck v. Goodberlett*, 109 N. Y. 180; *Chadeayne v. Robinson*, 55 Conn. 845. *Bellows v. Sackett*, 15 Barb. 96, decided that an owner of a house, from the roof of which rain-water fell through a broken gutter upon his own land, and injured the foundations of an adjoining house, was liable.

<sup>3</sup> *Middlesex Co. v. McCue*, 149 Mass. 108.

<sup>4</sup> 8 W. & S. 40; *Young v. Leedom*, 67 Penn. St. 351; *Vanderwiele v. Taylor*, 65 N. Y. 341; *Livingston v. McDonald*, 21 Iowa, 160; *Cincinnati R. Co. v. Ahr*, 2 Cincin. 504; *Whitney v. Sanders*, 3 Pittsburgh, 226; *Phinizy v. Augusta*, 47 Ga. 260; *Freudenstein v. Heine*, 6 Mo. App. 287; *Gormley v. Sanford*, 50 Ill. 158; *Whitney v. Sanders*, 3 Pitts. 226.

<sup>5</sup> *Mellor v. Pilgrim*, 3 Brad. (Ill.) 476; 7 id. 306; *Hicks v. Silliman*, 93 Ill. 255. See *Templeton v. Voshloe*.

proprietor is not liable when he plows his land, and makes drains, for the purpose of agriculture only, in the customary mode among farmers in raising crops.<sup>1</sup> An owner of vacant and unimproved city lots is not liable to an action for his failure to prevent mere surface water, accumulating thereon from natural causes, from passing thence upon the land of an adjoining proprietor to his injury,<sup>2</sup> although the washings of streets and deposits of garbage by third persons may have caused the land to slope in that direction.<sup>3</sup> If the owner of a city lot builds a house on it, damming up surface water on an adjacent lot so as to cause injury to the house, he cannot recover.<sup>4</sup> Such an owner may be obliged, by reason of changes and improvements in the surrounding lots, to care for accumulations of surface water thereby caused on his lot,<sup>5</sup> especially when the discharge upon such land has been long continued.<sup>6</sup> An owner of a city lot, on which surface water accumulates by the raising of a street and the adjacent land and becomes stagnant, is not liable for the nuisance.<sup>7</sup>

**§ 269. Same — Municipal corporations.**— Cities and towns have the same control over streets, highways and public places, in respect to surface water, as private owners of land. If a city or town so constructs or changes the grade of a street or highway as to cause the surface water, naturally collecting thereon in rain and snow, to flow upon the lands of adjoining owners, no liability arises<sup>8</sup> at common law; and such a corporation may prevent the escape of surface water upon its highways from such lands, although such highways have been laid

72 Ind. 134; *Cairo R. Co. v. Stevens*, 78 Ind. 278; *Dayton v. Rutherford*, 128 Ill. 271; *Total v. Bounefoy*, 128 Ill. 653; *Anderson v. Henderson*, 124 Ill. 164.

<sup>1</sup> *Knoll v. Mayer*, 13 Brad. (Ill.) 203.

<sup>2</sup> *Morrill v. Hurley*, 120 Mass. 99; *Vanderwiele v. Taylor*, 65 N. Y. 341.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Doerbaum v. Fischer*, 1 Mo. App. 149.

<sup>5</sup> *Thomas v. Kenyon*, 1 Daly, 132.

<sup>6</sup> *Reed v. Cheney*, 111 Ind. 387.

<sup>7</sup> *Barry v. Commonwealth*, 2 Duv. (Ky.) 95.

<sup>8</sup> *Flagg v. Worcester*, 13 Gray, 601; *Turner v. Dartmouth*, 13 Allen, 291; Gray, J., in *Emery v. Lowell*, 104 Mass. 13, 16; *Hubbard v. Webster*, 118 Mass. 599; *Wakefield v. Newell*, 12 R. I. 75; *Lynch v. New York*, 76 N. Y. 60; *Imler v. Springfield*, 55 Mo. 119; *Alden v. Minneapolis*, 24 Minn. 254; *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Roll v. Augusta*, 34 Ga. 326; *West Bellevue v. Huddleson*, 28 W. N. C. (Penn.) 240.

out and their grade established by law.<sup>1</sup> But the land-owner may, by any act or structure on his own land, prevent the water coming upon his land from a highway through a drain or culvert.<sup>2</sup> It has been held that a city, in changing the grade of a street, and thereby causing the water accumulating thereon to flow upon adjacent private property, will not be liable for damages thereby caused, unless the work was done in an unskilful and negligent manner,<sup>3</sup> or the adjacent owner could not have prevented the injury at moderate expense or by ordinary efforts.<sup>4</sup> A city which employed a contractor to regulate and grade one of its streets, was held liable after the expiration of the contract, for excavations which the contractor had made, which it had the right and power to change by taking charge of and completing the work, and which diverted upon the plaintiff's land surface water which had previously flowed in a natural channel.<sup>5</sup>

§ 270. **Same—Sewers and gutters.**—If a city or town makes provision for carrying off the surface water of its streets and highways, which proves insufficient, and such water flows over upon the land of an adjoining proprietor to his injury, he will have no right of action.<sup>6</sup> In constructing<sup>7</sup> or

<sup>1</sup> *Keith v. Brockton*, 136 Mass. 119.

<sup>2</sup> *Franklin v. Fisk*, 18 Allen, 211.

<sup>3</sup> *Muscatine v. Wallace*, 4 G. Greene (Iowa), 373; *Ellis v. Iowa City*, 29 Iowa, 229; *Russell v. Burlington*, 30 Iowa, 262; *Damon v. Lyons City*, 44 Iowa, 276.

<sup>4</sup> *Simpson v. Keokuk*, 34 Iowa, 568; *Bartle v. Des Moines*, 38 Iowa, 414; *Cubit v. O'Dett*, 51 Mich. 347.

<sup>5</sup> *Vogel v. New York*, 92 N. Y. 10.

<sup>6</sup> *Ante*, § 261; *Barry v. Lowell*, 8 Allen, 127; *Wilson v. New York*, 1 Denio, 595; *Mills v. Brooklyn*, 32 N. Y. 489; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Acker v. Newcastle*, 48 Hun, 312; *Schmidt v. Rowse*, 35 Mo. App. 288; *Fair v. Philadelphia*, 88 Penn. St. 309; *Carr v. Northern Liberties*, 35 Penn. St. 324; *Alden v. Minneapolis*, 24 Minn. 254; *Atchison*

*v. Challis*, 9 Kan. 603. So, if such water results from an extraordinary storm. *Allen v. Chippewa Falls*, 52 Wis. 430. See *Leavenworth v. Casey*, *McCahon* (Kan.), 125, 132; *Logansport v. Wright*, 25 Ind. 512; *Indianapolis v. Huffer*, 30 Ind. 235; *St. Louis v. Gurno*, 12 Mo. 414.

<sup>7</sup> *Dickinson v. Worcester*, 7 Allen, 19; *Hoyt v. Hudson*, 27 Wis. 656; *Waters v. Bay View*, 61 Wis. 642; *Henderson v. Minneapolis*, 32 Minn. 319; *Springfield v. Spence*, 39 Ohio St. 665; *Buchert v. Boyertown* (Penn.), 17 Atl. 190; *Stewart v. Clinton*, 79 Mo. 603; *North Vernon v. Voegler*, 89 Ind. 77; *Rozell v. Anderson*, 91 Ind. 591; *Princeton v. Gieske*, 93 Ind. 102; *Green v. Harrison County*, 61 Iowa, 311; *Parker v. Nashua*, 59 N. H. 402; *Clark v. Wilmington*, 5 Harr. (Del.)

raising the grade of a street or highway it is not bound to provide means of escape for accumulations of mere surface water thereby caused on adjacent land, nor is it liable for such obstruction. It is not liable when surface water collected in the catch-basins or gutters constructed by its agents beneath a highway percolates through the soil into an adjoining cellar,<sup>1</sup> or for the obstruction of surface water by a street horse-railroad track, properly authorized, constructed, and operated.<sup>2</sup> A city, which, in the construction of a street, made a fill across a natural drain for surface water, and flooded an adjoining owner's property, was held liable in Kentucky.<sup>4</sup> A municipal corporation is not liable for the non-exercise of its powers to construct gutters or other means of draining surface water;<sup>3</sup> and it may abandon a sewer or drain, constructed for the purpose of carrying off surface water, if it does not leave the adjoining owners in a worse position than they would be if the sewer or drain had never been made.<sup>5</sup> In Illinois, a city is liable for insufficiency of a gutter causing surface water to overflow upon an adjacent lot,<sup>6</sup> but not for the entire damage, if the owner contributed thereto by stopping up a drain.<sup>7</sup> In Iowa, a city is liable for the failure to provide, when practicable, temporary means for the escape of surface water while raising the grade of a street, causing its escape upon adjoining premises.<sup>8</sup>

§ 271. Same — Artificial channels.— An owner of land has no right to rid his land of surface water, or superficially percolating water, by collecting it in artificial channels and discharging it through or upon the land of an adjoining pro-

243; *Wilson v. New York*, 1 Denio, 595; *Gould v. Booth*, 66 N. Y. 62; *Lynch v. Mayor*, 76 N. Y. 60. See *Carr v. Northern Liberties*, 35 Penn. St. 324.

<sup>1</sup> *Kenniston v. Beverly*, 146 Mass. 467.

<sup>2</sup> *Swenson v. Lexington*, 69 Mo. 157. See *Damour v. Lyons City*, 44 Iowa, 276, *contra*.

<sup>3</sup> *Kemper v. Louisville*, 14 Bush (Ky.), 87.

<sup>4</sup> *Lynch v. Mayor*, 76 N. Y. 60; *Mills v. Brooklyn*, 32 N. Y. 489; *Flagg v. Worcester*, 13 Gray, 601; *Roll v. Augusta*, 34 Ga. 326; *Fair v. Philadelphia*, 88 Penn. St. 309.

<sup>5</sup> *Atchison v. Challiss*, 9 Kans. 603.

<sup>6</sup> *Dixon v. Baker*, 65 Ill. 518.

<sup>7</sup> *Paris v. Cracraft*, 85 Ill. 294.

<sup>8</sup> *Cotes v. Davenport*, 9 Iowa, 227; *Ross v. Clinton*, 46 Iowa, 606.

prietor.<sup>1</sup> This is alike the rule of the common and civil law;<sup>2</sup> and a municipal corporation has no greater right in this respect than a private land-owner.<sup>3</sup> The channel must be definite, but the injured land need not adjoin a highway, in order to make a city liable.<sup>4</sup> A land-owner may drain his land by artificial ditches and thereby cause the water to pass more rapidly and with increased volume on the adjacent land of the lower proprietor, if the same water would not naturally flow in a different direction, and he acts with a proper regard for his neighbor's welfare, the relative advantage and injury to the two tenements being elements for the jury's consideration;<sup>5</sup> and a riparian proprietor may collect, in an artificial channel,

<sup>1</sup> *White v. Chapin*, 12 Allen, 516; *Jackman v. Arlington Mills*, 137 Mass. 277; *Murray v. Archer*, 5 N. Y. S. 326; *Foot v. Bronson*, 4 Lans. 47; *Hicks v. Silliman*, 93 Ill. 255; *Kauffman v. Griesemer*, 26 Penn. St. 415; *Martin v. Riddle*, 26 Penn. St. 415 n.; *Miller v. Laubach*, 47 Penn. St. 154; *Butler v. Peck*, 16 Ohio St. 334; *Rychlicki v. St. Louis*, 98 Mo. 497; *Foster v. St. Louis*, 71 Mo. 157; *Davis v. Crawfordsville*, 119 Ind. 1; 12 Am. St. Reps. 361 and note; *Kearney v. Thoemason*, 25 Neb. 147; *Fremont R. Co. v. Marley*, id. 138; *Alcorn v. Sadler*, 66 Miss. 221; *Anderson v. Henderson*, 124 Ill. 164; *Dayton v. Drainage Com'rs*, 128 Ill. 271; *Weidekin v. Snelson*, 17 Ill. App. 461; *Livingston v. McDonald*, 21 Iowa, 160; *Hogenson v. St. Paul Ry. Co.*, 81 Minn. 224; *Kelly v. Dunning*, 39 N. J. Eq. 482; *Gray v. Knoxville*, 88 Tenn. 99; *Paddock v. Somes (Mo.)*, 14 S. W. 746; *Martin v. Gainesville R. Co.*, 78 Ga. 307; *Davis v. Londgreen*, 8 Neb. 43; *Porter v. Durham*, 74 N. C. 767. See *Goldsmith v. Elsas*, 53 Ga. 186; *Gillis v. Nelson*, 16 La. Ann. 275; *Sowers v. Schiff*, 15 La. Ann. 300; *ante*, § 264. *Jutte v. Hughes*, 67 N. Y. 267, decided that a land-owner, who conducted from the roofs of his houses, in leaders and drains to the privies,

water beyond their capacity, whereby it overflowed to the injury of an adjoining owner, was liable for his failure to prevent the overflow.

<sup>2</sup> *Barkley v. Wilcox*, 86 N. Y. 148; 19 Hun, 320; *Gregory v. Bush*, 64 Mich. 37; *Fremont R. Co. v. Marley*, 25 Neb. 138; *Knight v. Brown*, 25 W. Va. 808; *Chapel v. Smith*, 80 Mich. 100.

<sup>3</sup> *Weis v. Madison*, 75 Ind. 241; *North Vernon v. Voegler*, 89 Ind. 79; *O'Brien v. St. Paul*, 25 Minn. 331. See *Noonan v. Albany*, 79 N. Y. 470; *Cumberland v. Willison*, 50 Md. 138; *Field v. West Orange*, 36 N. J. Eq. 118; 37 id. 600; *Evansville v. Decker*, 84 Ind. 325; *Blakely v. Devine*, 36 Minn. 53; *Manning v. Lowell*, 130 Mass. 21; *Stanchfield v. Newton*, 142 Mass. 110; *Sullivan v. Phillips*, 110 Ind. 320; *Denver v. Rhodes*, 9 Col. 554; *Clark v. Rochester*, 48 Hun, 271; *Smith v. Atlanta*, 75 Ga. 110; *Davis v. Crawfordsville*, 119 Ind. 1; *Lafferty v. Girardville (Penn.)*, 17 Atl. 12; *Young v. Commissioners (Ill.)*, 25 N. E. 689; *Elgin v. Hoag*, 25 Ill. App. 650.

<sup>4</sup> *Manning v. Lowell*, 130 Mass. 21, 24; *Collins v. Waltham*, 151 Mass. 196.

<sup>5</sup> *Hughes v. Anderson*, 68 Ala. 280. See *ante*, § 265.

surface water which naturally flows from his estate into a watercourse running through or by such estate, and thereby discharge such water into the natural stream, although the latter is thereby increased in volume.<sup>1</sup> This right exists only with respect to waters of which the watercourse is the natural outlet;<sup>2</sup> and if the plaintiff cuts trees on the bank of the ditch so that the banks cave in and discharge its waters, with the surface water added thereto, upon his land, this may be pleaded in set-off.<sup>3</sup>

§ 272. Same — Municipal and railroad corporations.— Cities and towns have no greater rights than individuals to collect in artificial channels upon their streets and highways mere surface water, distributed in rain and snow over large districts, and precipitate it upon the premises of private owners;<sup>4</sup> or to construct ditches upon private lands for public

<sup>1</sup> Ibid.; *Waffle v. New York Central R. Co.*, 53 N. Y. 11; *McCormick v. Horan*, 81 N. Y. 86; *Gannon v. Hargadon*, 10 Allen, 106; *Miller v. Laubach*, 47 Penn. St. 154; *Kankakee District v. Lake Fork S. D. District*, 130 Ill. 261.

<sup>2</sup> Ibid.; *Tillotson v. Smith*, 82 N. H. 90; *Baltimore v. Appold*, 42 Md. 442.

<sup>3</sup> *Knight v. Brown*, 25 W. Va. 808. See *Mulberger v. Koenig*, 62 Wis. 558.

<sup>4</sup> *Ante*, § 261; *Plummer v. Sturtevant*, 32 Maine, 325; *Inman v. Tripp*, 11 R. L. 520; *Byrnes v. Cohoes*, 67 N. Y. 204; 5 Hun, 602; *Noonan v. Albany*, 79 Hun, 470; *Bastable v. Syracuse*, 8 Hun, 587; 72 N. Y. 64; *Moran v. McClearns*, 63 Barb. 185; 44 How. Pr. 30; *Sleight v. Kingston*, 11 Hun, 594; 73 N. Y. 592; *Pettigrew v. Evansville*, 25 Wis. 223; *Pontiac v. Carter*, 32 Mich. 164; *Ashley v. Port Huron*, 35 Mich. 296; *Rice v. Flint*, 67 Mich. 401; *Pye v. Mankato*, 36 Minn. 373; *Ashberry v. West Seneca*, 11 N. Y. S. 306; *Elgin v. Welch*, 16 Ill. App. 483; *Smith v. Milwaukee*, 18 Wis. 63; *Field v. West Orange*,

36 N. J. Eq. 118; *Union v. Durkes*, 38 N. J. L. 21; *Smith v. Alexandria*, 33 Gratt. 208; *Gillison v. Charleston*, 16 W. Va. 282; *Russell v. Burlington*, 30 Iowa, 262; *Weyman v. Jefferson*, 61 Mo. 55; *Arn v. City of Kansas (Mo.)*, 4 McCrary, 558; *Indianapolis v. Lawyer*, 38 Ind. 348; *Weis v. Madison*, 75 Ind. 241; *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 29; *Bloomington v. Brokaw*, 77 Ill. 194; *Shawneetown v. Mason*, 82 Ill. 337; *Stack v. East St. Louis*, 85 Ill. 377; *Elgin v. Kimball*, 90 Ill. 356; *Aurora v. Love*, 93 Ill. 521; *O'Brien v. St. Paul*, 25 Minn. 331; *Phinizy v. Augusta*, 47 Ga. 260; *Lee v. Minneapolis*, 22 Minn. 13. So, if such water escapes through a break in a gutter. *Alton v. Hope*, 68 Ill. 167. *A fortiori*, if a city thus discharges foul sewage with surface water. *Winn v. Rutland*, 52 Vt. 481; *Elliott v. Oil City*, 129 Penn. 570; *Rychlicki v. St. Louis*, 98 Mo. 497; *Butler v. Edgewater*, 6 N. Y. S. 174; *Defer v. Detroit*, 67 Mich. 346; *Jacksonville v. Lambert*, 62 Ill. 519.



uses without compensation.<sup>1</sup> A municipal corporation is liable for throwing water, collected in large quantities in a street or in the gutter of a street, upon the land of a private owner,<sup>2</sup> unless it appears that the plaintiff could have prevented the injury by ordinary efforts or at moderate expense.<sup>3</sup> But it is not liable when surface water, collected in catch-basins or gutters, constructed by its agents beneath a street, percolate thence into a cellar and cause injury.<sup>4</sup> In *Judge v. Meriden*,<sup>5</sup> a divided court held a city not liable for the act of its street commissioner in diverting an accumulation of surface water from a street through a sidewalk upon adjacent private premises. A city is liable if the embankment of a street horse railroad, properly authorized, causes the surface water of a large district to flow upon adjoining premises,<sup>6</sup> or if a similar injury is caused by its unlawful raising of a street above the established grade.<sup>7</sup> A city cannot maintain a culvert across a street, and discharge a pond of stagnant water upon adjoining premises,<sup>8</sup> even though it did not construct the culvert.<sup>9</sup> In Massachusetts, one whose premises have been flooded by great quantities of surface water passing through an artificial channel, must seek his remedy under the statute.<sup>10</sup> In *Inman v. Tripp*,<sup>11</sup> in Rhode Island, the city of Providence was held liable

<sup>1</sup> *Cauble v. Hultz*, 118 Ind. 13; *Randall v. Christiansen*, 76 Iowa, 169; *McCullough v. Denver*, 39 Fed. Rep. 307; *Downing v. More*, 12 Col. 316.

<sup>2</sup> *Byrnes v. Cohoes*, 67 N. Y. 204; *Mairs v. Manhattan Real Estate Association*, 89 N. Y. 498; *Indianapolis v. Lawyer*, 38 Ind. 348; *Damour v. Lyons City*, 44 Iowa, 276; *Kearney v. Thoemason*, 25 Neb. 147; *Gray v. Knoxville*, 85 Tenn. 99; *Bush v. Portland*, 19 Oregon, 90; *Bronson v. Wallingford*, 54 Conn. 513; *Watson v. Kingston*, 43 Hun, 367.

<sup>3</sup> *Simpson v. Keokuk*, 34 Iowa, 568.

<sup>4</sup> *Kennison v. Beverly*, 146 Mass. 467.

<sup>5</sup> 38 Conn. 90. Commissioners of highways cannot authorize individuals to drain their lands by digging a ditch along the highway. *Johnson v. Rea*, 12 Brad. (Ill.) 331.

<sup>6</sup> *Damour v. Lyons City*, 44 Iowa, 276. See *Swenson v. Lexington*, 69 Mo. 157; *Callahan v. Des Moines*, 63 Iowa, 705.

<sup>7</sup> *Addy v. Janesville*, 70 Wis. 401; *Herring v. District of Columbia*, 3 Mackey, 572; *Atlanta v. Word*, 78 Ga. 276; *Spangler v. San Francisco*, 84 Cal. 12; *Morris v. Council Bluffs*, 67 Iowa, 343; *Gilluly v. Madison*, 63 Wis. 518.

<sup>8</sup> *Kobs v. Minneapolis*, 22 Minn. 150; *Noble v. St. Albans*, 56 Vt. 52.

<sup>9</sup> *Crawfordsville v. Bond*, 96 Ind. 236.

<sup>10</sup> *Flagg v. Worcester*, 13 Gray, 601; *Turner v. Dartmouth*, 18 Allen, 291. See *Cochrane v. Malden*, 152 Mass. 365.

<sup>11</sup> 11 R. I. 520.

for damages occasioned to the plaintiff's property, in exercising its power to grade its streets, by causing surface water, some of which had flowed in other streets, and some of which had collected in a pond at a distance, to be turned into the street in front of and above the plaintiff's estate, whence it ran into his cellar and well. A city is liable for an injury resulting from a defect in a street, though caused by surface water,<sup>1</sup> or for diverting waters from a natural channel;<sup>2</sup> and in Pennsylvania a city is held liable for obstructing surface water and causing it to pass upon land over which it would not naturally flow.<sup>3</sup>

§ 273. *Same — Same.*— A railroad corporation duly authorized by law has no other or different rights regarding surface water or superficially percolating waters, and if its road-bed obstructs or diverts the natural flow of such waters, no right of action, by the common law, arises to adjoining owners of land,<sup>4</sup> the presumption being that the damages to which they are entitled were included in the compensation

<sup>1</sup> *Murphy v. Indianapolis*, 83 Ind. 76.

<sup>2</sup> *Vogel v. New York*, 92 N. Y. 10.

<sup>3</sup> *Torrey v. Scranton City*, 133 Penn. St. 173. See *Slack v. Lawrence Township* (N. J.), 19 Atl. 663; *Bates v. Westborough*, 151 Mass. 174; *Miller v. Morristown* (N. J.), 20 Atl. 61; *Rutherford v. Holley*, 105 N. Y. 632; *Gilfeather v. Council Bluffs*, 69 Iowa, 810.

<sup>4</sup> *Whalley v. Lancashire Ry. Co.*, 50 L. T. N. S. 472; *Greeley v. Maine R. Co.*, 53 Maine, 200; *Morrison v. Bucksport R. Co.*, 67 Maine, 358; *Walker v. Old Colony R. Co.*, 103 Mass. 10, 16; *Wagner v. Long Island R. Co.*, 2 Hun, 633; 5 *Thomp. & C.* 163; 70 N. Y. 614; *Conhocton Co. v. Buffalo R. Co.*, 3 Hun, 523; 5 *Thomp. & C.* 651; *Raleigh R. Co. v. Wicker*, 74 N. C. 220; *O'Connor v. Fond du Lac R. Co.*, 52 Wis. 526; *Louisville R. Co. v. McAfee*, 30 Ind. 291; *Clark v. Hannibal R. Co.*, 36 Mo. 202; *Hosher v.*

*Kansas City R. Co.*, 60 Mo. 329; *Munkers v. Kansas City R. Co.*, 60 Mo. 334; *Schneider v. Mo. Pac. Railway*, 29 Mo. App. 68; *Burke v. Same*, id. 370; *Hill v. Cincinnati Ry. Co.*, 109 Ind. 511; *Atchison R. Co. v. Hammer*, 22 Kansas, 763. See *Bagnall v. London R. Co.*, 31 L. J. (Exch.) 480. *Contra*, under the civil law. *Gillham v. Madison R. Co.*, 49 Ill. 484; *Alton R. Co. v. Deitz*, 50 Ill. 210; *Toledo Ry. Co. v. Hunter*, 50 Ill. 325; *Shane v. Kansas R. Co.*, 71 Mo. 237 (a divided court); *Cincinnati R. Co. v. Ahr*, 2 Cincin. 504; *Indianapolis R. Co. v. Smith*, 52 Ind. 428; *Abbott v. Kansas City R. Co.*, 83 Mo. 271; *Carriger v. East Tennessee R. Co.*, 7 Lea, 388; *Cornish v. Chicago R. Co.*, 49 Iowa, 378. In *Alton R. Co. v. Deitz*, 50 Ill. 210, held that a horse railroad, which laid its track across a street gutter, is liable for the obstruction of surface water. See *Indianapolis Ry. Co. v. Smith*, 52 Ind. 428.

assessed.<sup>1</sup> The same is true where the road-bed obstructs an artificial ditch through which the natural surface water on the plaintiff's land is conducted to a river.<sup>2</sup> Under the civil-law rule, a railroad corporation is liable for causing surface water to accumulate on adjoining lands by embankments or any artificial means;<sup>3</sup> but, in the absence of evidence that the corporation is under any legal obligation to maintain ditches, it is not liable for failing to keep open ditches for the purpose of leading water off the plaintiff's land.<sup>4</sup> And if a railroad, built without due legal proceedings, obstructs the passage of surface water, it will be liable to an action at the suit of the owner of the premises flooded.<sup>5</sup> Damages caused by the displacement or obstruction of surface water may be included in the assessment of damages under the statute caused by the original construction of the railroad.<sup>6</sup> A railroad corporation has no right by the erection of embankments, the construction

<sup>1</sup> *Clark v. Hannibal R. Co.*, 36 Mo. 202; *Raleigh R. Co. v. Wicker*, 74 N. C. 220; *Walker v. Old Colony Ry. Co.*, 103 Mass. 10; *Cassidy v. Same*, 141 Mass. 174; *Rathke v. Gardner*, 134 Mass. 14.

<sup>2</sup> *O'Connor v. Fond du Lac Ry. Co.*, 52 Wis. 526; *Pettigrew v. Evansville*, 25 Wis. 223.

<sup>3</sup> *Toledo Ry. Co. v. Morrison*, 71 Ill. 616; *Little Rock Ry. Co. v. Chapman*, 39 Ark. 463; *Louisville R. Co. v. Hays*, 11 Lea (Tenn.), 382.

<sup>4</sup> *Field v. Chicago Ry. Co.*, 76 Mo. 614.

<sup>5</sup> *Adams v. Hastings R. Co.*, 18 Minn. 260; *Mitchell v. New York R. Co.*, 38 Hun, 177; *Chicago R. Co. v. Glenney*, 28 Ill. App. 364; *Drake v. Chicago Ry. Co.*, 68 Iowa, 302; *Willets v. Chicago R. Co. (Iowa)*, 45 N. W. 916; *Hanlin v. Chicago Ry. Co.*, 61 Wis. 515; *Galveston Ry. Co. v. Tait*, 63 Texas, 223; *Same v. Seymour*, id. 345; *Gulf Ry. Co. v. Helsley*, 62 id. 593; *Sabine Ry. Co. v. Broussard*, 75 id. 597; *Omaha R. V. Co. v. Brown (Neb.)*, 46 N. W. 39; *Davidson v. Oregon R. Co.*, 11 Oregon, 136; *Rowe v.*

*St. Paul Ry. Co.*, 41 Minn. 384; 16 Am. St. Reps. 706, and note; *Ryan v. Miss. Valley R. Co.*, 62 Miss. 162; *Chamberlain v. Baltimore R. Co.*, 66 Md. 518.

<sup>6</sup> *Walker v. Old Colony R. Co.*, 103 Mass. 1, 16; *Morrison v. Bucksport R. Co.*, 67 Maine, 353; *Grand Rapids R. Co. v. Horn*, 41 Ind. 479; *Rockford R. Co. v. McKinley*, 64 Ill. 338. See *Proprietors of Locks, &c. v. Nashua R. Co.*, 10 Cush. 385; *Hatch v. Vermont R. Co.*, 25 Vt. 49. In *Waterman v. Connecticut R. Co.*, 30 Vt. 610, it was held that a railroad company may, as a question of prudence and care, be required to have regard to the prevention of damage to a land-owner by the accumulation of surface water when the geographical formation and surrounding circumstances are such as to make it apparent to reasonable men that such precautions are necessary; and that ordinarily this is a question of fact. This may not be everywhere the law. *Hanlin v. Chicago Ry. Co.*, 61 Wis. 515, 529.

of culverts, or the digging of ditches to collect and discharge unusual quantities of surface water upon adjoining lands.<sup>1</sup> A city has been held liable for permitting a railroad corporation to so use its streets as to cast surface water on the plaintiff's land.<sup>2</sup>

§ 274. **Same — Draining into watercourses.**—The owner of land has a right to discharge the natural drainage of his land, and the surface water accumulating thereon, into a watercourse, and in so doing he may change or concentrate its flow in artificial channels, thus accelerating the flow and increasing the volume of water in the stream, provided its natural capacity is not exceeded,<sup>3</sup> and those whose supply is rendered more variable cannot complain.<sup>4</sup> The land-owner may, for his own convenience, cleanse and wall up a natural spring on his land if the natural flow of water therefrom in the usual channel is not so increased as to materially injure his neighbor upon whose land the water passes.<sup>5</sup>

§ 275. **Same — Embanking.**—The owner of land may erect barriers upon it to prevent the influx of surface water whether collected in artificial channels or not, and if such water is set back or turned aside upon the land of another, to his injury, it affords no cause of action.<sup>6</sup> One cannot enter upon another's

<sup>1</sup> *Curtis v. Eastern R. Co.*, 98 Mass. 428; *Toledo R. Co. v. Morrison*, 71 Ill. 616; *St. Louis R. Co. v. Capps*, 72 Ill. 188; *Jacksonville R. Co. v. Cox*, 91 Ill. 500; *McCormick v. Kansas City R. Co.*, 57 Mo. 433; 70 Mo. 359; *Raleigh Railroad v. Wicker*, 74 N. C. 220; *Chicago R. Co. v. Conners*, 25 Ill. App. 561; *Same v. Riley*, id. 569; *Gilbert v. Savannah R. Co.*, 69 Ga. 396; *Bourdier v. Morgan's La. R. Co.*, 35 La. Ann. 947; *G., C. & S. F. R. Co. v. Donahoo*, 59 Texas, 128; *Springfield Railway v. Henry*, 44 Ark. 360; *Deigleman v. N. Y. Ry. Co.*, 12 N. Y. S. 83.

<sup>2</sup> *Torpey v. Independence*, 24 Mo. App. 288.

<sup>3</sup> *Wheeler v. Worcester*, 10 Allen, 591; *McCormick v. Horan*, 81 N. Y.

86; *Williams v. Gale*, 3 H. & John. 231; *Miller v. Laubach*, 47 Penn. St. 154; *Foot v. Bronson*, 4 Lans. 47; *Treat v. Bates*, 27 Mich. 390. See *Jones v. Hannovan*, 55 Mo. 462; *Noonan v. Albany*, 79 N. Y. 470; *Davison v. Hutchinson*, 44 N. J. Eq. 474; *Wagner v. Chaney*, 19 Ill. App. 546; *Hoester v. Hemsath*, 16 Mo. App. 485.

<sup>4</sup> *Waffle v. New York R. Co.*, 58 Barb. 413; 53 N. Y. 11; *Waffle v. Barber*, 61 Barb. 130.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ashley v. Wolcott*, 11 Cush. 192; *Bigelow, C. J.*, in *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 106; *Murphy v. Kelley*, 68 Maine, 521; *Eulrich v. Richter*, 37 Wis. 226; *Schlichter v. Phillipy*, 67 Ind. 201; *Lessard v. Stram*, 62 Wis.

land to erect a barrier.<sup>1</sup> In hilly regions, where in times of excessive rains or the melting of heavy snows large quantities of water are forced to seek an outlet through gorges or narrow valleys, the above rule should probably be modified, such waters having some of the characteristics of watercourses.<sup>2</sup> *Martin v. Riddle*,<sup>3</sup> in Pennsylvania, decided that a person could not obstruct an artificial flow of surface water and turn it upon a third person who is not responsible for the flow. In Missouri a riparian proprietor is held not to be entitled, by erecting an embankment, to divert the natural course of water overflowing from a river in a flood and turn it upon his neighbor's land.<sup>4</sup>

§ 276. **Same — Same — Under civil law.**— In those States where the influence of the civil law is felt, an owner of land cannot obstruct or alter the natural flow of surface water which his estate owes a servitude to receive.<sup>5</sup> If the owner of the dominant estate drains his land in such a manner as to injure the owner of the servient estate, and his act is not in the interest of good husbandry, it is an injury for which the latter has a remedy by action or by the preventive remedy of injunction.<sup>6</sup> And it is an actionable injury, without proof of actual damage, to prevent the flowing off of surface water by the erection of an embankment on one's own land.<sup>7</sup>

112; *Farris v. Dudley*, 78 Ala. 124; 308; *Porter v. Durham*, 74 N. C. 767; *Crabtree v. Baker*, 75 Ala. 91; *White Tootle v. Clifton*, 22 Ohio St. 247; *v. Sheldon*, 35 Hun, 193; *Burke v. Hicks v. Silliman*, 93 Ill. 255; *Lau-* *Mo. Pac. Ry. Co.*, 29 Mo. App. 370; *mier v. Francis*, 23 Mo. 181; *Ogburn* *Schneider v. Same*, id. 68; *Boyd v. v. Connor*, 46 Cal. 346; *McDaniel v.* *Conklin*, 54 Mich. 583. *A fortiori*, to *Cummings*, 83 Cal. 515; *Louisville* *shut out foul water. Beard v. Mur-* *R. Co. v. Hays*, 11 Lea (Tenn.), 382; *phy*, 37 Vt. 99. Even if drift-wood *Peck v. Harrington*, 109 Ill. 611. Evi- *carried along by floods be deposited* *dence of prospective damage held* *on another's land. Taylor v. Fickas,* *incompetent in Hargreaves v. Kim-* *64 Ind. 167.* *berly*, 26 W. Va. 787. See *ante*, § 266.

<sup>1</sup> *Grant v. Allen*, 41 Conn. 156.

<sup>2</sup> *Palmer v. Waddell*, 22 Kans. 352. See *Bowlsby v. Speer*, 2 Vroom, 35; *Hoyt v. Hudson*, 27 Wis. 656.

<sup>3</sup> 26 Penn. St. 415 n.; *Davidheiser v. Rhoads*, 25 W. N. C. 513.

<sup>4</sup> *Shane v. Kansas City R. Co.*, 71 Mo. 237; 36 Am. Rep. 480, and note.

<sup>5</sup> *Overton v. Sawyer*, 1 Jones (Law),

<sup>6</sup> *Herrington v. Peck*, 11 Brad. (Ill.) 62; *Livingston v. McDonald*, 21 Iowa, 160. See *Weddell v. Hapner*, 124 Ind. 315; *Vannest v. Fleming*, 79 Iowa, 638; 18 Am. State Rep. 387; *ante*, § 218a.

<sup>7</sup> *Tootle v. Clifton*, 22 Ohio St. 247; *Butler v. Peck*, 16 Ohio St. 334.

§ 277. **Same — In highways.**— An owner of premises adjacent to a street or highway may place any obstruction thereon to shut out the flow of mere surface water from such street or highway, and will not be liable to an action by the city or town for damage thereby suffered.<sup>1</sup> A city lot may be so improved by its owner as to cast rain-water into the street at the established grade without liability for injury by such water to a lot below grade.<sup>2</sup> In general, road drainage is governed by the same rule as farm drainage.<sup>3</sup>

§ 278. **Same — Pollution.**— A land-owner who places noxious substances on his land, polluting the surface water or superficially percolating waters passing thence upon the premises of an adjoining owner to his injury, will be liable in an action for such pollution,<sup>4</sup> although there is no occupied house on the latter's premises;<sup>5</sup> and the right to discharge surface water down a natural watercourse does not justify an unreasonable discharge of sewage.<sup>6</sup> But a land-owner across whose lot foul water flows from a higher source upon a lower estate, without any fault on his part, is not liable therefor.<sup>7</sup>

§ 279. **Same — Prescriptive rights.**— An owner of land, the natural drainage of which flows over the land of an adjoining owner, cannot by any lapse of time gain a right by prescription to have such flow continue, if at any time the owner of the lower estate chooses to interrupt or divert such flow.<sup>8</sup> And the continued flowing of mere surface water or

<sup>1</sup> *Franklin v. Fisk*, 13 Allen, 211; See *Beard v. Murphy*, 87 Vt. 99; *Bangor v. Lansil*, 51 Maine, 521; *Winn v. Rutland*, 52 Vt. 48; *Jacksonville v. Lambert*, 62 Ill. 519; *Jutte v. Hughes*, 67 N. Y. 267; *Daggett v. Cohoes*, 7 N. Y. S. 882; *Crossland v. Pottsville*, 126 Penn. St. 511; *Maguire v. Cartersville*, 76 Ga. 84.

<sup>2</sup> *Phillips v. Waterhouse*, 69 Iowa, 199; *Sentner v. Tees*, 132 Penn. St. 216.

<sup>3</sup> *Pre-emption H. Com'rs v. Whittsitt*, 15 Ill. App. 318; *Palmer v. O'Donnell*, id. 324; *Vale Mills v. Nashua*, 63 N. H. 136; *Durgin v. Neal*, 82 Cal. 595.

<sup>4</sup> *Brown v. Ilius*, 27 Conn. 84; *Ludeling v. Stubbs*, 84 La. Ann. 935; *Gawtry v. Leland*, 81 N. J. Eq. 385.

<sup>5</sup> *Busch v. New York Ry. Co.*, 12 N. Y. S. 85.

<sup>6</sup> *Charles v. Finchley Local Board*, 48 L. T. N. S. 596; *ante*, § 261.

<sup>7</sup> *Brown v. McAllister*, 39 Cal. 578. See *Sellick v. Hall*, 47 Conn. 260; *Barring v. Commonwealth*, 2 Duv. (Ky.) 95.

<sup>8</sup> *Parks v. Newburyport*, 10 Gray,



of the natural drainage upon or across land, either in natural or artificial channels, for any length of time, will not, in general, confer any right by prescription upon the owner of the land or any one using the water for any purpose to compel the continuance of such flow in the same manner and direction.<sup>1</sup> But the owner of land, by collecting into artificial channels the surface water or superficial drainage there flowing, and discharging such accumulations upon or across the land of an adjoining owner adversely for a sufficient length of time, may acquire an easement in such adjacent land for the continuance of such discharge;<sup>2</sup> and under the civil law prescriptive rights may be gained in surface drainage as well as in watercourses.<sup>3</sup>

§ 280. **Underground waters — Percolations.**— Water percolating through the ground beneath the surface, either without a definite channel, or in courses which are unknown and unascertainable, belongs to the realty in which it is found.<sup>4</sup>

28; *Dickinson v. Worcester*, 7 Allen, 19; *Foster, J.*, in *White v. Chapin*, 12 Allen, 516; *Swett v. Cutts*, 50 N. H. 439.

<sup>1</sup> *Wood v. Waud*, 3 Exch. 748; *Greatrex v. Hayward*, 3 Exch. 291; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, 11 Exch. 369; *White v. Sheldon*, 8 N. Y. S. 212; *White v. Chapin*, 12 Allen, 516; *Stoddard v. Filgur*, 21 Ill. App. 560; *Ribordy v. Pellachoud*, 28 Ill. App. 803; *Boynton v. Longley*, 19 Nev. 69.

<sup>2</sup> *Claxton v. Claxton, Jr.* R. 7 C. L. 28; *White v. Chapin*, 12 Allen, 516; *Earl v. De Hart*, 1 Beas. 280; *Conklin v. Boyd*, 46 Mich. 56; *ante*, § 225.

<sup>3</sup> *Louisville R. Co. v. Mossman*, (Tenn.) 16 S. W. 64.

<sup>4</sup> *Chasemore v. Richards*, 7 H. L. Cas. 349; 5 H. & N. 988; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Acton v. Blundell*, 12 M. & W. 324; *Hammond v. Hall*, 10 Sim. 552; *Cooper v. Barber*, 3 Taunt. 99; *Balston v. Bensted*, 1 Camp. 463; *Galgay v. Great Southern Ry. Co.*, 4 Ir. C. L.

456; *Chase v. Silverstone*, 62 Maine, 175; *Roath v. Driscoll*, 20 Conn. 533; *Brown v. Illius*, 27 Conn. 84; 25 Conn. 593; *Ocean Grove C. M. Ass'n v. Asbury Park Com'rs*, 40 N. J. Eq. 447; *Taylor v. Fickas*, 64 Ind. 167; *Delhi v. Youmans*, 45 N. Y. 362; s. c. 50 Barb. 316; *Dexter v. Providence Aqueduct Co.*, 1 Story, 387; *Wheatley v. Baugh*, 25 Penn. St. 528; 64 Am. Dec. 721, note; *Hough's Appeal*, 102 Penn. St. 442; 48 Am. Rep. 193, note; *Haldeman v. Bruckhart*, 45 Penn. St. 514; *Coleman v. Chadwick*, 80 Penn. St. 81; *Trout v. McDonald*, 83 Penn. St. 126; *Lybe's Appeal*, 106 id. 626; *Smith v. Adams*, 6 Paige, 435; 24 Wend. 585; *Ellis v. Duncan*, 29 N. Y. 466; 21 Barb. 230; *Radcliff v. Brooklyn*, 4 N. Y. 195, 200; *Pixley v. Clark*, 35 N. Y. 520; 32 Barb. 268; *Goodale v. Tuttle*, 29 N. Y. 466; *Bliss v. Greeley*, 45 N. Y. 671; *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; 31 Vt. 358; *Clark v. Conroe*, 38 Vt. 469; *Taylor v. Welch*, 6 Oregon, 198; *Mosier v. Cald-*

The rule that a man may freely and absolutely use his property, so long as he does not directly invade that of his neighbor, or consequentially injure his clearly defined rights, is applicable to the interruption of sub-surface supplies of water or of a stream, and the damage resulting therefrom is not the subject of legal redress.<sup>1</sup> The land-owner may, therefore, make a ditch to drain his land, or dig a well thereon, or open and work a quarry upon it, or otherwise change its natural condition, although by so doing he interrupts the underground sources of a spring or well on his neighbor's land.<sup>2</sup> The only remedy for the latter is to sink his own well deeper.<sup>3</sup> He may take the water which would otherwise pass by natural percolation into the adjoining land, or draw off the water which may come by natural percolation from that land,<sup>4</sup> and no adverse right to prevent the exercise of this privilege can be acquired by prescription.<sup>5</sup> In Nevada it is held that a spring cannot be lawfully diverted to the injury of a prior appropriator to whom its waters naturally flow through a creek by percolation from the spring.<sup>6</sup> And in Massachusetts a town which constructs a sewer upon land taken for that purpose, and thereby drains a well fed by percolation through the soil, and situated upon land not taken and not adjoining land taken, is liable in damages to its owner.<sup>7</sup> The owner of land who grants to a railroad a right of way grants only an easement, and remains the owner of springs thereon, as well as of streams and minerals, and he may thereafter continue to make any lawful use of the land.<sup>8</sup>

well, 7 Nev. 363; *New Albany R. Co. v. Peterson*, 14 Ind. 112; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 573; 30 Cent. L. J. 269; 23 Am. Law Rev. 376; *Davis v. Afong*, 5 Haw. 216.

<sup>1</sup> Ibid.

<sup>2</sup> Ibid.

<sup>3</sup> *New River Co. v. Johnson*, 2 El. & El. 445; *Brain v. Marfell*, 41 L. T. N. S. 455; *Razzo v. Varni*, 81 Cal. 289.

<sup>4</sup> Ibid.; *Wilson v. New Bedford*, 108 Mass. 261, 265.

<sup>5</sup> *Chasemore v. Richards*, 7 H. L. Cas. 349; 5 H. & N. 982; *Smith v.*

*Kendrick*, 7 C. B. 546; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Rawstron v. Taylor*, 11 Exch. 369; *Swett v. Cutts*, 50 N. H. 439; *Wheatley v. Baugh*, 25 Penn. St. 528; 64 Am. Dec. 721, 727, note; *Frazier v. Brown*, 12 Ohio St. 294; *Carbrey v. Willis*, 7 Allen, 367; *Roath v. Driscoll*, 20 Conn. 533.

<sup>6</sup> *Strait v. Brown*, 16 Nev. 317.

<sup>7</sup> *Trowbridge v. Brookline*, 144 Mass. 139.

<sup>8</sup> *Smith v. Holloway*, 124 Ind. 329; *ante*, § 249.

§ 281. **Same — In defined and known channels.**— If underground currents of water flow in defined and known channels, the rules of law which govern the use of similar streams flowing upon the surface of the earth are applicable to them;<sup>1</sup> but if it does not appear that the waters which come to the surface are supplied by a definite flowing stream, they are presumed to be formed by the ordinary percolations of water in the soil.<sup>2</sup> Some such presumption is necessary on account of the difficulty of determining whether the water flows in a channel, but in all other respects there appears to be no distinction between subterranean waters and those upon the surface.<sup>3</sup> In this connection, “defined” means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge, and “known,” which is not here synonymous with “visible,” refers to knowledge by reasonable inference.<sup>4</sup> The stream is not apparent when the subterranean water flows in an unknown channel which could be ascertained by excavation.<sup>5</sup> An action will equally lie for the obstruction or misuse of subterranean or of surface water after it has become a part of an open stream or spring,<sup>6</sup> and the owner of land has no right to construct his well or other structure in such manner as to create upon his own land an artificial underground current of water from a running stream.<sup>7</sup> A person who appropriates underground water by intercepting and storing it, will be restrained from discharging it upon or into his neighbor’s land or mine, although, if not intercepted,

<sup>1</sup> *Ibid.*; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Chesmore v. Richards*, 2 H. & N. 186; 7 H. L. Cas. 374; *Cole Silver Mining Co. v. Virginia Water Co.*, 1 Sawyer, 470; *Hale v. McLea*, 53 Cal. 578; *Collins v. Chartiers V. G. Co.*, 131 Penn. St. 143; 17 Am. St. Reps. 791, and note; 2 Cur. Comment, 304; *Lybe’s Appeal*, 106 Penn. St. 626; *Redman v. Forman*, 83 Ky. 214; *Keeney v. Carillo*, 2 New Mex. 480; *Taylor v. Welch*, 6 Oregon, 200; *Shively v. Hume*, 10 id. 96; *Cross v. Kitts*, 69 Cal. 217; *Strait v. Brown*, 16 Nev. 317; *Smith v. Adams*, 6 Paige, 433; *Mahan v. Brown*, 18 Wend. 261.

<sup>2</sup> *Hanson v. McCue*, 42 Cal. 303; *Ewart v. Belfast Poor Law Guardians*, 9 L. R. Ir. 172.

<sup>3</sup> *Swett v. Cutts*, 50 N. H. 439.

<sup>4</sup> *Black v. Ballymera Commissioners*, 17 L. R. Ir. 459.

<sup>5</sup> *Ewart v. Belfast Poor Law Guardians*, 9 L. R. Ir. 172.

<sup>6</sup> *Delhi v. Youmans*, 45 N. Y. 362; 50 Barb. 316; *Saddler v. Lee*, 66 Ga. 45; *Razzo v. Varni*, 81 Cal. 289.

<sup>7</sup> *Ante*, § 245; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Ætna Mills v. Brookline*, 127 Mass. 69, 71; *Emporia v. Soden*, 25 Kans. 588.

it might have found its way there by percolation.<sup>1</sup> In New Hampshire a different rule from that above stated has been adopted, it being held, with respect to both surface water not gathered into a stream, and to water percolating through the soil, that the land-owner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land;<sup>2</sup> and, in general, the exemption from liability for withdrawing water from a neighbor's well or spring by percolation does not exist when the acts complained of violate a grant or covenant.<sup>3</sup> With respect to the statute of limitations there is no distinction between trespasses above and below the surface of the earth, and it is not material whether the plaintiff has knowledge of the cause of action within the time limited by the statute.<sup>4</sup> But no right can be acquired by prescription in mere percolating waters.<sup>5</sup> In city streets wells may be abolished as a sanitary measure without compensation to the owners of lots.<sup>6</sup>

§ 282. **Acton v. Blundell.**—In *Acton v. Blundell*,<sup>7</sup> decided in 1843, in the Exchequer Chamber, the plaintiff's mill was carried by water raised from a well on his land. This supply of water was destroyed by a coal-pit dug by the defendant on his own land at a distance of half a mile from the well. The loss was held to be *damnum absque injuria*. Tindal, C. J., said: "In the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time; it may well be that it is only yesterday's date that they first took the course and di-

<sup>1</sup> *West Cumberland Iron Co. v. Hawk v. Minnich*, 19 Ohio St. 466; *Kenyon*, 6 Ch. D. 773.

<sup>2</sup> *Bassett v. Salisbury Manuf. Co.*, Ohio St. 583.  
43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439.

<sup>3</sup> *Johnstown Cheese Manuf. Co. v. Veghte*, 69 N. Y. 16; *Whitehead v. Parks*, 2 H. & N. 870; *Cooke v. Chilcott*, 3 Ch. D. 694.

<sup>4</sup> *Hunter v. Gibbons*, 1 H. & N. 459;

<sup>5</sup> *Bealey v. Shaw*, 6 East, 208; *Balston v. Bensted*, 1 Camp. 463. See *Whetstone v. Bowser*, 29 Penn. St. 59.

<sup>6</sup> *Ferrenbach v. Turner*, 86 Mo. 416.

<sup>7</sup> 12 M. & W. 324, 350, 351.

rection which enabled them to supply the well; again, no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all." "There is no limit of space within which the claim of right to an underground spring can be confined."

§ 283. **Later English decisions.**—In *Dickinson v. Grand Junction Canal Co.*,<sup>1</sup> the Court of Exchequer held, in 1852, that the defendants who sank a well upon their own premises, and thereby prevented water from percolating in its natural course into a river on which the plaintiff's mill was situated, to his damage, were liable therefor at common law. But in 1856, the same court held, in *Broadbent v. Ramsbotham*,<sup>2</sup> that where the plaintiff's mill had, for more than fifty years, been worked by a brook supplied with water from a pond filled by rain, a shallow well supplied by subterranean waters, a swamp and a well formed by a stream issuing from the side of a hill, all which waters occasionally overflowed and ran down the defendant's land in no defined channel into the brook, the plaintiff had no right, as against the defendant, to the flow of any of these waters.

§ 284. **Same.**<sup>3</sup>—In the leading case of *Chasemore v. Richards*,<sup>3</sup> the plaintiff's mill had been propelled for more than sixty years by the River Wandle which had its rise in the town of Croyden, and was largely fed by the rain falling upon a large territory which included the town, and percolating through the ground to the river. The defendants sunk a deep well in their land a quarter of a mile from the source of the river for the purpose of supplying the town with water, and thereby abstracted so much of the underground water, which would otherwise have found its way into the river, as to appreciably retard the mill. The action was brought for this

<sup>1</sup> 7 Exch. 282.

<sup>2</sup> 7 H. L. Cas. 349; 5 H. & N. 982; 2

<sup>3</sup> 11 Exch. 602; *Rawstron v. Taylor*, H. & N. 168; *Hodgkinson v. Ennor*, 4 B. & S. 229 (1863).

cause, and judgment was given for the defendants by the Court of Exchequer in 1856. In the Exchequer Chamber this was affirmed, all the judges concurring in the opinion delivered by Cresswell, J., except Coleridge, J., whose dissenting opinion was based upon the maxim *sic utere tuo ut alienum non lædas*.<sup>1</sup> In the House of Lords the former judgment was unanimously re-affirmed, although Lord Wensleydale hesitated as to sustaining the view of the other judges in its full extent. The decision in *Broadbent v. Ramsbotham* was followed, and that in *Dickinson v. Grand Junction Canal Co.* was disapproved. In *New River Co. v. Johnson*,<sup>2</sup> the plaintiff was held, upon the authority of the foregoing decisions, to have no cause of action against the defendant for acts which prevented water from percolating into her well, or for abstracting from the well water which had already found its way there. In *Regina v. Metropolitan Board of Works*,<sup>3</sup> the prosecutor's estate was situate in part upon a gravel bed, which was imbedded in a basin of clay, and in which there had existed from time immemorial, on the lower part of the premises, a pond fed by powerful springs at its bottom. The water overflowed one edge of the clay-basin, and formed a rivulet which ran through the grounds and supplied ornamental ponds there, and which was used for the cattle and for supplying the garden. The defendants constructed a sewer under a highway near by, and cut through the gravel bed and basin of clay, the immediate effect of which was to prevent the springs from finding their way into the pond, which, with the rivulet and other ponds, became dry in consequence. The case was held not distinguishable from that of *Chasemore v. Richards*.

§ 285. *Wheatley v. Baugh*.—In *Wheatley v. Baugh*,<sup>4</sup> Lewis, C. J., said: “A spring gutter on the surface is none the less a watercourse, although it is not equal in volume to a river. Small as it may be, if it have a clear and well-defined channel, and a regular flow in that channel, it cannot be diverted to the injury of the proprietors below.”<sup>5</sup> “So a subterranean

<sup>1</sup> 2 El. & El. 485 (1860).

<sup>3</sup> 8 B. & S. 710 (1863); *Chase v. Sil-*

<sup>2</sup> This is a maxim of the civil as well as the common law. *Reg. v.*

*verstone*, 62 Maine, 175.

*Bruce*, 10 Lower Can. 117.

<sup>4</sup> 25 Penn. St. 528, 531, 533.

<sup>5</sup> *Broadbent v. Ramsbotham*, 11



stream which supplies a spring with water cannot be diverted by the proprietor above for the mere purpose of appropriating the water to his own use.”<sup>1</sup> “As the owner of the land below is bound to permit the stream to flow in its accustomed channel, and cannot erect obstructions so as to throw the water back on his neighbor above, so the latter is bound, as a correlative obligation, to permit it to flow to his neighbor below.” “The owner of land, on which a spring issues from the earth, has a perfect right to it against all the world, except those through whose land it comes.” “Even a railroad corporation, armed by law with the eminent domain, and having power to take private property for the construction of its road, is answerable to the owner of a spring for destroying it, although its destruction be caused by excavations on the land of an adjacent proprietor.”<sup>2</sup>

§ 286. **Private agreements.**—In *Ballacorkish Co. v. Harrison*,<sup>3</sup> the Privy Council held that a grantor of the surface of land, who reserves the mines beneath, is not responsible for draining the water from the surface by working the mines in the absence of an express agreement. In *Brain v. Marfell*,<sup>4</sup> the sale of a well and of the right to convey water through the defendant's land was held by the Court of Appeal to give merely the right to the water after it had risen in the well, and that the interception of percolating water before it reached the well afforded no cause of action. When rights of water are created by deed, the nature and extent of the parties' interest are determined by the deed, and not by the rights which the parties would possess as riparian proprietors or otherwise. If a grant is made of all streams of water that may be found in certain land, in which there is a single stream

Exch. 602; *Dudden v. Guardians*, 1 H. & N. 627; *Arnold v. Foot*, 12 Wend. 330; *Whetstone v. Bowser*, 29 Penn. St. 59.

<sup>1</sup> *Smith v. Adams*, 6 Paige, 435.

<sup>2</sup> Citing *Parker v. Boston & Maine R. Co.*, 3 Cush. 107. See *New Albany Railroad v. Peterson*, 14 Ind. 112.

<sup>3</sup> L. R. 5 P. C. 49.

<sup>4</sup> 41 L. T. N. S. 455. See *Huston v.*

*Leach*, 53 Cal. 262. “It makes no difference whether the damage arise by the water percolating away, so that it ceases to flow along channels through which it previously found its way to the spring or well, or whether, having found its way to the spring or well, it ceases to be retained there.” *Ballacorkish Mining Co. v. Dumball*, 29 L. T. N. S. 658.

and several wells, the grantor, or those who claim through him, cannot drain off the subterranean water from the land.<sup>1</sup> A grant of the privilege of taking water from springs in a certain locality gives the right to take it only where it usually issues from the ground by natural forces, and not from wells or orifices in the ground where the water does not flow to the surface.<sup>2</sup> A grant of a well passes a fee in the land occupied by the well,<sup>3</sup> and the well includes, *ex vi termini*, not only the orifice which reaches down to the water, but the whole opening in the earth before it is stoned and the stone laid into the wall and the water therein.<sup>4</sup> Where a spring was set out and separated from other lands by the owner so as to extend three rods each way from the central portion covered by the water, the word "spring" in a deed was held to pass the land so set out and separated to be used with the spring.<sup>5</sup>

§ 287. **Harwood v. Benton, etc.**—In *Harwood v. Benton*,<sup>6</sup> in Vermont, it was held that the owner of a mill-pond, who raises the height of water upon his own land, and thereby causes subterranean streams to set back and flow another's land, is not liable for the injury. This is, however, in conflict with the decision of the Supreme Court of New Hampshire in *Bassett v. Salisbury Manuf. Co.*<sup>7</sup> In *Cole Silver Mining Co. v. Virginia Water Co.*,<sup>8</sup> in the Circuit Court of the United States, it was held that, in the West, where rights in water are acquired by prior appropriation,<sup>9</sup> one who in working a mining claim excavates a tunnel opening a subterranean flow of water which is appropriated and enjoyed for several years, is entitled to an injunction against one who constructs a tunnel beneath his own and thereby intercepts and diverts the flow of the water.

§ 288. **Pollution of wells.**—The foregoing rules do not apply to cases where a person poisons or corrupts the water

<sup>1</sup> *Whitehead v. Parks*, 2 H. & N. 870; *Northam v. Hurley*, 1 El. & Bl. 665.

<sup>2</sup> *Magoon v. Harris*, 46 Vt. 264, 271.

<sup>3</sup> *Johnson v. Rayner*, 6 Gray, 107.

<sup>4</sup> *Mixer v. Reed*, 25 Vt. 254; *Clark v. Conroe*, 38 Vt. 469, 474.

<sup>5</sup> *Woodcock v. Estey*, 43 Vt. 515. See *Proprietors v. Braintree Water Supply Co.*, 149 Mass. 478.

<sup>6</sup> 32 Vt. 724.

<sup>7</sup> 43 N. H. 569.

<sup>8</sup> 1 Sawyer, 470.

<sup>9</sup> *Ante*, ch. 7.

which percolates from his land to that of his neighbor.<sup>1</sup> "To suffer filthy water," says Foster, J., in *Ball v. Nye*,<sup>2</sup> "to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such circumstances the reasonable precaution which the law requires is, effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence. In the present instance, there was no pretense of a sudden and unavoidable accident which could not have been foreseen or guarded against by due care. The percolations appear to have been constant and their existence to have been known to the defendant." In the absence of negligence or knowledge, the same rule of liability would, it seems, apply, he whose filth it is being required to keep it on his premises at his peril.<sup>3</sup> But in a recent case,<sup>4</sup> Cooley, J., pointedly observes: "If withdrawing the water from one's well by an excavation on adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure and no negligence. The one act destroys the well, and the other does no more; the injury is the same in kind and degree in the two cases." Fouling an underground stream, which flows into the plaint-

<sup>1</sup> *Wood v. Waud*, 3 Exch. 748; 28 Ill. 73; *Wahle v. Reinbach*, 76 Hodgkinson v. Ennor, 4 B. & S. 229; Ill. 322; *Decatur Gaslight Co. v. 9 Jur. N. S.* 1152; *Baird v. Williamson*, 15 C. B. N. S. 376; *Smith v. Kendrick*, 7 C. B. 515; *Embrey v. Owen*, 6 Exch. 353; *Kinnaird v. Standard Oil Co. (Ky.)*, 7 L. R. A. 451; *Frazier v. Brown*, 12 Ohio St. 312; *Pixley v. Clark*, 35 N. Y. 520; *ante*. § 219.

<sup>2</sup> 99 Mass. 582, 584; *Goodrich v. Burbank*, 97 Mass. 22; *Wilson v. New Bedford*, 108 Mass. 261.

<sup>3</sup> *Tenant v. Goldwin*, 2 Ld. Raym. 1089; 6 Mod. 311; *Womersley v. Church*, 17 L. T. N. S. 190; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Jacobs v. Worrell*, 15 Leg. Int. 139; *Ottawa Gaslight Co. v. Graham*, 35 Ill. 346;

<sup>4</sup> *Upjohn v. Richland Township*, 46 Mich. 542, 549. See, also, *Brown v. Illius*, 27 Conn. 84; 25 Conn. 583; *Greencastle v. Hazelett*, 23 Ind. 186; *Ballard v. Tomlinson*, 26 Ch. D. 194; s. c. 29 Ch. D. 115; *Snow v. Whitehead*, 27 Ch. D. 588. See 32 Alb. L. J. 289; *Pope v. Boyle*, 98 Mo. 527; *Haugh's Appeal*, 102 Penn. St. 42; 48 Am. Rep. 193, note; *Collins v. Chartier V. G. Co.*, 131 Penn. St. 143; 16 Cent. L. J. 65; 30 id. 269.

iff's mill stream or colliery, is an actionable injury.<sup>1</sup> When it is clearly proved that a place of sepulture or such a structure as a gas reservoir or privy vault will corrupt wells or springs, a court of equity may grant relief by way of injunction,<sup>2</sup> and it appears to be immaterial that the nuisance was existing and noticeable, when the plaintiff dug or built upon his land.<sup>3</sup> If the water of a well is rendered impure by an escape of gas therein, the fact that other causes contributed to make it unfit for use is not a bar to an action, but may be shown to affect the amount of damages.<sup>4</sup>

§ 289. **Sinking of land.**—A man who is entitled to take minerals has no right to withdraw from his neighbor or grantor the support of adjacent or superincumbent soil,<sup>5</sup> but there is nothing at common law to prevent his draining that soil when for any reason it becomes necessary or convenient for him to do so, even though the effect may be to cause a subsidence of the surface.<sup>6</sup> In *Smith v. Thackerah*,<sup>7</sup> the defendants dug a well near the plaintiff's land, which sank in consequence, and a building erected thereon within twenty years fell. It appearing that if the building had not been on the land, the land would still have sunk, but the damage to the plaintiff would have been inappreciable, it was held that there was no cause of action. The mine-owner has no right to remove his surface-supports, when that will cause a large amount of surface water from above his mine to pass into a lower mine adjoining, through openings between the two mines.<sup>8</sup>

<sup>1</sup> *Hodgkinson v. Ennor*, 4 B. & S. 229; *Turner v. Mirfield*, 34 Beav. 390.

<sup>2</sup> *Ibid.*; *Clark v. Lawrence*, 6 Jones Eq. 88; *Haugh's Appeal*, 102 Penn. St. 42.

<sup>3</sup> *Perrine v. Taylor*, 43 N. J. Eq. 128. See *Mowday v. Moore*, 25 W. N. C. (Penn.) 529.

<sup>4</sup> *Sherman v. Fall River Iron Works Co.*, 5 Allen, 213.

<sup>5</sup> *Darley Main Colliery Co. v. Mitchell*, 54 L. T. N. S. 882; *Dixon v. White*,

8 App. Cas. 833; *Burgner v. Humphrey*, 41 Ohio St. 340.

<sup>6</sup> *Popplewell v. Hodgkinson*, L. R. 4 Ex. 248; *Humphries v. Brogden*, 12 Q. B. 739; *Partridge v. Scott*, 3 M. & W. 280; *Elliot v. North Eastern Ry. Co.*, 10 H. L. Cas. 393; 1 H. & J. 145; *Wilson v. Waddell*, 2 App. Cas. 95.

<sup>7</sup> L. R. 1 C. P. 564.

<sup>8</sup> *Lord v. Carbon Iron Manuf. Co.*, 38 N. J. Eq. 452; *Carlin v. Chappel*, 101 Penn. St. 348; *Nelson v. Hoch*, 14 Phila. 655.

§ 290. **Draining wells — Motive.**— In *Greenleaf v. Francis*,<sup>1</sup> it was held that, in the absence of any agreement subjecting his estate to another, or of rights acquired by adverse enjoyment, the owner may consult his own convenience in his operations above or below the surface of his land; that each owner of adjoining estates has the absolute dominion of the soil, extending upwards and below the surface as far as each pleases, each, however, being bound so to operate below the surface as not to cause the soil to fall in from the adjoining estate. "These rights," it was said, "should not be exercised for mere malice."<sup>2</sup> In a later case before the same court,<sup>3</sup> Wells, J., referring to *Greenleaf v. Francis*, said: "It is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial."<sup>4</sup> A similar decision was

<sup>1</sup> 18 Pick. 117, 122.

<sup>2</sup> See, also, *Wheatley v. Baugh*, 25 Penn. St. 528; *Haldeman v. Bruckhart*, 45 Penn. St. 514; *Hoy v. Sterrett*, 2 Watts, 327; *Roath v. Driscoll*, 20 Conn. 533; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Panton v. Holland*, 17 Johns. 92; *Chatfield v. Wilson*, 28 Vt. 49; 31 Vt. 358; *Harwood v. Benton*, 32 Vt. 724, 737; *Radcliff v. Mayor*, 4 Comst. 195; *Bellows v. Sackett*, 15 Barb. 96; *Ellis v. Duncan*, 21 Barb. 230.

<sup>3</sup> *Walker v. Cronin*, 107 Mass. 555, 564. In *Chesley v. King*, in Maine (74 Maine, 164, 175, 177), Barrows, J., said: "The general doctrine of *Walker v. Cronin*, 107 Mass. 555, is not what counsel claim, but rather that, while a man has no right to protection against competition, he 'has a right to be free from malicious and wanton interference, disturbance, and annoyance.' The *dictum* in *Walker v. Cronin*, adverse to this same doctrine as it was shadowed forth in *Greenleaf v. Francis*, 18 Pick. 117, seems to be based upon what we con-

ceive to be the erroneous assumption that the owner of a spring has no rights whatever in water percolating through the soil of adjacent proprietors, because his rights therein are assuredly subject to the paramount claims of the owner of the soil, operating in good faith in his own land, 'for a justifiable cause.' . . . Upon the whole, we are better satisfied with the view of the law on this point which we get from *Acton v. Blundell*, *Roath v. Driscoll*, *Wheatley v. Baugh*, hereinbefore cited, and from *Panton v. Holland*, 17 Johns. 92, 98, and from the instructions approved in *Greenleaf v. Francis*, 18 Pick. 119, than with that given in *Chatfield v. Wilson*."

<sup>4</sup> *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Mahan v. Brown*, 13 Wend. 261; *Delhi v. Youmans*, 50 Barb. 316. See, also, *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Harwood v. Benton*, 32 Vt. 737; *Mahon v. Brown*, 13 Wend. 261; *Rawstron v. Taylor*, 11 Exch. 369; *McCune v. Norwich City*

made in *Wheatley v. Baugh*;<sup>1</sup> but the suggestion in *Greenleaf v. Francis* was approved so far as this, namely, that malicious acts without the justification of any right, that is, acts of a stranger, resulting in like loss or damage, might be actionable; and the case of *Parker v. Boston & Maine Railroad*<sup>2</sup> was referred to as showing that such loss of advantages previously enjoyed, although not of vested legal right, might be a ground of damages recoverable against one who caused the loss without superior right or justifiable cause." In *Phelps v. Nowlen*,<sup>3</sup> in New York, the defendant dug a ditch through an embankment which surrounded a spring upon his own land, not for his own benefit, but with the intent to divert the water from the plaintiff's well, whereby the water in the well was lowered and the plaintiff injured. There was held to be no cause of action, irrespective of the intent.

**§ 291. Petroleum oil.**—Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word land, and is a part of the soil in which it is found.<sup>4</sup> Like water it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie.<sup>5</sup> A lease of land for the purpose of mining oil, coal, rock, or carbon oil passes a corporeal interest which is the proper subject of an action of ejectment,<sup>6</sup> and a proportionate

*Gas Co.*, 30 Conn. 521, 524; *Clark v. Clapp*, 14 R. I. 248. The acts of public officers in diverting a stream are to be judged according to the lawfulness of the acts and not by their motives. *Moran v. McClearns*, 60 Barb. 388; *Benjamin v. Wheeler*, 8 Gray. 409; *Morrison v. Howe*, 120 Mass. 565.

<sup>1</sup> 25 Penn. St. 528.

<sup>2</sup> Cush. 107.

<sup>3</sup> 72 N. Y. 39; *Kiff v. Youmans*, 86 N. Y. 324; 20 Hun, 123.

<sup>4</sup> *Kier v. Peterson*, 41 Penn. St. 357, 362; 2 Pitts. 191; *Chicago Oil Co. v. United States Petroleum Co.*, 57 Penn. St. 83; *Stoughton's Appeal*, 88 Penn. St. 198; *Hail v. Reed*, 15 B. Mon. 479. A description of premises

in a conveyance which is sufficiently broad to include everything within the meaning of the word "land," includes a spring of water thereon. *Clark v. Conroe*, 38 Vt. 469. A reservation in a deed, of "all minerals," does not include petroleum oil. *Dunham v. Kilpatrick*, 101 Penn. St. 36.

<sup>5</sup> *Dark v. Johnston*, 55 Penn. St. 164; *Rynd v. Rynd Farm Oil Co.*, 63 Penn. St. 397; *Karns v. Tanner*, 66 Penn. St. 297; *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Penn. St. 173.

<sup>6</sup> *Baker v. Dale*, 3 Pitts. 190; *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Penn. St. 173; *Funk v. Halde-man*, 53 Penn. St. 229; *McGuire v. Wright*, 18 W. Va. 507.



share of the oil to be produced by an oil well is an interest in land, a parol sale of which is void under the statute of frauds.<sup>1</sup>

§ 292. **Eaves-drip.**—The owner of a building who extends the eaves over the adjoining land of another person, so as to cast water thereon from his roof, is liable therefor in an action on the case.<sup>2</sup> If the water so falling penetrates his neighbor's wall, he is not relieved of responsibility by the fact that the water would not have entered if the wall had been well built;<sup>3</sup> and, if a license or agreement is relied upon to justify the dripping, it is void under the statute of frauds, if not in writing.<sup>4</sup>

§ 293. **Same.**—The owner of a house is not liable to his neighbor for eaves-drip, unless there is some neglect of duty on his part;<sup>5</sup> the privilege of having rain-water fall from one's eaves upon a neighbor's land may be acquired by twenty years' acquiescence on the part of the latter,<sup>6</sup> although the mere fact that the defendant's building has been in the same condition for more than twenty years does not sustain the burden of proof, which is upon him.<sup>7</sup> The right to have rain-water drop on land, when once acquired by user, is not lost by increasing the height of the building unless the burden upon

<sup>1</sup> Henry v. Colby, 3 Brewst. 171. The rule that the possession of the land is not necessary to enable the owner of an incorporeal hereditament to maintain an action on the case for its disturbance, applies in such action by lessees against lessors of a right to bore for oil, and ejectment would not be the proper remedy. Union Petroleum Co. v. Bliven Petroleum Co., 72 Penn. St. 173.

<sup>2</sup> Fay v. Prentice, 1 C. B. 828; Tucker v. Newman, 11 Ad. & El. 40; Garraty v. Duffy, 7 R. L. 476; Underwood v. Waldron, 83 Mich. 232; Simonds v. Pollard, 53 Vt. 343; Martin v. Simpson, 6 Allen, 102; Bel-lows v. Sackett, 15 Barb. 96; Hazel-tine v. Edgmand, 35 Kansas, 202; Lotz v. Scott, 103 Ind. 155. The mere projection of eaves over a boundary

line is not trespass *quare clausum fregit*. Bureau v. Marshall, 55 Mich. 234.

<sup>3</sup> Gould v. McKenna, 86 Penn. St. 297; Crommelin v. Coxe, 30 Ala. 318; Meister v. Lang, 28 Ill. App. 624.

<sup>4</sup> Tanner v. Volentine, 75 Ill. 624.

<sup>5</sup> Underwood v. Waldron, 33 Mich. 239; McHugh v. Curtis, 48 Mich. 263; Barry v. Peterson, id. 263; Kaveny v. Troy, 108 N. Y. 571.

<sup>6</sup> Lady Browne's Case, Palmer, 446, cited in Sury v. Pigott, Popham, 166; Baten's Case, 9 Rep. 536; Jones v. Peskett, 1 M. & S. 234; Battishill v. Reed, 18 C. B. 696; Cherry v. Stein, 11 Md. 1; Carbrey v. Willis, 7 Allen, 364; Conner v. Woodfill (Ind.), 25 N. E. 876.

<sup>7</sup> Hooten v. Barnard, 137 Mass. 36.

the servient tenement is made more onerous.<sup>1</sup> The right to have water fall from the eaves of a house into a neighbor's enclosure does not justify casting the water into the same enclosure in a larger body by means of a spout.<sup>2</sup> And a private land-owner who paves his yard, thus rendering it less penetrable by water, and conducts the water in leaders from the roofs of his houses to his yard in quantities beyond the capacity of the drains to carry away, thereby flowing his neighbor's premises, is bound to prevent the water thus accumulating on his own premises from causing injury to his neighbor's, and it is error to submit to the jury the question whether he has done everything practicable in the way of drainage to carry off the water.<sup>3</sup> It being settled that no one has a right, by an artificial structure of any kind erected upon his own land, to cause the water which collects thereon or therein to be discharged upon his neighbor's land, either in a torrent or stream or in drops, it can make no difference whether the discharge is in the form of snow, or upon land, or the person of a neighbor or of a traveler upon a highway.<sup>4</sup>

§ 294. Mines.—In the case of subterranean mines, if one owner removes barriers by a trespass, as by extending his works into his neighbor's mine, he is bound to protect such mine from inundation.<sup>5</sup> But when a recovery has been had against him for the trespass, he is not liable in damages for the consequential and continued flow of the water, since he cannot enter upon another's land for the purpose of remedying his tortious act.<sup>6</sup> It is the natural right of each of the

<sup>1</sup> Thomas v. Thomas, 2 C. M. & R. 84; Harvey v. Walters, L. R. 8 C. P. 162.

<sup>2</sup> Reynolds v. Clarke, 2 Ld. Raym. 1899; 8 Mod. 172; Schwab v. Cleveland, 28 Hun, 458.

<sup>3</sup> Jutte v. Hughes, 67 N. Y. 267.

<sup>4</sup> Shipley v. Fifty Associates, 106 Mass. 194; 101 Mass. 251; Milford v. Holbrook, 9 Allen, 17, 28; Brooks v. Curtis, 4 Lans. 283; Walsh v. Mead, 8 Hun, 387. See Garland v. Towne, 55 N. H. 55, where the question of negligence in such a case was treated

as one of fact for the jury. The occupier is *prima facie* liable. Leonard v. Storer, 115 Mass. 86; *ante*, § 113.

<sup>5</sup> Firmstone v. Wheeley, 13 L. J. (N. S.) Exch. 361; 2 Dowl. & L. 203; Westminster Brymbo Coal Co. v. Clayton, 36 L. J. Ch. 476; Haward v. Bankes, 2 Burr. 1118; Douty v. Bird, 60 Penn. St. 48. As to erecting barriers against water in mines, see McKnight v. Ratcliff, 44 Penn. St. 156.

<sup>6</sup> Clegg v. Dearden, 12 Q. B. 561; Taylor v. Stendall, 7 Q. B. 684.

owners of two adjoining mines, where neither is subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, at least if it does not arise from the negligent or malicious conduct of the party.<sup>1</sup> One mine-owner may thus permit water naturally flowing in his own mine to pass off by gravitation into an adjoining or lower mine, so long as his operations are carried on properly and in the usual manner, and is not bound to give notice of his intention to remove the barriers.<sup>2</sup>

§ 295. **Subterranean waters — Increasing the flow.**— When the flow of the water is increased artificially or is greater than would result from gravitation alone, the mine-owner who causes it is liable for the increased injury to another mine.<sup>3</sup> This is termed a “non-natural” use of the land, and the principle applies wherever anything which causes injury to another’s close was not in or upon the land in its natural condition, but was introduced in quantities and in a manner not the result of any operation on or under the land; and the injury is caused either by this being done, or by an imperfection in the mode of doing it.<sup>4</sup> If a miner collects and appropriates the water for his own benefit, he is responsible for its future course, even when it comes to another’s land through natural channels.<sup>5</sup> Where the defendant by his coal works disturbed

<sup>1</sup> *Smith v. Kendrick*, 7 C. B. 515; *Carbon Iron Manuf. Co.*, 88 N. J. Eq. 452; 42 *id.* 157; *Jones v. Robinson*, 311; 2 *Ld. Raym.* 1089; *Fletcher v. Rylands*, L. R. 3 H. L. 330, 338; *Bagnall v. London Ry. Co.*, 7 H. & N. 423; 1 H. & C. 544; *ante*, § 290. See *Jegon v. Vivian*, L. R. 6 Ch. 742.

<sup>2</sup> *Trower v. Chadwick*, 6 Bing. N. C. 1; 8 *Scott*, 1; *Bainbridge on Mines* (4th ed.), 297; *Hurdman v. North Eastern Ry. Co.*, 3 C. P. D. 168.

<sup>3</sup> *Baird v. Williamson*, 15 C. B. N. S. 376; 12 *W. R.* 150; *Whitehouse v. Fellowes*, 30 L. J. C. P. 305; *Fletcher v. Rylands*, 3 H. L. 330, 339; *Mitchell v. Darley Maine Colliery Co.*, 11 App. Cas. 127; 14 *Q. B. D.* 125; *Lord v.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *West Cumberland Iron Co. v. Kenyon*, 11 Ch. D. 782; 6 Ch. D. 773; *Musgrove v. Smith*, 37 L. T. 367. In *West Cumberland Iron Co. v. Kenyon*, the defendants sunk a shaft in their mining property, which tapped water formerly finding its way into old workings in their ground, and thence percolating into the plaintiff’s mines. The defendants then made a borehole at the bottom of the shaft, admitted to be not in due course of

the soil above, which was naturally impervious to water, and caused fissures by the subsidence of the soil through which the natural rainfall on the surface passed into the defendant's workings, and thence by gravitation into the plaintiff's, it was held that there was no servitude on the owner of the upper mines, for the benefit of the owner of the mines on the dip. to preserve either the surface or the subjacent minerals as water-tight as the undisturbed state of the strata;<sup>1</sup> or to prevent the withdrawal by percolation of water from the wells and springs of the superjacent land.<sup>2</sup> The owner of two adjoining mines, who in working the lower stops up an opening from the higher, wherein the accumulated water rises until it flows over into the plaintiff's mine, is not liable for the consequent injury, especially if the opening from the higher mine into the plaintiff's was caused by a trespass of the plaintiff's predecessor.<sup>3</sup>

mining, but to get rid of the water,—the effect of which was to let off the water into the above old workings, whence it percolated into the plaintiff's mines precisely as if the shaft and borehole had never been made. Mr. Justice Fry (in 6 Ch. D. 773) decided that the defendants, by making the shaft, appropriated the water and made themselves masters of it, and became bound to prevent its flowing into the plaintiff's works. On appeal (11 Ch. D. 782) it was held, reversing his decision, that the defendants' act was not an appropriation, the effect of making the shaft and borehole being merely to alter the course of the water, and not to add to the amount of water thrown upon the plaintiff, or vary the time of its getting there. See *Genet v. Delaware & H. Canal Co.*, 122 N. Y. 505.

<sup>1</sup> *Wilson v. Waddell*, 2 App. Cas. 95. In Pennsylvania, a mine-owner is bound to leave sufficient support for the surface; and if he withdraws such support, whereby the surface sinks and cracks, allowing surface water to flow into his mine, and thence into the mine of an adjoining

owner, he is liable for the resulting damage. *Horner v. Watson*, 79 Penn. St. 242; *Jones v. Wagner*, 66 Penn. St. 429. So of the destruction of a spring caused by the falling in of the surface for want of sufficient support. *Barnes v. Berwind*, 3 Penny. (Pa.) 140.

<sup>2</sup> *Ballacorkish Mining Co. v. Harrison*, L. R. 5 P. C. 49; 29 L. T. N. S. 658; *Wheatley v. Baugh*, 25 Penn. St. 525; *Coleman v. Chadwick*, 80 Penn. St. 81; *Trout v. McDonald*, 88 Penn. St. 144. A lessor who, in quarrying, caused water to percolate into, and to flood his lessee's mine, was held liable on his covenant for quiet enjoyment in *Shaw v. Stenton*, 2 H. & N. 858. As to a landlord's liability for constructing a nuisance by permitting rubbish and filth to accumulate in a well, see *Kern v. Myll*, 80 Mich. 525.

<sup>3</sup> *Lomax v. Stott*, 39 L. J. Ch. 834. In *Locust Mountain Coal Co. v. Gorrell*, 9 Phila. 247, Agnew, J., held at *nisi prius*, that a mine-owner, who, in extending a gangway, struck an opening that had been wrongfully made by a trespasser up the dip of

An injunction will issue where the damage will be inevitable, or the workings are clearly improper,<sup>1</sup> if applied for within a reasonable time after the commencement of the workings,<sup>2</sup> or after the right to damages has been established by action at law.<sup>3</sup>

§ 296. *Fletcher v. Rylands*.—In *Fletcher v. Rylands*,<sup>4</sup> the owners of a mill constructed a reservoir for the purpose of accumulating water from their own and adjoining lands, and employed an engineer and a contractor to choose the site and direct the work. The contractor failed to provide sufficient support to resist the pressure of the water in certain old shafts which communicated with ancient coal workings, the existence of which was then unknown to the defendants or to any of the persons employed by them. The reservoir burst, and the water therein penetrated through intervening coal workings into the plaintiff's colliery, which was flooded. In the Court of Exchequer it was held that the defendants were not liable for the injury in the absence of negligence on their part, or of knowledge that unusual caution was necessary. But in the

his coal vein, is not justified in turning the water flowing down the gutter of the gangway into such opening, whence it will run into a lower mine, if he can easily carry the water across the opening, as by means of a wooden trunk into a drain leading into his own pit.

<sup>1</sup> *Crompton v. Lee*, L. R. 19 Eq. 115; *Robinson v. Byron*, 18 Ves. 517; *Beaufort v. Morris*, 6 Hare, 340; *Mexborough v. Bower*, 7 Beav. 127; *Stralley v. Pearson*, 28 W. R. 752; *Lord v. Carbon Iron Manuf. Co.*, 38 N. J. Eq. 452; 42 id. 157; *Thomas Iron Co. v. Allentown Mining Co.*, 28 id. (1 Stew.), 77.

<sup>2</sup> *Ibid.*; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515.

<sup>3</sup> *Ibid.*

<sup>4</sup> L. R. 3 H. L. 330; L. R. 1 Ex. (Ex. Ch.) 265; 4 H. & C. 263; 3 H. & C. 774; *Smith v. Fletcher*, 2 App. Cas. 781; L. R. 7 Ex. 305; *Wilson v. New-*

*berry*, L. R. 7 Q. B. 31; *Musgrave v. Smith*, 47 L. J. 4; 37 L. T. 367; *Dunn v. Birmingham Canal Navigation*, L. R. 7 Q. B. 244; L. R. 8 Q. B. 42; *Humphreys v. Cousins*, 2 C. P. D. 239; *Crowhurt v. Amersham Burial Board*, 4 Ex. D. 5; 27 Am. L. Reg. 348; *Chalmers v. Dixon*, 3 Sessions Cases (4th Series), 461; *Nugent v. Smith*, 1 C. P. D. 423; *Box v. Judd*, 1 C. P. 423; *Cahill v. Eastman*, 18 Minn. 324; *Knapheide v. Eastman*, 20 Minn. 478; *Gilham v. Madison County R. Co.*, 49 Ill. 484; *The Nitro-Glycerine Case*, 15 Wall. 524; *Parrot v. Barney*, 1 Sawyer, 423; 1 Deady, 405; *Gorham v. Goss*, 125 Mass. 232. See *Wilson v. Newberry*, L. R. 7 Q. B. 31; *Hurdman v. North-Eastern Ry. Co.*, 3 C. P. D. 168; *Cattle v. Stockton Water Works*, L. R. 10 Q. B. 453; *Firth v. Bowling Green Co.*, 47 L. J. C. B. 358.

Exchequer Chamber, and afterwards in the House of Lords, the views of Bramwell, B., in a dissenting opinion, were sustained, and the defendants were held liable upon the ground that "foreign water had been sent down upon the plaintiffs, and that the defendants' lack of knowledge thus became immaterial. The principle established is thus stated and illustrated by Mr. Justice Blackburn in the Court of Exchequer Chamber: "We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.<sup>1</sup> He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems, on principle, just." The principle thus established has since been applied to injuries resulting to adjoining land from the percolation of the waters of an artificial reservoir<sup>2</sup> or canal<sup>3</sup> through the soil; to water allowed to collect in a cellar and to percolate into the plaintiff's cellar or well adjoining;<sup>4</sup> to dampness caused in the plaintiff's house by an artificial deposit near by of spongy soil and clay;<sup>5</sup> to damage caused by the neglect of the occupier of a house to adjoining premises from the escape of sewage from defective

<sup>1</sup> This principle seems to apply when a person uses a thing of a dangerous character on a public highway and causes injury to another. *Hilliard v. Thurston*, 9 Ont. App. 514, 523.

<sup>2</sup> *Wilson v. New Bedford*, 108 Mass. 261; *Gray v. Harris*, 107 Mass. 492; *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 46; *Pixley v. Clark*, 35 N. Y. 520; *Reed v. State*, 108 N. Y. 407. See *Roths v. Kircaldy*, 7 App. Cas. 694, the case of a water-works company, imposing similar liability.

<sup>3</sup> *Evans v. Manchester Ry. Co.*, 86

Ch. D. 626. The damages for this cause are recoverable only to the date of the writ, and not for a permanent injury. *Aldworth v. Lynn*, 153 Mass. ; 10 L. R. A. 210, and note.

<sup>4</sup> *Snow v. Whitehead*, 27 Ch. D. 588; *Ballard v. Tomlinson*, 26 Ch. D. 194; 29 id. 116. As to an artificial change in the course of a natural stream, causing percolation into a cellar, see *Jones v. Westerhausen*, 131 Penn. St. 62.

<sup>5</sup> *Hurdman v. North-Eastern Ry. Co.*, 26 W. R. 489; 8 C. P. D. 168. See *Broder v. Saillard*, 2 Ch. D. 700.



drains under the first house.<sup>1</sup> In New York,<sup>2</sup> New Hampshire,<sup>3</sup> and New Jersey,<sup>4</sup> the doctrine of *Fletcher v. Rylands* is qualified, and it is held to be a question of fact for the jury whether the defendant was guilty of negligence. If an artificial accumulation of water is for the benefit of both plaintiff and defendant, as where they are respectively tenants of the upper and lower stories in the same house, the principle of *Fletcher v. Rylands* does not apply, and the defendant is liable only for ordinary negligence.<sup>5</sup> Nor does such extraordinary liability arise when the water is accumulated for public purposes under the express authority of a statute, and negligence is not proved;<sup>6</sup> or when the accumulation is not made by the land-owner intentionally and for his own benefit, as in the case of the destruction of a house by fire, in the uncovered cellar of which water collects and flows thence against the walls of an adjoining house built after the destruction of the first house.<sup>7</sup> Under an act, which empowers a company to

<sup>1</sup> *Humphreys v. Cousins*, 2 C. P. D. 239; *Hodgkinson v. Ennor*, 4 B. & S. 241.

<sup>2</sup> *Losee v. Buchanan*, 51 N. Y. 476. See *Seldon v. Delaware Canal Co.*, 23 Barb. 362; *Bellinger v. New York Central R. Co.*, 23 N. Y. 47; *Hay v. Cohoes Co.*, 2 Comst. 159.

<sup>3</sup> *Garland v. Towne*, 55 N. H. 55. See *Brown v. Collins*, 53 N. H. 443; *Swett v. Cutts*, 50 N. H. 439.

<sup>4</sup> *Marshall v. Welwood*, 38 N. J. L. 339. See, also, *Hoyt v. Hudson*, 27 Wis. 656; *Pettigrew v. Evansville*, 25 Wis. 223; *Proctor v. Jennings*, 6 Nev. 83; *Simonton v. Loring*, 68 Maine, 164.

<sup>5</sup> *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Ross v. Fedden*, L. R. 7 Q. B. 661; *Bell v. Twentyman*, 1 Q. B. 766. See *Marshall v. Cohen*, 44 Ga. 489; *Cattle v. Stockton Waterworks Co.*, L. R. 10 Q. B. 453.

<sup>6</sup> *Dunn v. Birmingham Canal Co.*, L. R. 7 Q. B. 244; L. R. 8 Q. B. (Ex. Ch.) 42; *Dudley Canal Navigation Co. v. Grazebrook*, 1 B. & Ad. 59;

*Blyth v. Birmingham Water Works*, 25 L. J. Ex. 212; *Great Western Ry. Co. v. Braid*, 1 Moo. P. C. N. S. 101; *Eaton v. B. C. & M. R. Co.*, 5 N. H. 504. So, of *vis major* (extraordinary freshets), causing a boom to obstruct navigation. *McMillan v. Southwest Boom Co.*, 1 Pugs. & B. (N. B.) 715. A horse-railroad company may lawfully throw snow from the track upon a street, but may be held liable by a jury, if it casts the snow into the gutter and thereby so obstructs the flow of water as to flood the plaintiff's premises. *Short v. Baltimore City Passenger Ry. Co.*, 50 Md. 73. The doctrine of *Fletcher v. Rylands* has been held by the privy council not to apply in India where water was stored from time immemorial in tanks for the purposes of irrigation and the public benefit, and these were protected by the local law. *Madras Ry. Co. v. The Zemindar*, 30 L. T. N. S. 771; 22 W. R. 865.

<sup>7</sup> *Trustees v. Hutchinson*, 2 Pugs. & B. (N. B.) 523; *Quinn v. Chicago*

make a canal, making satisfaction for injuries to mines, compensation may be required by the owners of a coal mine under the canal for coal properly left for the security of the canal or the mine, but such owners are liable in damages for working the mine to the injury of the canal.<sup>1</sup>

§ 297. **Proximate and remote cause.**—Where it appeared that large quantities of water accumulated in artificial pools on the defendant's land, which were formed by damming up, with artificial embankments, a natural stream flowing through the defendant's land, an extraordinary and excessive rainfall, which amounted to *vis major*, and caused the embankments to be carried away and the accumulated waters to rush down the stream and injure the plaintiff's property, was held to be the sole proximate cause of the escape of the water and not to give the plaintiff a cause of action.<sup>2</sup> So, where the defendants' reservoir, constructed with sluices, connected with a main drain or watercourse, from which the reservoir was supplied, and with sluices by which the surplus water was returned into a drain at a lower level, and the combined effect of the emptying of a reservoir belonging to a third person above the defendants' premises, and of an obstruction in the drain below them, was to force water through the sluices into the defendants' reservoir and cause an overflow thence upon the plaintiff's land, the defendants were held not liable, it appearing that they had no control over the main drain, or the

R. Co., 63 Iowa, 510. As to defective water-pipes on adjoining premises, see *Comstock v. New York C. R. Co.*, 48 Hun, 225.

<sup>1</sup> *Knowles v. Lancashire Ry. Co.*, 14 App. Cas. 248; 20 Q. B. D. 391; *Cromford Canal Co. v. Cutts*, 5 Ry. Cases, 442; *Consett Waterworks Co. v. Ritson*, 22 Q. B. D. 318, 702.

<sup>2</sup> *Nichols v. Marsland*, 2 Exch. Div. 1; L. R. 10 Exch. 255; *Fletcher v. Smith*, 2 App. Cas. 781; L. R. 9 Ex. 64; L. R. 7 Ex. 305; *River Wear Commissioners*, 26 W. R. 217. *Mellich, L. J.*, here said: "If, indeed, the making of the reservoir was a wrong-

ful act in itself, it might be right to hold the defendant liable for the consequences of his own wrongful act, even although occasioned by the act of God, just as he would be liable in the case of an absolute contract. But the making of a reservoir is not itself a wrongful act, unless, as in *Fletcher v. Rylands*, it is on land the peculiar character of which allows the water to escape and do damage." See *Mahoney v. Libbey*, 123 Mass. 20; *Gorham v. Goss*, 125 Mass. 232. See *McLean v. Crosson*, 33 Q. B. (Canada) 448 (case of diversion of freshet through unlawful ditch).

other reservoir, or knowledge of the cause of the injury, and that the sluices prevented overflow under ordinary circumstances.<sup>1</sup>

§ 298. *Same.*—A person may lawfully collect water by means of a dam, or in ditches, canals, culverts,<sup>2</sup> or pipes, and is not liable in such a case for injuries caused by the escape of the water, in the absence of negligence on his own part,<sup>3</sup> or when the work is done by competent and independent contractors.<sup>4</sup> There is, therefore, no liability where a dam, which is properly constructed and kept in repair, breaks and causes injury to lands below, because of an extraordinary flood or other act of God,<sup>5</sup> or when, in consequence of great and exceptional floods, it injures a land-owner above or below,<sup>6</sup> although liability for even these injuries may arise from the terms of a statute by which the works are expressly authorized.<sup>7</sup> The owner of the dam is held responsible for that degree of care, skill and diligence in its construction and maintenance which men of ordinary prudence are accustomed, in similar cases, to employ.<sup>8</sup> If the injury is caused by hazardous experiments, by the imperfect construction of a dam or

<sup>1</sup> *Box v. Judd*, 4 Exch. D. 76.

<sup>2</sup> *Baltimore R. Co. v. Sulphur Spring School District*, 96 Penn. St. 65.

<sup>3</sup> *Livingston v. Adams*, 8 Cowen, 175; *Shrewsbury v. Smith*, 12 Cush. 177; *Blyth v. Birmingham Water Co.*, 11 Exch. 781; *Noyes v. Shepherd*, 30 Maine, 173; *China v. Southwick*, 12 Maine, 238; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 9 Rawle, 9; *Bell v. McClintock*, 9 Watts, 120; *Pollet v. Long*, 56 N. Y. 200; *New York v. Bailey*, 3 Denio, 433; *Lapham v. Curtis*, 5 Vt. 371; *Hoffman v. Tuolumne Water Co.*, 10 Cal. 413; *Campbell v. Bear River Mining Co.*, 35 Cal. 683; *Tenney v. Miners' Ditch Co.*, 7 Cal. 835; *Wolf v. St. Louis Water Co.*, 10 Cal. 541; *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225; *Frye v. Moore*, 53 Maine, 583; *Fraler v. Sears Water Co.*, 12 Cal. 555; *Weider-*

*kind v. Tuolumne County W. Co.*, 65 Cal. 431; *Wright v. Holbrook*, 52 N. H. 120; *Washburn v. Gilman*, 64 Maine, 163, 168; *McArthur v. Green Bay Canal Co.*, 34 Wis. 139.

<sup>4</sup> *Boswell v. Laird*, 8 Cal. 469.

<sup>5</sup> *Ibid.*; *Rogers v. Central Pac. R. Co.*, 67 Cal. 607.

<sup>6</sup> *Ibid.*; *Young v. Leedom*, 67 Penn. St. 351; *McCoy v. Danley*, 20 Penn. St. 89; s. c. 57 Am. Dec. 680, and note; *Monongahela Navigation Co. v. Coon*, 6 Barr, 379; *Smith v. Agawam Canal Co.*, 2 Allen, 358; *Weiderkind v. Tuolumne County Co.*, 65 Cal. 431; *Moore v. Los Angeles*, 72 Cal. 387; *Brown v. Atlanta*, 66 Ga. 71.

<sup>7</sup> *Roths v. Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 694.

<sup>8</sup> *Ibid.*; *Todd v. Cochell*, 17 Cal. 97; *Verran v. Baird*, 150 Mass. 141; *Rich v. Keshena Imp. Co.*, 56 Wis. 287.

canal embankment or negligence in maintaining it, the owner is liable.<sup>1</sup> And if a stream is subject to extraordinary freshets once in several years, although at no regular intervals, a person who builds a dam across the stream is bound to so construct it as to resist such freshets.<sup>2</sup> A dam or levee may be cut to save life and property, when clearly necessary to that end.<sup>3</sup> Similar principles apply to the owners of booms, who are not liable for lumber lost by inevitable accidents or the unavoidable dangers of the river.<sup>4</sup> The owner of an irrigating ditch who carelessly passes water into and through it beyond its reasonable capacity, and thereby causes it to overflow its banks upon the land of another proprietor, injuring the latter's fruit trees and vines, is liable for such injury under the Colorado statutes.<sup>5</sup>

<sup>1</sup> *Cahill v. Eastman*, 18 Minn. 324; *Knapheide v. Eastman*, 20 Minn. 478; *St. Anthony Falls Water Power Co. v. Eastman*, 20 Minn. 277; *Porter v. Pequonnoc Manuf. Co.*, 17 Conn. 249; *Tuolumne Water Co. v. Columbia Water Co.*, 10 Cal. 193. A complaint by a turnpike company against a land-owner for negligently constructing his fence across a stream, so that it obstructs the water, etc., whereby the plaintiff's bridge was destroyed, is bad on demurrer if it fails to negative contributory negligence by the plaintiff. *Stevens v. Lafayette Gravel Road Co.*, 99 Ind. 392.

<sup>2</sup> *Gray v. Harris*, 107 Mass. 492; *New York v. Bailey*, 2 Denio, 138;

*ante*, § 211c. It is the settled law of Louisiana and in accordance with the natural state of things as they exist in the alluvial portion of that state, that the breaking of a *crevasse* in the Mississippi river levee is a fortuitous or foreseen event within the meaning and scope of La. Code, arts. 2697, 2699. *Viterbo v. Friedlander*, 120 U. S. 707; 24 Fed. Rep. 320; *Jackson v. Michie*, 33 La. Ann. 723.

<sup>3</sup> *Newcomb v. Tisdale*, 62 Cal. 575.

<sup>4</sup> *Brown v. Susquehanna Boom Co.*, 109 Penn. St. 57.

<sup>5</sup> Gen. Stats. §§ 812, 1728, 1733; *Greeley Irrigating Co. v. House*, 14 Col. 549.

## CHAPTER X.

### CONTRACTS AND COVENANTS.

#### SECTION.

- 299. Easements in general.
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- 301. Easements in gross and appurtenant.
- 302. Covenants personal and real.
- 302*a*. Conditions.
- 303. Easements as encumbrances against warranty.
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- 304*a*. Words and phrases passing the water privilege and the soil.
- 305. Appurtenances.
- 306-309. Secondary easements.
- 310. Reservations and exceptions.
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- 312. Must be inclusive and unambiguous.
- 313. Extinguished by unity of possession.
- 314. Not so of necessary or continuous easements.
- 315. Partition.
- 316. Easements follow parted estates — Mining ditches indivisible.
- 317. Pipes and aqueducts.
- 318, 318*a*. Construction of water easements.
- 319. Should regard preliminaries, circumstances, and intention.
- 320. Does not restrict use, in grant of quantity.
- 321. Statute of Frauds.
- 322. License granted verbally.
- 323. When revocable.
- 324. Unexecuted license always revocable.
- 325. Misrepresentations as to water easements actionable.
- 326. Promissory representations non-actionable.
- 327. Damages.
- 328. Repairs.

§ 299. **Easements.**— In addition to the rights which riparian proprietors possess *ex jure naturæ*, other rights may be acquired in watercourses known as easements. An easement is a privilege without profit which the owner of one tenement has in an adjoining tenement, by which the servient owner is obliged to suffer or not to do something on his own

land for the advantage of the dominant estate.<sup>1</sup> Easements in watercourses appear to be exclusively affirmative,<sup>2</sup> that is, the exercise of the easement obliges the servient owner to suffer something on his own land, which would be a cause of action if the right did not exist. Such rights may be acquired by a contract, express or implied, or by prescription, which presupposes a contract or grant from the long-continued exercise of the right.<sup>3</sup> The grantor of land through which a stream of water flows may reserve the water privilege, or he may convey the use of the water in whole or in part, leaving the fee of the land vested in the grantor.<sup>4</sup> A grant of riparian land, together with the use of the water of the stream for operating the grantee's mill, "free from interference or detention," is to be construed as subject to the reasonable use of the stream by the grantor, according to general principles of law, independent of the grant.<sup>5</sup> If a miller purchases the water privilege adjoining his mill, the right of soil remaining in the original proprietor, he gains an incorporeal hereditament;<sup>6</sup> but if he buys the land itself over which the water flows, he has a corporeal tenement, and the right which he possesses in respect to the watercourse is real.<sup>7</sup> In the former case the right

<sup>1</sup> *Termes de la Ley*, tit. Easement; *Monsey v. Ismay*, 3 H. & C. 497; *Quinlan v. Noble*, 75 Cal. 250. Easements may come into existence (1) by express public grant by an act of the Legislature; (2) by express private grant, (a) *inter vivos*, (b) by testament; (3) by implied grant, when the intention is implied to grant the easement together with property which is expressly granted, as on severance of tenements; (4) by prescription, which requires enjoyment as of right for a particular period. Prescription is either by (a) common law, or (b) by statute. *Innes on Easements* (2d ed.), 3. For grants of easements, upon special facts and clauses, see *Ludlow v. Gierhon*, 6 N. Y. S. 121 ("adjoining dock surface"); *Fort Edwards W. Works v. McIntyre*, 4 id. 638 (pipes outside of

granted privilege); *Fitch v. Belding*, 49 Conn. 469; *Reno Water Co. v. Leete*, 17 Nev. 208.

<sup>2</sup> See *post*, § 340.

<sup>3</sup> It is improper to assign, as part of dower, a right of way over other land, or the right to use water-pipes laid therein. *Price v. Price*, 7 N. Y. S. 474.

<sup>4</sup> *Rood v. Johnson*, 26 Vt. 64; *Miller v. Lapham*, 44 Vt. 416; *Soule v. Russell*, 13 Met. 436.

<sup>5</sup> *Red River Roller Mills v. Wright*, 30 Minn. 249.

<sup>6</sup> The right of maintaining a pond or reservoir upon another's land is an easement. *Johnson v. Skillman*, 29 Minn. 95; *Watuppa Reservoir Co. v. Mackenzie*, 132 Mass. 71; *Tuttle v. Harry*, 56 Conn. 194.

<sup>7</sup> *Ibid.*; *Woolrych on Waters*, 146; *Sterling Hydraulic Co. v. Williams*,



acquired is an easement and not a *profit a prendre*, since running water, whether above or below the surface of the earth, is not a product of soil and does not remain in any one place.<sup>1</sup> The right to enter upon another's close and there take water for domestic purposes from a natural fountain, as a pond or a running spring, is an easement only, sustainable by proof of custom by the inhabitants.<sup>2</sup> So the privilege of laying pipes in another's land for the purpose of taking water, and of entering upon the land to lay, repair, or renew such pipes, is an interest in the realty which is assignable, descendible, and devisable,<sup>3</sup> when the grant contains words of inheritance.<sup>4</sup> The right to water in wells or cisterns is an interest in land, although not a *profit a prendre*, and may be claimed by custom.<sup>5</sup> If the plaintiff's claim is upon a contract, there must always be some privity between the parties. Thus, a town which repairs a bridge cannot recover against neighboring mill-owners upon a claim for reimbursement unless there is some relation between them showing an express or implied promise.<sup>6</sup>

§ 300. Created only by deed.—An easement in a water-course can only be created by deed;<sup>7</sup> and when so created,

66 Ill. 393; Seymour v. Lewis, 13 N. J. Eq. 439; Morgan v. Mason, 20 Ohio, 401; Wall v. Cloud, 3 Humph. 181, 184; Smith v. Ford, 48 Wis. 166.

<sup>1</sup> Race v. Ward, 4 El. & Bl. 702; Mounsey v. Ismay, 3 H. & C. 486; Shuttleworth v. Le Fleming, 19 C. B. N. S. 687; Manning v. Wasdale, 5 A. & E. 758; Owen v. Field, 102 Mass. 90; Hill v. Lord, 48 Maine, 83, 99; 3 Kent Com. 427.

<sup>2</sup> Ibid.

<sup>3</sup> Goodrich v. Burbank, 12 Allen, 459; 97 Mass. 22; Amidon v. Harris, 113 Mass. 68; Hankey v. Clark, 110 Mass. 262; French v. Morris, 101 Mass. 68; Lonsdale Co. v. Moies, 21 Law Rep. 664; Williams v. Wadsworth, 51 Conn. 277; Nellis v. Munson, 108 N. Y. 453; 24 Hun, 575; Wright v. Newton, 130 Mass. 552; Dority v. Dunning, 78 Maine, 381; Wilder v. Wheeler, 60 N. H. 351

Cole v. Lake Co., 54 N. H. 242; Jones v. Pettibone, 2 Wis. 308; Peaslee v. Tower, 62 N. H. 434; McMullin v. Wooley, 2 Lans. 394; Warren v. Carey, 145 Mass. 78.

<sup>4</sup> Wilder v. Wheeler, 50 N. H. 351; Salem Capital F. M. Co. v. Stayton W. D. Co., 13 Sawyer, 99; Whitney v. Richardson, 59 Hun, 601.

<sup>5</sup> Ibid.; Tyler v. Bennett, 5 Ad. & El. 377.

<sup>6</sup> North Providence v. Dyerville Manuf. Co., 13 R. L. 45.

<sup>7</sup> Co. Litt. 9a; Hewlins v. Shippam, 5 B. & C. 221, 229; Cocker v. Cowper, 1 C. M. & R. 418; Cook v. Stearns, 11 Mass. 533; Fuller v. Plymouth, 15 Pick. 81; Short v. Woodward, 13 Gray, 86; Stevens v. Stevens, 11 Met. 251; Banghart v. Flummerfelt, 43 N. J. L. 28; Carlton v. Redington, 21 N. H. 291; Stevens v. Dennett, 51 N. H. 324; Fuhr v. Dean, 29 Mo. 116;

the grantor cannot derogate from the deed, and the nature and extent of the rights of the parties can only be determined thereby.<sup>1</sup> A grantee of a water privilege whose deed contains no covenant as to the height of the dam or his rightful extent of flowage, is without remedy at law or in equity, if he is subjected to damages by reason of his maintenance of a dam at an improper height.<sup>2</sup> The above rule applies equally whether the water flows in a natural or artificial channel, or is mere surface or percolating water;<sup>3</sup> and whether all the interest in the soil beneath the water is conveyed, or only so much as is necessary for a due enjoyment of the water, yet the interest is of such a character that it cannot pass by parol.<sup>4</sup> No water easement, however, will arise under a deed, giving a mere right of election to the grantee, unless the grantee exercises his election during his lifetime.<sup>5</sup> A covenant which is annexed to the realty becomes, upon a total breach, a mere personal right which remains with the covenantor or his personal representatives and does not pass with the land.<sup>6</sup> Where a railroad company, having a license to change the course of a stream, agreed with the owner of a mill fed by the stream to dig a new channel and erect levees, it was held that, after the

*Miller v. Auburn & Syracuse R. Co.*, 6 Hill, 61; *Brown v. Woodworth*, 5 Barb. 550; *Russell v. Scott*, 9 Cowen, 279; *Wiseman v. Lucksinger*, 84 N. Y. 31; — *v. Deberry*, 1 Hayw. (N. C.) 248; *Watrous v. Watrous*, 3 Conn. 373; *Moore v. Sinks*, 2 Ind. 157; *Foot v. New Haven Co.*, 23 Conn. 214. Under the statutes of Ohio, an unsealed written license to enter upon and imbed water pipes in another's land, with privilege to enter and repair them, creates no incumbrance upon the land as against a subsequent purchaser. *Wilkins v. Irvine*, 33 Ohio St. 138.

<sup>1</sup> *Northam v. Hurley*, 1 E. & B. 665; *Whitehead v. Parks*, 2 H. & N. 878; *Sharp v. Waterhouse*, 7 E. & B. 816; *Tipping v. Eckersley*, 2 K. & J. 273; *Risien v. Brown*, 73 Texas, 135; *Wood v. Saunders*, L. R. 10 Ch. 582; *Finlinson v. Porter*, L. R. 10 Q. B. 188;

*United Land Co. v. Great Eastern Ry. Co.*, L. R. 10 Ch. 586; *Collins v. Slade*, 23 W. R. 199.

<sup>2</sup> *Hopper v. Lutkins*, 3 Green Ch. 149.

<sup>3</sup> *Rawstron v. Taylor*, 11 Exch. 369; *Whitehead v. Parks*, 27 L. J. Exch. 169.

<sup>4</sup> *Bullen v. Runnels*, 2 N. H. 255; *Hall v. Chaffee*, 18 Vt. 170; *Tanner v. Volentine*, 75 Ill. 624; *Wood v. Edes*, 2 Allen, 580; *Seidensparger v. Spear*, 17 Maine, 123; *Clement v. Durgin*, 5 Greenl. 9; *Brand v. Doane*, 17 Conn. 402; *Fitch v. Seymour*, 9 Met. 462; *Smith v. Goulding*, 6 Cush. 154; *Seymour v. Carter*, 2 Met. 250; *Cobb v. Fisher*, 121 Mass. 170.

<sup>5</sup> *Vanderburgh v. Van Bergen*, 18 John. 212. See *Jackson v. Van Buren*, 13 id. 525.

<sup>6</sup> *Spencer's Case*, 1 Smith's Lead. Cas. 165.

mill was conveyed to another, the purchaser could not maintain an action against the company for failure to fulfil the above provision in the manner agreed upon.<sup>1</sup> A personal covenant made in general terms is to be construed, in determining whether there has been a breach, with such implied exceptions and qualifications as necessarily grow out of the subject-matter or the context.<sup>2</sup> If the stipulation be to supply an adjoining land-owner with water-power during regular working hours without exception, an occasional brief interruption, caused by ice or freshets, would not constitute a breach.<sup>3</sup>

§ 301. **In gross or appurtenant.**—An easement is not presumed to be a mere personal right, or in gross, when it may fairly be regarded as appurtenant to some other estate;<sup>4</sup> but if there is nothing connecting the privilege with such other estate, it does not pass with the land to an assignee.<sup>5</sup> Where an upper tract of land was drained by ditches running through a lower tract, and the owner of both tracts conveyed the lower to J., excepting “a privilege of two leading ditches to T.,” and the following day conveyed to T. the upper tract without mentioning this privilege, it was held not to be annexed to the upper tract so as to pass with it to an assignee.<sup>6</sup> So, a covenant to repair a canal, dug for the purpose of draining the lands of the parties to the covenant, runs with such

<sup>1</sup> *Junction R. Co. v. Sayers*, 28 Ind. 818.

<sup>2</sup> *Fitch v. Belding*, 49 Conn. 469.

<sup>3</sup> *Mill-dam Foundry v. Hovey*, 21 Pick. 417, 442; *Green v. Kelley*, 8 Harr. (N. J.) 246; *Spencer*, 544. A covenant by a landed proprietor, not to permit the owner of an adjoining tract of land to cut a ditch through the grantor's premises, is not against public policy. *Jacobs v. Davis*, 34 Md. 204.

<sup>4</sup> *Spensley v. Valentine*, 34 Wis. 154; *Dennis v. Wilson*, 107 Mass. 592; *Bank of North America v. Miller*, 24 Alb. Law Journ. 35; 6 Fed. Rep. 545; 7 Sawyer, 163. *Louisville R. Co. v. Koelle*, 104 Ill. 455, holds the same;

also that the grant of a right of way to several persons may be a right appurtenant as to some of them, and in gross as to others. A right of profit *a prendre* may be transferred in gross, or it may be attached to, and pass as an appurtenance with other land. *Huntington v. Asher*, 96 N. Y. 604; 26 Hun, 496.

<sup>5</sup> *Ackroyd v. Smith*, 10 C. B. 164; *Linthicum v. Ray*, 9 Wall. 241; *Spencer v. Spencer*, 2 Ired. 96; *Moline Water Power Co. v. Waters*, 10 Brad. (Ill.) 159, 178; *Clark v. Brown*, 70 Iowa, 139; *Haithcock v. Swift Island Manuf. Co.*, 72 N. C. 410.

<sup>6</sup> *Spencer v. Spencer*, 2 Ired. 96.

lands and binds a subsequent purchaser in fee.<sup>1</sup> So the covenant of a railroad corporation to build its track above the overflow of a river is a covenant running with the land.<sup>2</sup> But a deed-poll which conveys to a railroad company for its road-bed the fee of a strip of land, and contains the condition subsequent "that the system of drainage shall remain the same as now, and ditches to remain of such a depth as to allow, as heretofore, the drainage of the land to the depth of five feet," does not create a covenant running with the land, and a new company, which purchases the road after the condition is violated, is not liable in damages to the grantor, in the absence of a personal covenant, for its mere failure to remove obstructions placed in the ditches by the first company.<sup>3</sup>

§ 302. **Covenants personal and real.**— Rights in water-courses created by deed may arise from real or from personal covenants. All covenants which relate to land and are for its benefit run with it and may be enforced by the heir to whom the land descends, or by each successive assignee into whose hands it may come by conveyance or assignment.<sup>4</sup> A covenant by a lessor, or by one of the owners of two adjacent premises, to supply the lessee or other owner with water, to raise a dam to a certain height, or to keep a dam and flume in good repair, passes to a subsequent assignee, who may sue thereon in his own name.<sup>5</sup> So the grantor's agreement for an open space between the street which the granted lots adjoin

<sup>1</sup> *Norfleet v. Cromwell*, 74 N. C. 1; 70 N. C. 634.

<sup>2</sup> *St. Louis Ry. Co. v. O'Baugh*, 49 Ark. 418; *Peden v. Chicago Ry. Co.*, 73 Iowa, 328.

<sup>3</sup> *Hammond v. Port Royal Ry. Co.*, 16 S. C. 567.

<sup>4</sup> *Sharp v. Waterhouse*, 7 E. & B. 816; *Howard Manuf. Co. v. Water Lot Co.*, 53 Ga. 689; *Batavia Manuf. Co. v. Newton Wagon Co.*, 91 Ill. 280; *Norman v. Wells*, 17 Wend. 136; *Horn v. Miller*, 136 Penn. St. 640; 9 L. R. A. 810; *post*, § 447. It seems that the burden of a covenant, which does not involve a grant, never runs

with the land at law. *Austerberry v. Oldham Co.*, 29 Ch. D. 750.

<sup>5</sup> *Jourdain v. Wilson*, 4 B. & Ald. 266; *Holmes v. Buckley*, Prec. in Chan. 39; 1 Eq. Cas. Ab. 27; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Noonan v. Orton*, 27 Wis. 272, 300; 4 Wis. 335; 22 Wis. 84; *Thompson v. Shattuck*, 2 Met. 615; *Hurd v. Curtis*, 7 Met. 94; *Maxon v. Lane*, 102 Ind. 364. *Philps v. St. John Water Co.*, 4 Allen (N. B.), 24, also holds that a reasonable time is to be allowed to repair dam if injured by an extraordinary flood.

and the water,<sup>1</sup> or a covenant, in a grant of a watercourse, to clear it and keep it in repair, is a covenant running with the land of the grantor through which the watercourse passes.<sup>2</sup> A covenant, in a deed of a mill lot and a certain amount of water power, by which the grantees were to pay their ratable share of the expenses of keeping the dam and raceway in repairs "in proportion to the number of square inches of water by them owned or used," and upon a failure to make such payments, the grantor should have the right to enter upon said lot to shut off the water until such payment should be made, runs with the land and binds all persons claiming under the deed.<sup>3</sup> The same is true of a covenant by which the proprietors upon opposite sides of a stream agree for themselves, their heirs and assigns, to rebuild a dam.<sup>4</sup> If the owner of a public warehouse on a navigable river conveys the adjoining premises and at the same time takes from the purchaser a penal bond by which the latter binds himself, his representatives and assigns, not "to permit or allow a warehouse or place for the shipping or receiving of goods either upon or through said premises," such covenant may be enforced by the covenantee, his representatives, heirs or assigns against the covenantor, his heirs, and purchasers with notice.<sup>5</sup> Upon

<sup>1</sup> *Delogny v. Mercer* (La.), 8 So. 903.

<sup>2</sup> *Holmes v. Buckley*, Prec. in Chan. 39; 1 Eq. Cas. Ab. 27; *Morse v. Aldrich*, 19 Pick. 449; *Bronson v. Coffin*, 108 Mass. 175, 184; *Van Rensselaer v. Read*, 26 N. Y. 558, 574; *Nye v. Hoyle*, 120 N. Y. 195; *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489; *Carr v. Lowry*, 27 Penn. St. 257.

<sup>3</sup> *Wooliscroft v. Norton*, 15 Wis. 198.

<sup>4</sup> *Lindeman v. Lindsey*, 69 Penn. St. 93; *Jamison v. McCredy*, 5 Watts & S. 129.

<sup>5</sup> *Robbins v. Webb*, 68 Ala. 393. Such a covenant is held not to be against public policy. *Ibid.*; *post*, §§ 447-449; *Stearns v. Richmond Paper Manuf. Co.* (Va.), 11 S. E. 1057; *Weill v. Baldwin*, 64 Cal. 476; *Cady v.*

*Springville W. Co.*, 10 N. Y. S. 570; *Shaber v. St. Paul Water Co.*, 30 Minn. 179, 183. The assignee of a covenant running with the land, who parts with his estate therein previous to bringing his action, parts with his action also. *Wallace v. Vernon*, 1 Kerr (N. B.), 5. Where the owners of land below low-water mark in a harbor granted to the owner of a lot fronting thereon the right to extend a wharf built upon his own lot, below low-water mark; and the lot-owner covenanted, for himself, his heirs and assigns, not to erect buildings on the wharf, extended the wharf beyond low-water mark, and then assigned to the defendant, who erected buildings on the wharf, it was held that the defendant was bound by the covenant

the other hand, in a lease of land, with liberty to make a watercourse and erect a mill, a covenant by the lessee, for himself, his executors, and assigns, not to hire persons settled in other parishes to work in the mill without a parish certificate, does not run with the land or bind the assignee of the lessee.<sup>1</sup> A real covenant cannot pass independent of the land. It is not sufficient that it concerns the land, but in order to make it run therewith, there must be privity of estate between the contracting parties.<sup>2</sup> Where the owners of a mill-site and water privilege conveyed a portion thereof, and a few days afterwards entered into a contract with the grantees to erect and keep in repair at their joint expense a dam and flume for conducting water to their respective mills, it was held that, as the grantors had no estate in the land when the agreement was made, the contract was not a covenant which ran with the mill-site.<sup>3</sup> So, where the defendant was bound by his joint and several bond to the owners of certain mills, dam and water power, and to the grantees of either or all the obligees in the bond, to complete the dam and keep it in repair for twenty years, it was held that the defendant's covenant was personal, he being a stranger to the title, and that, as the plaintiff, who was grantee of some of the owners, and brought suit for non-performance of the defendant's covenant, was not originally a party to the bond, there was neither privity of contract nor of estate, and that the action could not be maintained.<sup>4</sup> A reservation of the right to use water in a particular manner, for the accommodation of land which remains vested in the grantor, is an assignable interest, al-

as to buildings and estopped from denying that the wharf was subject to the conditions of the grant, although the low-water mark had receded to the outer end of the wharf since the grant was made, and the defendant claimed the land to the new low-water line as an accretion. *St. John v. Smith*, 3 Allen (N. B.), 103.

<sup>1</sup> *Congleton v. Pattison*, 10 East, 130; *Keppell v. Bailey*, 2 Myl & K. 517.

<sup>2</sup> *Spencer's Case*, 3 Co. 16; 1 *Smith's Lead. Cas.* (7th Am. Ed.) 137;

*Webb v. Russell*, 3 T. R. 393; *Hurd v. Curtis*, 19 Pick. 459; *Plymouth v. Carver*, 16 Pick. 183; *Wheelock v. Thayer*, 16 Pick. 68; *Lynn v. Mount Savage Iron Co.*, 34 Md. 603; *Lawrence v. Whitney*, 115 N. Y. 410.

<sup>3</sup> *Wheeler v. Schad*, 7 Nev. 204; *Target v. Lloyd*, 2 Vent. 277; *Mitchell v. Warner*, 5 Conn. 497.

<sup>4</sup> *Lyon v. Parker*, 45 Maine, 474. That the right to rent may pass, see *Manderbach v. Bethany Orphans Home*, 109 Penn. St. 231.



though the right is reserved to him without words of inheritance, and without naming his assigns.<sup>1</sup> Covenants are as capable of running with incorporeal hereditaments as with those which are corporeal.<sup>2</sup> An unsealed writing, signed by a former owner of the land, which purports to convey the right of flowing the same and to release all claim for damages therefor, does not bind the land, or estop subsequent grantees of the land to recover damages for the flowing thereof in future.<sup>3</sup> So, a verbal license to enter and connect with a public drain does not run with the land.<sup>4</sup>

**§ 302a. Conditions.**—Where a conveyance was made of a mill-dam or pond of water and mill-race, and a perch of land on each side thereof for the use of a certain mill with the land thereto belonging, “and for no other use whatsoever,” the title was held to be a base fee, determinable on disuser as a pond.<sup>5</sup> But subsequent conditions, relied on to work a forfeiture, must be created by express terms or clear implication and are strictly construed. The words will, if possible, be construed as a reservation or covenant rather than as a condition.<sup>6</sup> And a mere declaration in the grant that it is for a special purpose, without other words, will not be held to be a condition.<sup>7</sup>

**§ 303. Encumbrances against warranty.**—When land is conveyed by deed, with covenants of warranty, the existence of outstanding easements which prevent the grantee having a clear title to the land conveyed is a breach of these covenants, although the grantee knew of their existence.<sup>8</sup> Where the

<sup>1</sup> *Kennedy v. Scovil*, 12 Conn. 317, 326; 14 Conn. 62; *Morse v. Aldrich*, 19 Pick. 449; *London v. Richmond*, 2 Vern. 421; 1 Bro. P. C. 30; *Merriman v. Russell*, 2 Jones Eq. 470.

<sup>2</sup> *Baldy v. Wells*, 3 Wils. 26; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393.

<sup>3</sup> *Cobb v. Fisher*, 121 Mass. 169.

<sup>4</sup> *Estes v. China*, 56 Maine, 407.

<sup>5</sup> *Scheetz v. Fitzwater*, 5 Penn. St. 126.

<sup>6</sup> *Union Canal Co. v. Young*, 1

*Wharton*, 410; *Cook v. Trimble*, 9 Watts, 15; *First M. E. Church v. Old Columbia Public Ground Co.*, 103 Penn. St. 608.

<sup>7</sup> *Ibid.*; *Packard v. Ames*, 16 Gray, 327; *Labaree v. Carleton*, 53 Maine, 211.

<sup>8</sup> *Huyck v. Andrews*, 113 N. Y. 81; *Fresno Canal Co. v. Rowell*, 80 Cal. 114; *Same v. Dunbar*, id. 530; *Isele v. Arlington S. Bank*, 135 Mass. 142; *Scriven v. Smith*, 80 Hun, 129.

defendant, who conveyed to the plaintiff, with covenants of warranty and seisin, a tract of land having a spring thereon, had previously granted to another the right to the water to the spring, and of drawing it away by an aqueduct to his premises, there was held to be a breach of the covenants in the plaintiff's deed.<sup>1</sup> If a man buys land which is covered with water, the water is not necessarily an incumbrance in the legal sense of the word, and it is not a breach of general covenant against incumbrances that, prior to the conveyance, the grantor had lawfully erected a dam and thereby caused water to flow upon the granted premises;<sup>2</sup> or that a third person has, by means of a dam erected on land not belonging to the grantor, openly and notoriously flowed a portion of the land for a sufficient period to create a prescriptive right.<sup>3</sup> The existence of a right in the mill-owner to cleanse the natural channel of the stream, and to remove obstructions to the free flow of the water from the mill, is not an incumbrance within the meaning of a covenant in a deed describing the grant as land "through which the water to a mill passes."<sup>4</sup> If a mill and water privilege are excepted in a grant of land bounding upon a stream, the exception includes the right to flow the land so far as may be necessary or has been customary, and the existence of this easement is not a breach of a covenant against incumbrances.<sup>5</sup> If mill property is granted with the privilege of raising the waters of a creek to a specified height to furnish power for the mill, and the raising of the water to that height will render the grantee liable in damages for flowage, the measure of damages for breach of the covenant of seisin in the deed is the difference between the value, at the time of the purchase, of the privilege of maintaining the water at the height specified, and the value of the right to maintain the water to the height at which the grantee can rightfully keep it.<sup>6</sup> Upon the conveyance of a piece of land by metes and bounds which was described as "containing two acres, more or

<sup>1</sup> *Clark v. Conroe*, 38 Vt. 469; *Lamb v. Danforth*, 59 Maine, 322; *Alexander v. Kerr*, 2 Rawle, 83; *Knapp v. White*, 23 Conn. 529.

<sup>2</sup> *Kidder v. George*, 18 N. H. 511; *post*, §§ 451-455. <sup>4</sup> *Prescott v. Williams*, 5 Met. 429.

<sup>3</sup> *Kurtz v. McCune*, 22 Wis. 628; *Davis v. Wilson*, 6 Cush. 206.

<sup>5</sup> *Pettee v. Hawes*, 13 Pick. 323; <sup>6</sup> *Hall v. Gale*, 20 Wis. 292.

less, and embraces all the mill privilege on the Rochester side of said falls," it was held that the word "embraces" was not a term of grant, and that there was not a covenant that a mill privilege existed within the boundaries of the land.<sup>1</sup> A State grant of a mill-site with no mill or dam in existence confers no right, unless expressly granted, to flow adjoining State lands as against subsequent purchasers, although such purchasers acquire title after the erection of the dam, under patents referring to a map which represents their lands as flowed to the extent claimed.<sup>2</sup>

§ 304. **Quantity and power.**—Grants relating to water may include a certain quantity of the water itself, having reference to its bulk or weight, or to the quantity which will pass through an aperture of known dimensions in a certain time,<sup>3</sup> or it may be of such water-power as is necessary to propel certain machinery.<sup>4</sup> In the latter case, no property is acquired by virtue of the grant in the corpus of the water; others are not deprived of the right to use it in such manner as does not impair the power;<sup>5</sup> nor is it necessary that it should be annexed to a mill or limited in location.<sup>6</sup> Rights of water thus conveyed are distinct and substantive subjects of grant, and, although in their nature appertaining to land, they may exist without any restriction as to their use in connection with the land granted, or any other designated parcel, and stand precisely as if granted by deeds containing no conveyance of land.<sup>7</sup> If the right is granted in a single deed to build a dam on the

<sup>1</sup> *Pray v. Great Falls Manuf. Co.*, 38 N. H. 442. See *Cummings v. Parker*, 61 N. H. 516.

<sup>2</sup> *Colvin v. Burnet*, 2 Hill, 620.

<sup>3</sup> *Canal Co. v. Hill*, 15 Wall. 94; *Bardwell v. Ames*, 22 Pick. 383; *Wright v. Newton*, 130 Mass. 552; *Washburn & Moen Manuf. Co. v. Salisbury*, 152 Mass. 346; *San Diego Flume Co. v. Chase* (Cal.), 25 Pac. 756; *Read v. Erie Ry. Co.*, 97 N. Y. 341.

<sup>4</sup> The acquiescence of millwrights in the accuracy of "Leffel's Tables" as to the grinding power of specified water-power is common knowledge

on their part, and makes their computations on that basis admissible in evidence. *Garwood v. N. Y. Central R. Co.*, 45 Hun, 128.

<sup>5</sup> *Mayor v. Commissioners*, 7 Penn. St. 348; *Schuylkill Navigation Co. v. Moore*, 2 Wharton, 477; *Vermont Central R. Co. v. Hills*, 28 Vt. 681; *Society v. Holsman*, 1 Halst. Ch. 126.

<sup>6</sup> *Hurd v. Curtis*, 7 Met. 94, 114.

<sup>7</sup> *De Witt v. Harvey*, 4 Gray, 486; *Pratt v. Lamson*, 2 Allen, 275; *Schuylkill Navigation Co. v. Moore*, 2 Whart. 477.

grantor's land, to enter for repairs, and to flow the grantor's land to a specified point, the privilege of flowing may be exercised independently by a dam erected on land other than the grantor's.<sup>1</sup> If land is granted with the right, should it become necessary, to erect a dam on the land of the grantor, in order that the grantee may have "the best possible use of the water of a stream for running machinery," the dam need not be maintained at the place where it is first erected, but the grantee is at liberty to erect and maintain the dam upon his own land.<sup>2</sup> A conveyance of all the water of a river between certain points "for the purposes and use of machinery or ditches, or for any other uses," does not convey the land of a mill-site on the stream.<sup>3</sup>

§ 304a. **When the soil passes.**—"A grant of a watercourse in law," says Jessel, M. R.,<sup>4</sup> "especially when coupled with other words, may mean any one of three things. It may mean the easement or the right to the running of water, it may mean the channel-pipe or drain which contains the water, and it may mean the land over which the water flows. What it does mean must be shown by the context, and if there is no context, I apprehend that it would not mean anything but the easement, a right to the flow of the water." In *Egremont v. Williams*,<sup>5</sup> it was held that the reservation or exception, in a lease, of a watercourse flowing through a meadow was only an exception of the water itself, and not of the channel through which it flowed. A grant of a "pool," or "gulf," or of a "pond" may pass the land which is covered by water,<sup>6</sup> or a

<sup>1</sup> *Kilgore v. Hascall*, 21 Mich. 502; *Olmstead v. Abbott*, 61 Vt. 281. The express mention, in a deed, of the right to take water from one source excludes by implication the right to take water from any other. *Hare v. Horton*, 5 B. & Ad. 715; *Warden v. Balch*, 59 N. H. 468; *Coolidge v. Hagar*, 43 Vt. 9.

<sup>2</sup> *Barber v. Nye*, 65 N. Y. 211.

<sup>3</sup> *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44.

<sup>4</sup> *Taylor v. St. Helens*, 6 Ch. D. 264, 271.

<sup>5</sup> 11 Q. B. 688.

<sup>6</sup> Co. Lit. 5; *Goodrich v. Eastern Railroad*, 87 N. H. 149, 164. See *ante*, §§ 31, 166, note. In a deed of a piece of land, "together with the mill privilege, saw-mill, and erections belonging to the same; and also the pond or flowage above the said mill," the words "pond or flowage" convey no right to the soil of the mill-pond, but only an easement to dam the water and overflow the land for the purposes of the mill below. *Herbertson v. Cunningham*, 1 Pugsley

right of access to the wharf for vessels over the submerged soil owned by the grantor.<sup>1</sup> So a grant of a "well," or "spring," or "wharf" is effectual to pass the soil as well as the thing conveyed.<sup>2</sup> Upon the sale of a division of a canal belonging to the State of Indiana, "including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, and all the appurtenances thereunto belonging," certain adjoining parcels of land belonging to the grantor, which were necessary to the use of the canal and water-power, and were used with it at the time, but were not clearly described by the above terms, were held to pass by the conveyance.<sup>3</sup> A lease of a riparian lot "with all the improvements thereon made" will cover an addition by filling and natural accretion, which the lessor might, by statute, have lawfully made at the date of the lease.<sup>4</sup>

§ 305. **Appurtenances.**—If a "mill" be granted, reserved, or devised,<sup>5</sup> either with or without the word "appurtenances,"

(N. B.), 235. So it has been held that a grant of a river *eo nomine* does not pass the soil under the water, or an island in the river, but only the right of fishery therein. *Jackson v. Halstead*, 5 Cowen, 216; Co. Lit. 4b; Com. Dig. tit. Grant, E. 5. But a Crown grant of a lake *proprio nomine*, with all profits, hereditaments, etc., reserving to the Crown all mines and minerals, has been held to convey the soil of the lake. *Burke v. Niles*, 2 Hannay (N. B.), 166.

<sup>1</sup> *Langdon v. New York*, 93 N. Y. 129. See *Brown v. Pancoast*, 34 N. J. Eq. 321. A reservation in a deed of "the wharf and wharf franchises" does not include a house partly on the premises, built on piles adjoining and "butting up" against the wharf, but not being a part of the wharf. *Upham v. Hosking*, 62 Cal. 250. See *Coburn v. Ames*, 80 Cal. 243.

<sup>2</sup> *Ante*, § 286; *Johnson v. Rayner*, 6 Gray, 107; *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159. A sale of a

"pier," or "wharf," carries the right of wharfage. *Wiswall v. Hall*, 3 Paige, 313; *Smith v. New York*, 68 N. Y. 552. "Wharf" may include the grantor's adjacent flats. *Ashby v. Eastern R. Co.*, 5 Met. 368. See *Buszard v. Capel*, 8 B. & C. 141; *Owen v. Field*, 102 Mass. 90; *Mixer v. Reed*, 25 Vt. 254; *Woodcock v. Estey*, 43 Vt. 515.

<sup>3</sup> *Sheets v. Selden*, 2 Wall. 177. If a deed of a mill and mill-privilege contains the words "grant, bargain and sell," and the grantor afterwards erects a dam on his own land further down the stream, thereby overflowing the grantee's land and preventing his mill from working, there is a breach of the covenant for quiet enjoyment. *Wells v. Trenholm*, 2 Allen (N. B.), 371.

<sup>4</sup> *Williams v. Baker*, 41 Md. 523.

<sup>5</sup> *Bacon v. Bowdoin*, 22 Pick. 401; *Webster v. Potter*, 105 Mass. 414; *Blaine v. Chambers*, 1 Serg. & R. 169. See *Harlan v. Moore*, 9 Watts, 360.

it includes not only the mill itself, but the land under it and so much of the land adjacent to it as is necessary to its use or commonly used in connection with it;<sup>1</sup> also, the fixtures used in operating the mill, including its machinery, race,<sup>2</sup> booms, etc., in use or in their appropriate position at the time of the conveyance,<sup>3</sup> and the water privileges appurtenant and essential to the mill, as corporeal hereditaments.<sup>4</sup> But this right to continue the flooding of the grantor's lands to the same extent as when the grant was made,<sup>5</sup> does not apply to grants of land from the government.<sup>6</sup> A grant of land, on which a mill stands, passes a raceway which is necessary for the convenient working of the mill,<sup>7</sup> but not the right to dig a new trough on the grantor's adjoining dry land for the purpose of

<sup>1</sup> *Forbush v. Lombard*, 13 Met. 109; *Auburn Congregational Church v. Walker*, 124 Mass. 71; *Leonard v. White*, 7 Mass. 6; *Farrar v. Cooper*, 34 Maine, 394; *Esty v. Baker*, 48 Maine, 495; *Crosby v. Bradbury*, 20 Maine, 61; *Whitney v. Olney*, 3 Mason, 280; *Voorhees v. Burchard*, 55 N. Y. 98; 6 Lans. 176; *Van Horn v. Richardson*, 24 Wis. 245; *Lanoue v. McKinnon*, 19 Kansas, 408. The same rule applies to exceptions in a grant. *Moulton v. Trafton*, 64 Maine, 222.

<sup>2</sup> *Curtis v. Norton*, 58 Mich. 411.

<sup>3</sup> *Farrar v. Stackpole*, 6 Greenl. 154; *Lampman v. Milks*, 21 N. Y. 510; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57; *John Spry Lumber Co. v. The C. H. Green*, 76 Mich. 320; *Rogers v. Prattsville Manuf. Co.*, 81 Ala. 483.

<sup>4</sup> *Blake v. Clark*, 6 Greenl. 436; *Maddox v. Goddard*, 15 Maine, 218; *Baker v. Bessey*, 73 Maine, 472, 478; *Seavey v. Jones*, 43 N. H. 441; *Miller v. Miller*, 15 Pick. 57; *Pettee v. Hawes*, 13 Pick. 323; *Prescott v. White*, 21 Pick. 341; *Crittenden v. Field*, 8 Gray, 621; *Hapgood v. Brown*, 102 Mass. 458; *Richardson v. Bigelow*, 15 Gray, 146; *Frink v. Branch*, 16

Conn. 260, 273; *Smith v. Moodus Water Power Co.*, 35 Conn. 392; *Brugger v. Butler*, 6 Oregon, 459; *Jackson v. Trullinger*, 9 Oregon, 393; *Bank of North America v. Miller*, 7 Sawyer, 163, 170; 6 Fed. Rep. 545; *Gibson v. Brockway*, 8 N. H. 465; *Wickersham v. Bills*, 8 Ind. 387; *Hadden v. Shoutz*, 15 Ill. 581; *Leggett v. Kerton*, 2 Rich. (S. C.) 156; *Page v. Esty*, 54 Maine, 319; *Wall v. Cloud*, 3 Humph. 181; *Neaderhouser v. State*, 28 Ind. 257; *Simmons v. Cloonan*, 81 N. Y. 557; *Hill v. National Bank*, 97 U. S. 450. See *Swasey v. Brooks*, 30 Vt. 692; 34 Vt. 451; *Spaulding v. Abbott*, 55 N. H. 423; *Tucker v. Jones*, 8 Mont. 225.

<sup>5</sup> See *Eastman v. St. Anthony Falls W. P. Co.*, 43 Minn. 60.

<sup>6</sup> *Wilcoxon v. McGehee*, 12 Ill. 381.

<sup>7</sup> *New Ipswich Factory v. Bachelder*, 3 N. H. 190; *Babcock v. Utter*, 1 Abb. Dec. 27; 1 Keyes, 115, 397; *Hannum v. Westchester*, 70 Penn. St. 367; *Jackson v. Louw*, 9 Johns. 298; *Eshelman v. Snyder*, 82 Ind. 498. An iron water-pipe may constitute an artificial watercourse appurtenant to real estate. *Standart v. Round Valley W. Co.*, 77 Cal. 399.



conducting water to the mill, although the deed purports to convey "the right of digging, damming, and flowing for the accommodation of said mill."<sup>1</sup> A deed which does not mention water-rights, but conveys land "with the buildings thereon and appurtenances," does not pass the grantor's right to bring water from a stream on other land by a pipe terminating at his house on the land.<sup>2</sup> The conveyance of "ferry ways," which are permanent structures, includes the land under them and used with them;<sup>3</sup> and the grant of a "water ditch" will include another water ditch by which it is fed and without which it would be useless.<sup>4</sup> The term "mill-site" is sufficient to pass the mill, the water-power immediately connected therewith, and the right to use it by the erection of a dam;<sup>5</sup> but the grant of the "liberty" or "privilege"<sup>6</sup> of using the waters of a stream,<sup>7</sup> or the conveyance of a right of way over land for a mill-race,<sup>8</sup> is the grant of an easement only, and not of a fee. The grant of a "dam" includes an easement in the mill-pond.<sup>9</sup>

<sup>1</sup> *Miller v. Bristol*, 12 Pick. 550. See *Mack v. Bensley*, 74 Wis. 112.

<sup>2</sup> *Williams v. Wadsworth*, 51 Conn. 277.

<sup>3</sup> *Gerrish v. Gary*, 120 Mass. 132.

<sup>4</sup> *Donnell v. Humphreys*, 1 Mon. 518.

<sup>5</sup> *Stackpole v. Curtis*, 82 Maine, 383; *Curtis v. Smith*, 35 Conn. 158; *Wood v. Sawin*, 4 Gray, 322; *Le Roy v. Bradley*, 4 Paige, 77; *Tabor v. Bradley*, 18 N. Y. 113. But not a reservoir dam above, belonging to the grantor, but not within the boundaries named in the deed. *Brace v. Yale*, 4 Allen, 303. See, however, *Elliott v. Shepherd*, 25 Maine, 371. The term "mill-dam" does not include a dam built at the outlet of a lake to raise the waters for purposes of navigation, although used to propel mills. *Arimond v. Green Bay Canal Co.*, 35 Wis. 41. A river bank, or a structure built to support a break in such bank, is not a dam so as to render a person who injures it liable under a statute which provides a penalty against

those who injure dams, unless such injury draws off the water of a mill-pond. *People v. Gage*, 23 Mich. 93. See *Burnham v. Kempton*, 44 N. H. 78; *Colwell v. May's Landing Co.*, 4 C. E. Green, 245.

<sup>6</sup> Under a crown grant of the privilege to build mills in a river-bed, the grantee cannot maintain *trespass* before actual entry in the exercise of the privilege. *Frink v. Hill*, *Stevens' N. B. Digest*, 131, 384. So, where A. grants all his right, title and interest in and to the "water privilege" merely of a piece of land described, it creates only an easement. *Wilson v. Sinclair*, 3 Allen (N. B.), 343.

<sup>7</sup> *Hadley v. Hadley Manuf. Co.*, 4 Gray, 140; *Jamaica Pond Aqueduct Corporation v. Chandler*, 9 Allen, 159.

<sup>8</sup> *Miller v. Vaughn*, 8 Oregon, 333.

<sup>9</sup> *Maddox v. Goddard*, 15 Maine, 218; *Sabine v. Johnson*, 35 Wis. 185; *Hutchinson v. Chicago Ry. Co.*, 37 Wis. 582, 604; *Cross v. Pike*, 59 Vt. 324; *Green Bay Canal Co. v. Hewitt*, 66 Wis. 461; *Monmouth v. Plimpton*,

While a conveyance of land transfers whatever is properly and lawfully appurtenant to the subject of the grant, it does not convey an easement, such as the flowage of a stranger's land, which has no valid existence as such, although it may appear, as matter of fact, to be attached to the land; and what the deed does not purport to convey, the ordinary covenants of warranty do not warrant.<sup>1</sup> Where certain land was conveyed by metes and bounds, without mention of a mill, dam, or water privilege of any kind, and the grantee had previously constructed a mill and dam upon the land, which flowed other land of the grantor, it was held that the grantee did not acquire the right of flooding the grantor's land, it not appearing that the grantor knew of the existence of the mill or dam when the deed was executed.<sup>2</sup>

§ 306. **Secondary easements.**—The grant of water easements carries with them by implication, as secondary or subsidiary easements, everything that is beneficially necessary or incident to the grant, whether mentioned or not as “privileges,” “appurtenances,” or the like.<sup>3</sup> A distinction has been

77 Maine, 556. A levy upon a dam and water-power connected therewith is not a bar to a subsequent levy on the bottom of the stream, the one affecting the dominant, the other the servient estate. *Eagle Manuf. Co. v. Van Leonard*, 67 Ga. 648.

<sup>1</sup> *Green v. Collins*, 86 N. Y. 246; 20 Hun, 474; *Adams v. Conover*, 87 N. Y. 422; 22 Hun, 424; *Brace v. Yale*, 4 Allen, 393; *Illinois Central R. Co. v. Wren*, 43 Ill. 77. A grant of a part of land conveys the easement of a private sewer as appurtenant. *Fitzpatrick v. Mik*, 24 Mo. App. 435.

<sup>2</sup> *Tabor v. Bradley*, 18 N. Y. 109.

<sup>3</sup> *Pomfret v. Ricroft*, 1 Wms. Saund. 321, 323, and note 6; 1 Sid. 429; *Hodgson v. Field*, 7 East, 613, 622; *Hunchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1; *Osborn v. Wise*, 7 C. & P. 761; *Dodd v. Burchell*, 1 H. & C. 118; *United States v. Appleton*, 1 Sumner, 491, 501; *Grant v. Chase*, 17 Mass.

443, 448; *Hazard v. Robinson*, 3 Mason, 272, 276; *Whitney v. Olney*, 3 Mason, 280; *Kent v. Waite*, 10 Pick. 138; *Oliver v. Dickinson*, 100 Mass. 114, 117; *Hollenbeck v. McDonald*, 112 Mass. 247, 250; *Rackley v. Sprague*, 17 Maine, 281; *Maddox v. Goddard*, 15 Maine, 218; *Wyman v. Farrar*, 35 Maine, 64; *Hammond v. Woodman*, 41 Maine, 177; *Pickering v. Stapler*, 5 Serg. & R. 107; *Valley Pulp & Paper Co. v. West*, 58 Wis. 599; *Diffendal v. Virginia Ry. Co.*, 86 Va. 459; *Swartz v. Swartz*, 4 Penn. St. 353. That a grant of land includes rents for an easement to flow the granted premises, see *Pollock v. Cronise*, 12 How. Pr. 363. An easement in the nature of an easement of necessity need not be expressly reserved in a conveyance of the property affected thereby. *Shubbrook v. Tufnell*, 46 L. T. 886.

made between an easement reserved in land granted for the benefit of the land retained, and an easement granted in other land of the grantor for the benefit of that conveyed, it being held that a grant of an easement may be implied under circumstances where there would be none of a reserved easement.<sup>1</sup> But there must be a reasonable necessity for such an implication,<sup>2</sup> mere convenience not being enough,<sup>3</sup> and the use must be reasonable.<sup>4</sup> What will pass as impliedly appurtenant to the easement granted is a question for the jury.<sup>5</sup> Of two constructions that will be selected which gives to such appurtenant privileges the more convenient and reasonable mode of enjoyment.<sup>6</sup> The grantor will have a right to elect, where there are several modes of use or enjoyment, in default of which the grantee may choose.<sup>7</sup> The use of such an appurtenant right will vary as the necessity varies,<sup>8</sup> and when the necessity for such an implied easement ceases, the right to its enjoyment also ends.<sup>9</sup> The purchaser of the land over which a visible drain is maintained under authority from his grantor, takes subject to the servitude thus created.<sup>10</sup>

§ 307. *Same.*— The grant of a “mill privilege” or “privilege of a mill” will include the land on which the mill and its appendages stand, and the land and water actually and commonly used therewith and necessary to its enjoyment,<sup>11</sup> including, as well the water in the raceway,<sup>12</sup> as a right to re-

<sup>1</sup> *Johnson v. Jordan*, 2 Met. 284; *post*, § 354.

<sup>2</sup> *Brigham v. Smith*, 4 Gray, 297; *Leonard v. Leonard*, 2 Allen, 543; *Pettingill v. Porter*, 8 Allen, 1; *Parker v. Bennett*, 11 Allen, 388; *Oliver v. Pitman*, 98 Mass. 46.

<sup>3</sup> *Nichols v. Luce*, 24 Pick. 102; *White v. Leeson*, 5 H. & N. 53; *post*, § 362.

<sup>4</sup> *Tomlin v. Fuller*, 1 Ventr. 48.

<sup>5</sup> *Hall v. Benner*, 1 Penn. 402.

<sup>6</sup> *Morris v. Edginton*, 8 Taunt. 24; *Dand v. Kingscote*, 6 M. & W. 174; *Tinker v. Forbes* (Ill.), 26 N. E. 503.

<sup>7</sup> *Holmes v. Seely*, 19 Wend. 507.

<sup>8</sup> *Seeley v. Bishop*, 19 Conn. 128.

<sup>9</sup> *Holmes v. Goring*, 2 Bing. 76;

*Viall v. Carpenter*, 14 Gray, 126; *Collins v. Prentice*, 15 Conn. 39, 423; *Pierce v. Selleck*, 18 Conn. 321.

<sup>10</sup> *Kelly v. Dunning*, 43 N. J. Eq. 62.

<sup>11</sup> *Moore v. Fletcher*, 16 Maine, 63. Parol evidence is admissible to show whether an ambiguous paper, which recites the purchase of a “mill-seat,” includes the land under the mill-pond. *Towner v. Thompson*, 82 Ga. 740.

<sup>12</sup> *Wetmore v. White*, 2 Caines' Cas. 87; *Strickler v. Todd*, 10 Serg. & R. 63; *Morgan v. Mason*, 20 Ohio, 401, a case of a judgment sale. That an injury to a raceway is an injury to the mill, see *Butz v. Ihrie*, 1 Rawle 218. In those States where the ac-

ceive or discharge the water from the mill by an existing race-way through other land of the grantor.<sup>1</sup> Mere distance between the principal thing and the incident to be enjoyed is immaterial; and the continued existence of a dam has been deemed essential to the beneficial enjoyment of a mill, although at a distance of three-quarters of a mile.<sup>2</sup> A conveyance of a water right includes the necessary use of land for the foundation of a "dam;"<sup>3</sup> if of a "dam" in a grant of land with a stream through it together with a dam, a flume, and a conductor upon it, it will be construed to cover, or as being equivalent to "flume;"<sup>4</sup> and if of "mills and dam," it will include the flowage of the grantor's land as then flowed,<sup>5</sup> or as it must inevitably be flowed by their fair and proper use,<sup>6</sup> as by a tightening or necessary raising of the dam to secure a sufficient head.<sup>7</sup> A grant "of all the land which the dam flows" conveys the land flowed when the dam is in use, and not when the water runs to waste as if no dam existed.<sup>8</sup> Where a "saw-mill," without further description, was assigned to one of several heirs as his portion of an estate, it was decided that he was entitled to the use of the head of water, and of any further easement theretofore used with it or necessary to its enjoyment,<sup>9</sup> and the same was held in a State where a strict division of an estate, under the statute of descents, gave the land upon which a mill stood to one heir, while the dam used in connection with it covered a portion of a part allotted to another.<sup>10</sup>

knowledge and record of a town or city plat amounts to a dedication of the streets platted, a reservation, in such plat, of the right to construct and use a mill-race across one of such streets gives to the land-owner only an easement in the street. *Waterloo v. Union Mill Co.*, 59 Iowa, 437; *ante*, § 260.

<sup>1</sup> *New Ipswich Woolen Factory v. Batchelder*, 3 N. H. 190; *Morgan v. Mason*, 20 Ohio, 401; *Elliott v. Sallee*, 14 Ohio St. 10; *Ely v. Stewart*, 11 Md. 408.

<sup>2</sup> *Perrin v. Garfield*, 37 Vt. 304.

<sup>3</sup> *Conwell v. Brookhart*, 4 B. Mon. 580, 584.

<sup>4</sup> *Kennedy v. Scovil*, 12 Conn. 317.

<sup>5</sup> *Preble v. Reed*, 17 Maine, 169; *Hills v. Dey*, 14 Wend. 204; *Kestler v. Verble*, 7 Jones (N. C.), 185.

<sup>6</sup> *Butler v. Huse*, 63 Maine, 447; *Albee v. Hayden*, 25 Minn. 267.

<sup>7</sup> *Brugger v. Butler*, 6 Oregon, 459.

<sup>8</sup> *Morse v. Marshall*, 11 Allen, 229.

<sup>9</sup> *Blake v. Clark*, 6 Greenl. 436.

<sup>10</sup> *Kilgour v. Ashcom*, 5 H. & John. 82.

§ 308. **Same.**— If a “saw-mill” is conveyed “with a convenient privilege to pile logs, boards, or other lumber,” an easement results in the land used for the purpose of piling the product of the mill,<sup>1</sup> and a right to the use of a mill-pond carries the privilege to float logs in it for mill use.<sup>2</sup> The grant of a privilege in a ditch or watercourse has been held, under the circumstances, to include a right to cut a trench through the land of another, if in that way only it could be beneficially used.<sup>3</sup> Where a lease of a mill was granted to one who was described as a “bleacher” and the premises were described as “late in the occupation of P.,” who was a bleacher, and had been wont to pollute the stream by discharging the refuse of his mill therein, it was held that the lessee could discharge refuse from his works into the stream in the same manner that P. had formerly done, as against a subsequent vendee of the lessor of this and another mill, in the latter of which such vendee carried on the business of paper making.<sup>4</sup> If a “right of drainage” is granted, the right of passing house-sewage through the drain is not granted.<sup>5</sup>

§ 309. **Same.**— A grant of a right to use water as “accustomed to do” will include all of that so used, whether such customary use has ripened into a strict right or not;<sup>6</sup> but a custom of the owner of a lot to vary the course of a stream upon it to meet the emergencies of his business of brick-making, but without at any time preventing its traversing the whole lot, creates no easement in one portion against another, so as to give one of his heirs, to whom in a division of the lot the upper portion came, a right to wholly divert it from flowing through the lower portion of the lot.<sup>7</sup> A conveyance of one of two ancient mills, *eo nomine*, which comprise the entire mill privileges of a stream, carries with it such a proportion of the whole

<sup>1</sup>Thompson v. Androscoggin Bridge, 5 Greenl. 62; Thompson v. Banks, 43 N. H. 540.

<sup>2</sup>Beals v. Stewart, 6 Lans. 408.

<sup>3</sup>Dyer v. Depui, 5 Wharton, 584. Mining ditches do not pass under a sheriff's deed without express mention. White v. Barlow, 72 Ga. 887.

<sup>4</sup>Hall v. Lund, 1 H. & C. 676.

<sup>5</sup>Wetmore v. Fiske, 15 R. I. 854. See Munsion v. Reid, 46 Hun, 399.

<sup>6</sup>Avon Manuf. Co. v. Andrews, 30 Conn. 476. Cf. Hoskins v. Brawn, 76 Maine, 68 (boom privilege).

<sup>7</sup>Macomber v. Godfrey, 108 Mass. 219.

right in the stream as the water used to drive the mill conveyed bears to that used by the other mill; while a modern grant of such a mill, situated on a stream where there were several mills of different kinds, all drawing from the same level, and where there was only sufficient water to supply the power necessary to drive each mill, passes nothing but the mill itself, and the water actually necessary to drive it.<sup>1</sup>

**§ 310. Reservations — Exceptions.**— A grantor may withhold easements in water privileges, either by way of reservation or exception,<sup>2</sup> which become binding upon the grantee upon his acceptance of the deed,<sup>3</sup> cover what is excluded from the grant,<sup>4</sup> and, in the case of an exception, enure to the benefit of his heirs and assigns without words of inheritance,<sup>5</sup> unless it is plain that an exception in favor of the grantor only is intended.<sup>6</sup> While an exception is defined to be some existing part taken out of the premises conveyed, and a reservation as some new thing carved out of the granted premises by the conveyance,<sup>7</sup> the words are often used indiscriminately, and effect will be given to the intention of the parties irrespective of the words employed.<sup>8</sup> Thus, where a conveyance to A. was of a portion of certain land, and a right to maintain a dam on the rest, a subsequent grant to B. of the whole parcel, “reserving” all the rights of A., his heirs and assigns therein, was

<sup>1</sup> *Crittenden v. Field*, 8 Gray, 621, 627.

<sup>2</sup> *Wade v. Howard*, 6 Pick. 492; *Knox v. Silloway*, 10 Maine, 201; *Cocheco Manuf. Co. v. Whittier*, 10 N. H. 305; *Bowen v. Conner*, 6 Cush. 132, 136; *Barnes v. Lloyd*, 112 Mass. 224, 232; *Peck v. Conway*, 119 Mass. 546, 549; *Pennsylvania R. Co.'s Appeal*, 125 Penn. St. 189.

<sup>3</sup> *Newell v. Hill*, 2 Met. 180; *Vickerie v. Buswell*, 13 Maine, 239; *Emerson v. Mooney*, 50 N. H. 315.

<sup>4</sup> *Greenleaf v. Birth*, 6 Pet. 302, 310; *Mower v. Hutchinson*, 9 Vt. 242.

<sup>5</sup> *Winthrop v. Fairbanks*, 41 Maine, 307; *Emerson v. Mooney*, 50 N. H. 315; *Keeler v. Wood*, 30 Vt. 242; *Wheeler v. Brown*, 46 Penn. St. 197.

See *Memphis & St. Louis Packet Co. v. Grey*, 9 Bush, 137.

<sup>6</sup> *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen, 159, 170, citing *Shep. Touchstone*, 100; *Curtis v. Gardner*, 13 Met. 461. See *Buffum v. Hutchinson*, 1 Allen, 58.

<sup>7</sup> *Case v. Haight*, 3 Wend. 632; *Winthrop v. Fairbanks*, 41 Maine, 307; *Garland v. Hodsdon*, 46 Maine, 511.

<sup>8</sup> *Cocheco Manuf. Co. v. Whittier*, 10 N. H. 305; *Cutter v. Tufts*, 3 Pick. 272; *Bowen v. Conner*, 6 Cush. 132, 135; *Hill v. Cutting*, 107 Mass. 597; *Bowman v. Wathen*, 3 McLean, 366. *Hurd v. Curtis*, 7 Met. 94, held the words “except the reserve” to be equivalent to “except and reserve.”



held to create an exception, and not a reservation.<sup>1</sup> If the water in a well is ample for the use of both parties, the words "reserving to myself the use of the well in front of the granted premises" create a reservation merely.<sup>2</sup> In the case of a reservation, as of a mill-site, the whole premises vest in the grantee until the grantor or his assigns exercise the right reserved,<sup>3</sup> and a power of revocation of an easement, reserved in a demise, is valid and may be exercised partially as well as wholly.<sup>4</sup> By accepting a deed containing a reservation and covenant the grantee may become a covenantor.<sup>5</sup> A clause in a deed of conveyance reserving an easement operates as a grant of a newly created easement, and the reservation is to be practically regarded as a counter grant by the grantee.<sup>6</sup>

§ 311. **Same—Certainty.**—An exception or reservation of a water right will be construed most strictly against the grantor, and most beneficially for the grantee.<sup>7</sup> Thus, where a grantor in a deed of land, with a right to take water for machinery from a dam, reserved "sufficient water at all times to work" the tannery wheels, "as now used," it was determined that the water so reserved was the quantity actually used by the tannery at the time the deed was given, and not its capacity.<sup>8</sup> If an exception does not clearly designate the particular portion meant of the property conveyed, it fails for uncertainty.<sup>9</sup> In a grant of land "excepting one acre and one-half acre, which is reserved for the use and flowing of water for the

<sup>1</sup> *Stockwell v. Couillard*, 129 Mass. 231.

<sup>2</sup> *Barnes v. Burt*, 38 Conn. 541.

<sup>3</sup> *Dygert v. Matthews*, 11 Wend. 35; *Newmarket Manuf. Co. v. Pendergast*, 24 N. H. 54. See *Thompson v. Gregory*, 4 John. 81.

<sup>4</sup> *Ex parte Miller*, 2 Hill, 418.

<sup>5</sup> *Cooper v. Louanstein*, 87 N. J. Eq. 284, 308; *Pope v. Bell*, id. 495.

<sup>6</sup> *Ibid.*; *Goold v. Great Western Deep Coal Co.*, 2 De G. J. & S. 600.

<sup>7</sup> *Case v. Haight*, 3 Wend. 632; *Howard v. Wadsworth*, 3 Greenl. 471; *Bryan v. Idaho Quartz M. Co.*, 73 Cal. 249; *Brigham v. Ross*, 55 Conn. 373;

*Mack v. Bensley*, 63 Wis. 80; *Emery v. Three Rivers*, 78 Mich. 438.

<sup>8</sup> *Wyman v. Farrar*, 35 Maine, 64. See *Terry v. Smith*, 47 Hun, 333; *Groat v. Moak*, 26 id. 380; *Watson v. Bartlett*, 62 N. H. 447.

<sup>9</sup> *Co. Litt. 142a*; *Hull v. Leonard*, 1 Pick. 31; *Wusthoff v. Dracourt*, 3 Watts, 240. A deed from A. to B. with the words "C.'s mill-seat excepted" conveys no title to C. beyond an easement therein for a mill-site, a dam, and a flowage right. *Everett v. Dockery*, 7 Jones (N. C.), 390. See *Memphis & St. Louis Packet Co. v. Grey*, 9 Bush, 137.

mill," the exception was decided to be void for uncertainty.<sup>1</sup> In a reservation of streams, a right to build dams, and of such land as might be flowed thereby in the granted premises, the reservation is inoperative until the grantor exercises the right by the erection of dams, and, if viewed as an exception strictly, it is void for uncertainty.<sup>2</sup> Where the question was whether a certain creek or cove was excluded or included in the premises conveyed by deed, and the evidence made either hypothesis possible, a reservation in the deed of the use of the cove for certain purposes was held to be strong *prima facie* evidence of its inclusion.<sup>3</sup>

§ 312. Same — Must be unambiguous.— An exception or reservation of something not embraced in the premises conveyed would be simply void, there being nothing for it to operate upon,<sup>4</sup> and any restrictions placed by a grantor upon a grantee respecting the use of water, or rights in and to water, must be clear and unambiguous, and not repugnant to the grant.<sup>5</sup> An exception or reservation of a mill in a grant of land includes not only the land beneath it, but whatever is necessary to its beneficial use as an appurtenant water privilege,<sup>6</sup> land sufficient for a mill-pond,<sup>7</sup> and a right of flowing land so far as may be necessary,<sup>8</sup> words in a grant that are effective to pass being equally effective to except.<sup>9</sup> If the exception is for so long "as the said grantee occupies said privilege with mills," the existence of the mills marks the limit.<sup>10</sup> And if the reservation be of the right of mining coal and

<sup>1</sup> Darling v. Crowell, 6 N. H. 421.

<sup>2</sup> Thompson v. Gregory, 4 Johns. 81.

<sup>3</sup> Small v. Wright, 74 Maine, 428.

<sup>4</sup> Hurd v. Curtis, 7 Met. 94, 110; Cocheco Manuf. Co. v. Whittier, 10 N. H. 305.

<sup>5</sup> Lambert v. Bennet, 3 Smith, 34; Cutter v. Tufts, 3 Pick. 272; Sprague v. Snow, 4 Pick. 54; Jewett v. Ricker, 68 Maine, 377; Denton v. Leddell, 23 N. J. Eq. 64.

<sup>6</sup> Allen v. Scott, 21 Pick. 25; Hammond v. Woodman, 41 Maine, 177, 203; Moulton v. Trafton, 64 Maine, 218.

<sup>7</sup> Jackson v. Vermilyea, 6 Cowen, 677. In Gregg v. Birdsall, 53 Barb. 402; 35 How. Pr. 345, where there was a reservation for sawing lumber and of flowage for that purpose, the latter right was held co-extensive with the former.

<sup>8</sup> Pettee v. Hawes, 13 Pick. 323; Vickerie v. Buswell, 13 Maine, 289.

<sup>9</sup> Blake v. Madigan, 65 Maine, 522.

<sup>10</sup> Moulton v. Trafton, 65 Maine, 218. See Esty v. Currier, 98 Mass. 500; Linthicum v. Ray, 9 Wall. 241.

sinking air-shafts, the grantor is entitled to place his buildings on the surface, to make a pond on the surface for the collection of water to run his machinery, and to use a part of the surface as a dump.<sup>1</sup> A reservation of "all watercourses suitable for the erection of mills" gives a right to all the mill-sites on the granted land, whenever the grantor chooses to make a location,<sup>2</sup> for all purposes that he may choose,<sup>3</sup> including, however, natural, not artificial, mill-sites.<sup>4</sup> A reservation to a grantor, and to his heirs and assigns, of a certain water privilege for the benefit of his saw-mill, cannot be availed of by a grantee of other land of his, but not of the saw-mill, for any purpose.<sup>5</sup> If a reference to breast-wheels in the reservation of the right to draw water from a pond is intended merely to describe the quantity of water, the breast-wheels may be removed and turbin-wheels substituted therefor.<sup>6</sup>

§ 313. **Same — Unity of possession.**— When the dominant estate and servient estate become united in the person of the same owner, easements in and to the use of water resting upon the latter in favor of the former become extinguished.<sup>7</sup> A natural watercourse, however, which is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as parcel of it, is never extinguished or suspended by such unity of possession.<sup>8</sup> If, however, the owner, after unity of possession, does not interrupt existing easements in the use or enjoyment of water, a subsequent grant by him of either estate, or any portion of either, will carry therewith all the water privileges and burdens existing at the time of the conveyance.<sup>9</sup> Where the owner of the lower of two mills on

<sup>1</sup> *Wardwell v. Watson*, 93 Mo. 107.

<sup>2</sup> *Russell v. Scott*, 9 Cowen, 279; *Butz v. Ihrie*, 1 Rawle, 218.

<sup>3</sup> *French v. Carhart*, 1 Comst. 96.

<sup>4</sup> *Armstrong v. Masten*, 11 Johns. 189.

<sup>5</sup> *Judd v. Wells*, 12 Met. 504.

<sup>6</sup> *Coburn v. Middlesex Co.*, 142 Mass. 264.

<sup>7</sup> *Lady Brown's case*, cited in *Sury v. Pigot*, Popham, 166, 170; *Palmer*, 444, 446; *Canham v. Fisk*, 2 Cr. & J. 126; *Thomas v. Thomas*, 2 Cr. M. &

*R.* 34; *Ivimey v. Stocker*, L. R. 1 Ch. 396, 407; *Ritger v. Parker*, 8 Cush. 145; *Atwater v. Bodfish*, 11 Gray, 151; *Stevens v. Dennett*, 51 N. H. 324, 330; *Kieffer v. Imhoff*, 26 Penn. St. 438, 443; *Pearce v. McGlenaghan*, 5 Rich. (S. C.) 178; *McAllister v. Devane*, 76 N. C. 57.

<sup>8</sup> *Woolrych, Waters*, 234; *Bul. N. P.* 74; *Hazard v. Robinson*, 8 Mason, 272; *Johnson v. Jordan*, 2 Met. 239; *Tucker v. Jewett*, 11 Conn. 311; *ante*, § 204.

<sup>9</sup> *Nicholas v. Chamberlain*, Cro. Jac.

a stream lowered his dam, which flowed back the water upon the upper mill, and thus freed the upper mill from obstruction for thirty-eight years, when he sold his mill to the upper owner, it was held that the lapse of time and unity of possession had extinguished the right to again raise the dam two feet in height, and that the upper mill had a right to be kept free from obstruction.<sup>1</sup> An upper and lower owner, although occupying the relation of grantor and grantee, must each use the water in a reasonable and proper manner, irrespective of the use prior to the conveyance.<sup>2</sup>

**§ 314. Same — Necessary or continuous easements.**—Easements which are necessary to the enjoyment of an estate, such as gutters and drains, are called continuous easements. They do not, like discontinuous easements,<sup>3</sup> come to an end by mere unity of possession, but will revive on severance,<sup>4</sup> like ways of necessity,<sup>5</sup> because they are subsisting easements, provided the necessity for them has not ceased,<sup>6</sup> unless the owner during the unity has by some positive act shown his desire to no longer enjoy them.<sup>7</sup> The unity of title and possession, such as will extinguish, and not merely suspend, an easement in the beneficial use of water, must be of an estate in fee in both the dominant and the servient tenements in the same person. Thus the possession by the same person of one parcel of land

121; *Morris v. Edgington*, 3 Taunt. 24; *Pyer v. Carter*, 1 H. & N. 916; *Elliott v. Sallee*, 14 Ohio St. 10; *Grant v. Chase*, 17 Mass. 443; *Philbrick v. Ewing*, 97 Mass. 133; *Seymour v. Sage*, 13 N. J. Eq. 439; *Perry v. Parker*, 1 Woodb. & M. 280; *Manning v. Smith*, 6 Conn. 289; *Dunklee v. Wilton R. Co.*, 24 N. H. 489. See *Cary v. Daniels*, 8 Met. 466.

<sup>1</sup> *Hazard v. Robinson*, 3 Mason, 272. See *Brace v. Yale*, 4 Allen, 393. See also *Seeley v. Bridges*, 13 Neb. 547.

<sup>2</sup> *Barrett v. Parsons*, 10 Cush. 367; *Haskins v. Haskins*, 9 Gray, 390.

<sup>3</sup> *Worthington v. Gimson*, 2 El. & El. 618; *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 761. See *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159,

164; *Durel v. Boisblanc*, 1 La. Ann. 407.

<sup>4</sup> *Sury v. Pigot*, Popham, 166; *Palmer*, 444; *Pheysey v. Vicary*, 16 M. & W. 484; *Hazard v. Robinson*, 3 Mason, 272; *Lampman v. Milks*, 21 N. Y. 505.

<sup>5</sup> *Clark v. Cogge*, Cro. Jac. 170; *Jorden v. Atwood*, Owen, 121; *Holmes v. Goring*, 2 Bing. 88. See *Proctor v. Hodgson*, 10 Exch. 824.

<sup>6</sup> *Viall v. Carpenter*, 14 Gray, 126; *Collins v. Prentice*, 15 Conn. 39, 423; *Pierce v. Selleck*, 18 Conn. 321; *Seeley v. Bishop*, 19 Conn. 128.

<sup>7</sup> *Copie v. L. de B.* 11 Hen. 7, 25; *Robins v. Barnes*, Hob. 131; *Pyer v. Carter*, 1 H. & N. 916, 921. See *Dodd v. Burchell*, 1 H. & C. 113.

in fee, and another for the term of five hundred years, one of which had an easement for drip in the other;<sup>1</sup> the vesting of two estates in the same person as mortgagee without foreclosure,<sup>2</sup> and the holding an estate in a dock in fee by a defective title, and an easement in the same by a valid title,<sup>3</sup> have all been held insufficient to extinguish the easement. If an owner on one side of a stream of half the water privilege is also the owner as a tenant in common of an undivided part of the other half, there is not such unity of possession as will extinguish in whole or in part the water easements of the tenants in common.<sup>4</sup> If A. enjoys adversely a water easement in adjoining land, and before it ripens into a right conveys to the adjoining owner, who shortly reconveys to A., who again enjoys the easement as before for a period less than, but, with the former period, exceeding the statutory limit, he gains no right to the easement by user, by reason of the former unity of possession in himself.<sup>5</sup> An easement in a watercourse may also be extinguished by operation of law, as by filling it up and laying out over it a highway.<sup>6</sup>

§ 315. **Partition.**—Tenants in common of watercourses or other water rights may, as of right at the common law, have partition of the whole property so held, regardless of the difficulty, hardship, or inconvenience resulting from so doing.<sup>7</sup> This partition need not necessarily be by metes and bounds, although the land covered by water, or used in connection therewith, may be so divided, but the extent of water or water privilege assigned may be marked by visible monuments, noting the rise and fall, by controlling the flowage through gates, by designating the number of inches to which

<sup>1</sup> *Thomas v. Thomas*, 2 C., M. & R. 34; *James v. Plant*, 4 A. & E. 749. See *Kavanagh v. Coal Mining Co.*, 14 Ir. C. L. 82.

<sup>2</sup> *Ritger v. Parker*, 8 Cush. 145.

<sup>3</sup> *Tyler v. Hammond*, 11 Pick. 193.

<sup>4</sup> *Bliss v. Rice*, 17 Pick. 23; *Atlanta Mills v. Mason*, 120 Mass. 244, 251.

<sup>5</sup> *Manning v. Smith*, 8 Conn. 289.

<sup>6</sup> *Hancock v. Wentworth*, 5 Met. 446; *Wright v. Freeman*, 5 H. & John. 467.

<sup>7</sup> *Hanson v. Willard*, 12 Maine, 142; *Smith v. Smith*, 10 Paige, 470; *Morrill v. Morrill*, 5 N. H. 134; *Hamilton v. Farrar*, 128 Mass. 492. *Doan v. Metcalf*, 46 Iowa, 120, seems to intimate that partition is confined to cases where "practicable." Undivided interests in a ferry, including both ferry and landings, may be partitioned. *Rohn v. Harris*, 130 Ill. 525.

each partitioner is entitled, or by ascertaining in any way the bulk, value, or quantity of water to be used.<sup>1</sup> In a partition of land lying on each side of the watercourse between tenants in common, by assigning the land on either side to each respectively, the dividing line between the two tracts will be the thread of the stream.<sup>2</sup> A partition of a dam and the water-power thereby formed will not be made exclusive of the mill and the mill-site to which they are appurtenant.<sup>3</sup> An ancient partition into proportionate parts of a water privilege, originally owned by one proprietor, but for a long series of years occupied by different persons in severalty, and transferred from time to time between themselves by deed, levy, or descent, will be presumed, as it has been used, excepting as to what has been disposed of by common consent.<sup>4</sup>

**§ 316. Dividing estates.**—In a partition one part of the common premises may be assigned to a party charged with an easement for the benefit of another party, to which another portion was assigned by metes and bounds,<sup>5</sup> as of flowage as the water had been wont to flow back before partition.<sup>6</sup> In a partition of a water-power, provision may be made for keeping the various portions of the dam, the water-gates, and the flume in repair, by making it a charge upon the land including them, or by a compensation to be paid by one party to another therefor.<sup>7</sup> Water, however, conducted in ditches for mining purposes and owned by tenants in common, cannot, from the nature of the water service to be performed, be mechanically partitioned, a distribution of the proceeds after a sale being the only partition practicable to permanently end the disputes of such tenants in common.<sup>8</sup> Equity will intervene to prevent

<sup>1</sup> *Hanson v. Willard*, 12 Maine, 142; *Smith v. Smith*, 10 Paige, 470; *Morrill v. Morrill*, 5 N. H. 134; *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa, 398. See *Kane v. Parker*, 4 Wis. 123, 131; *Spensley v. Janesville Cotton Manuf. Co.*, 62 Wis. 549; *Mulberger v. Koenig*, 62 Wis. 558; *Janesville Cotton Manuf. Co. v. Ford*, 55 Wis. 197; *United N. J. R. Co. v. Long Dock Co.*, 38 N. J. Eq. 142.

<sup>2</sup> *King v. King*, 7 Mass. 496.

<sup>3</sup> *Miller v. Miller*, 13 Pick. 237.

<sup>4</sup> *Munroe v. Gates*, 48 Maine, 463. See *Clark v. Debaugh*, 67 Md. 430.

<sup>5</sup> *Smith v. Smith*, 10 Paige, 470, 479.

<sup>6</sup> *Hills v. Dey*, 14 Wend. 204.

<sup>7</sup> *Smith v. Smith*, 10 Paige, 470; *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa, 398.

<sup>8</sup> *McGillivray v. Evans*, 27 Cal. 92; *Lorenz v. Jacobs*, 59 Cal. 262. In the latter case a statement that the parties as tenants in common held and



the removal of a dam and the building a new one higher up the stream by a grantee under a deed of partition of a water privilege, the effect of which will be to deprive a co-grantee under the same indenture who was entitled to "six-tenths of the water appertaining to said divided premises," which was construed to mean six-tenths of the water-power, which had been conveyed, as provided in the deed, by a trench to said co-grantee's mill for forty years during which the grantees shared the expense.<sup>1</sup> Equity will not order a sale, under a statute, if the whole water-power, in connection with each mill property, would not be worth more than the same power equally divided by a proper partition, the one half to be used with each mill, in the hands of different proprietors.<sup>2</sup>

**§ 317. Pipes and aqueducts.**— When the privilege is granted of taking water by a pipe of a specified size, it authorizes the taking of all the water which such a pipe would conduct, and it is not an abuse of the right for the grantee to permit the water to flow continuously from the mouth of the pipe, even though it runs to waste.<sup>3</sup> When the quantity of water granted is regulated by the size of the pipe through which it is drawn, it is limited to so much water as will run through the pipe without increasing its head by a dam, but if the right is granted to draw water from any and all springs on the grantor's land, "with the right to conduct the same by aqueduct to said premises for all uses and purposes forever," the grantee is entitled to take all the water from the springs which is in good faith required for use on the granted premises, and to make such reasonable arrangements as are really necessary to enable him to use all the water.<sup>4</sup> Where in a deed of land with "one hundred and fifty inches of water for propelling machinery," to be furnished by the grantor on the premises conveyed

possessed "a certain water ditch, running from and taking water from" a creek and "conducting the water of said creek" to a certain point "for mining and other useful purposes," was held to sufficiently allege that the property can be partitioned only by a sale and distribution.

<sup>1</sup> *Matteson v. Wilbur*, 11 R. L. 545.

<sup>2</sup> *Smith v. Smith*, 10 Paige, 470.

<sup>3</sup> *Bissell v. Grant*, 85 Conn. 288. See *Paschall v. Passmore*, 15 Penn. St. 295; *Arnold v. Farr*, 61 Vt. 444; *Paine v. Chandler*, 5 N. Y. S. 739.

<sup>4</sup> *Stevens v. Wiggan*, 56 N. H. 308; *Walker v. Stewart*, 18 Law Rep. 396. See *Zimmer v. San Louis W. Co.*, 57 Cal. 221.

in a flume or race and to be taken by the grantee "at the side thereof," at an opening or openings between the bottom and top of the same, it was provided that no more water be taken at said opening or openings than would be discharged at a point as low as the surface of the river "at said premises by an aperture of one hundred and fifty square inches," the deed was held to convey only as much water as would naturally flow through an opening of one hundred and fifty square inches at the side of the main race or flume as low as the surface of the river.<sup>1</sup> The use of an easement is confined to the purposes for which it was granted; and a right reserved in a deed of one lot to draw water from a well thereon for the family occupying another lot confers the right to draw water for the ordinary purposes of a family, but not for an additional use, such as a bakery.<sup>2</sup>

§ 318. **Construction.**— Grants of the right to use water are to be so construed as to substantially secure the rights which appear to have been contemplated by the parties, and the literal reading of the conveyance will not be followed if a more liberal construction does not impair the rights of the other party.<sup>3</sup> If the grant of a water-power leaves it doubtful whether the kind of mill mentioned indicates the quantity of water and measures the extent of the power intended to be conveyed, or limits the use to a particular kind of mill, the former construction will be favored, because it is most favorable to the grantee without being more onerous to the grantor.<sup>4</sup> When it appears that the granted privilege is a

<sup>1</sup> *Blanchard v. Doering*, 21 Wis. 477; 23 Wis. 200; *Norris v. Showerman*, Walker Ch. 206; 2 Dougl. (Mich.) 16.

<sup>2</sup> *Noyes v. Hemphill*, 58 N. H. 536; 27 Alb. L. Journ. 157; *French v. Marstin*, 24 N. H. 440.

<sup>3</sup> *Atlanta Mills v. Mason*, 120 Mass. 244; *Merrill v. Calkins*, 74 N. Y. 1; 10 Hun, 495; *Esty v. Baker*, 50 Maine, 325; *Salado College v. Davis*, 47 Texas, 131; *Madore's Appeal*, 24 W. N. C. (Penn.) 260; *Warren Manuf. Co. v. Hoffman*, 62 Md. 165; *Hathaway v. Mitchell*, 34 Mich. 164; *Doan*

*v. Metcalf*, 46 Iowa, 120. If the owner of the whole length of a river grants "a certain part" of it, he conveys a part of the whole length. *Bullen v. Runnels*, 2 N. H. 255.

<sup>4</sup> *Ashley v. Pease*, 18 Pick. 275; *Pratt v. Lamson*, 2 Allen, 281; *Groat v. Moak*, 94 N. Y. 115; *Hartwell v. Mutual Life Ins. Co.*, 50 Hun, 497; *Johnston v. Hyde*, 33 N. J. Eq. 632; *Warner v. Cushman*, 82 Maine, 168; *Carleton Mills Co. v. Silver*, id. 215; *Covel v. Hart*, 56 Maine, 518; *Hines v. Robinson*, 57 Maine, 324; *Kaler v.*

given quantity of power, not limited to a specific purpose, it may be apportioned to any purpose whatever, and by any person to whom it may be assigned or transferred.<sup>1</sup> And even if the grant is limited, it may carry ancillary easements necessary to the full enjoyment of what is granted. Thus a deed of a mill-site, with the appurtenant rights of constructing a canal through the grantor's land and of drawing water from a pond for the use of a mill on the land conveyed, carries by implication the right to maintain the pond, although the deed expressly provides that no rights, privileges, easements, or appurtenances shall pass by implication.<sup>2</sup> So the granted right to dig a canal through another's land confers the right to deposit the excavated soil upon the canal bank.<sup>3</sup> A grant of the right to take water from a river anywhere on the grantor's land, and to cut and maintain a canal capable of carrying sufficient water for the grantee's needs, authorizes the grantee to deepen, widen or prolong the ditch to obtain water when made necessary by a change in the river bed or any similar cause.<sup>4</sup> If, under a grant of an unlimited right to flow, at the first settlement of the country, the grantee flows his land to a certain extent for a great length of time, this will be considered his construction of the grant, and will prevent him from raising his dam.<sup>5</sup>

§ 318a. Same.—If the easement described in the grant is clearly limited to a defined locality, a substantial change in the place or manner of the enjoyment will not be permitted.<sup>6</sup> But when a water easement is granted in general or indefinite terms, rendering the construction doubtful, contemporaneous acts of the parties, giving a practical construction to the

Beaman, 49 Maine, 207; Garland v. Maine, 289; Dow v. Edes, 58 N. H. 193; Clement v. Gould, 61 Vt. 573; Hathaway v. Mitchell, 34 Mich. 164.  
 1 Hodson, 46 Maine, 511; Miller v. Lap- ham, 46 Vt. 525; 44 Vt. 416; Albee v. Huntley, 56 Vt. 454; Dewey v. Williams, 40 N. H. 222; Leavitt v. Towle, 8 N. H. 96; Salado College v. Davis, 47 Texas, 131.

<sup>2</sup> St. Anthony Falls W. P. Co. v. Minneapolis, 41 Minn. 270.  
<sup>3</sup> Wheeler v. Wilder, 61 N. H. 2.  
<sup>4</sup> Salem Capitol Flour Mills Co. v. Stayton W. D. Co., 33 Fed. Rep. 146.  
<sup>5</sup> 2 Swift's Sys. 86; Barret v. Hosmer, 1 Root, 271.  
<sup>6</sup> Jaqui v. Johnson, 27 N. J. Eq. 526, 552; 25 id. 410.

<sup>1</sup> Ibid.; Tourtellot v. Phelps, 4 Gray, 374; Casler v. Shipman, 35 N. Y. 533; Comstock v. Johnson, 46 N. Y. 615; Drummond v. Hinckley, 30 Maine, 483; Deshon v. Porter, 38

grant, will be deemed to express their intention.<sup>1</sup> Thus a right to erect a dam within certain limits is fixed by building it within those limits by mutual consent.<sup>2</sup> A grant of a right to build a dam and flow the water "as high as will answer, and not injure or obstruct the water-wheels" of an upper mill, is determined by what the parties did immediately after the grant, under a mutual agreement, defining the site and height of the dam.<sup>3</sup> And when the parties have once exercised the right, the grantee cannot change the manner of its enjoyment at his pleasure.<sup>4</sup> Thus, after pipes have been laid and water through them used for many years under a grant defining neither size or quantity, larger pipes cannot be laid and more water taken,<sup>5</sup> and pipes of the same size, if relaid, must be sunk in the same place.<sup>6</sup> If a boundary is variable, as a pond which is raised more or less at various times by a dam, parol evidence is admissible to show what line was actually agreed on at the time of the conveyance;<sup>7</sup> and if the boundary is uncertain, as is sometimes the case with alluvion, equity has jurisdiction to quiet the title of the claimants, and apportion the added soil upon just principles.<sup>8</sup> A boundary line in a deed to run so as to include the "whole of a mill-pond which may be raised by a dam," determines the land boundary and not the height to which the pond may be raised.<sup>9</sup> A grant of the right to raise the water of a stream two inches above a certain stake does

<sup>1</sup> *Makepeace v. Bancroft*, 12 Mass. 485; *Choate v. Burnham*, 7 Pick. 274; 469; *Davis v. Rainsford*, 17 Mass. 207; *Allen v. Bates*, 6 Pick. 460; *Dryden v. Jepherson*, 18 Pick. 385; *Stone v. Clark*, 1 Met. 378; *Bannon v. Angier*, 2 Allen, 128; *Farrar v. Cooper*, 34 Maine, 394; *Davidson v. Fowler*, 1 Root, 358; *Curtis v. La Grande W. Co. (Or.)*, 23 Pac. 808; *Place v. Proctor*, 2 Penny. (Pa.) 264; *ante*, § 194; *Gifford Hosiery Co. v. Pitman Mantuf. Co.*, 63 N. H. 500.

<sup>2</sup> *Boynton v. Rees*, 8 Pick. 329.

<sup>3</sup> *Dryden v. Jepherson*, 18 Pick. 385.

<sup>4</sup> *Jennison v. Walker*, 11 Gray, 423; *Evangelical Orphans' Home v. Buffalo Hydraulic Co.*, 64 N. Y. 561; 4 Hun, 419; *Jones v. Percival*, 5 Pick.

485; *Choate v. Burnham*, 7 Pick. 274; *Wynkoop v. Burger*, 12 John. 222. <sup>5</sup> *Onthank v. Lake Shore R. Co.*, 71 N. Y. 194; 8 Hun, 131.

<sup>6</sup> *Woodcock v. Estey*, 43 Vt. 515; *Jennison v. Walker*, 11 Gray, 423; *Furner v. Seabury*, 13 N. Y. S. 12; *Marsh v. Haverhill Aqueduct Co.*, 134 Mass. 106.

<sup>7</sup> *Waterman v. Johnson*, 13 Pick. 261; *Quigley v. De Haas*, 98 Penn. St. 292.

<sup>8</sup> 1 Story, Eq. Jur. § 611; *York v. Pilkington*, 1 Bro. Ch. 40; 1 Atk. 282; *Pearcy v. Bybee* (20 Oregon), 26 Pac. 233; *Conn. River Lumber Co. v. Olcott Falls Co. (N. H.)*, 21 Atl. 1090; *Bresler v. Pitts*, 58 Mich. 347.

<sup>9</sup> *Hull v. Fuller*, 4 Vt. 199.

not make the grantee liable in damages if floods cause the water to rise higher.<sup>1</sup>

§ 319. *Same.*—A conveyance of water rights should be construed in the light of preliminary agreements and surrounding circumstances, rendering the purpose of the parties plain.<sup>2</sup> A general grant of water easements will be construed in connection with any express stipulations that may be contained in the demise in view of the character of the right granted.<sup>3</sup> In *Prentiss v. Wood*,<sup>4</sup> where a grant of a water privilege by A. and B. to C. provided that “the said C. is to have the right to build a dam across said river as high as he shall need, by his being responsible for all damages that may be done by flowing in consequence of said dam, excepting as is hereinafter provided, to wit, the said C. shall have the right to flow the land of said A. and B. without paying damage therefor, so far and so high as he can do so without setting the water back upon the wheel of their grist-mill, so as in any manner to obstruct said wheel or injure the privilege of said A. and B.,” it was held that the natural construction was that C. had the right to build the dam as high as he should need, paying all damages, with the proviso that he was not to pay A. and B. any damages unless it flowed the water back upon their wheel, the clause as to the back-flow upon their wheel being a limitation of the right to flow without paying damages, not a limitation of the right granted to build a dam as high as C. should need. In the construction of a grant and reservation, the obvious intention of the parties will govern.<sup>5</sup> In *Chadwick v. Marsden*,<sup>6</sup> a reservation in a lease of “the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised, in and through the sewers and watercourses made or to be made within,

<sup>1</sup> *Thatcher v. Baker*, 109 Penn. St. 32.

<sup>2</sup> *Salmon Falls Manuf. Co. v. Portsmouth Co.*, 46 N. H. 249. See *Winkley v. Salisbury Manuf. Co.*, 14 Gray, 443.

<sup>3</sup> *Watts v. Kinney*, 6 Hill, 82; *Phelps v. Tourtellot*, 9 Gray, 102; *Kennedy v. Scovil*, 12 Conn. 317. See *Hatch v. Dwight*, 17 Mass. 289;

*Randall v. Silverthorn*, 4 Penn. St. 173.

<sup>4</sup> 118 Mass. 589.

<sup>5</sup> *Moore v. Fletcher*, 16 Maine, 63; *Provost v. Calder*, 2 Wend. 517; *Marshall v. Niles*, 8 Conn. 369; *Nicodemus v. Nicodemus*, 41 Md. 529.

<sup>6</sup> L. R. 2 Ex. 285.

through, or under the said premises," was held to "mean water naturally falling or arising on, or elsewhere, and coming to, the contiguous land, and to such matters as are the product of the ordinary use of land for habitation, such as night soil and sewage," and not to extend to the "refuse, however offensive," of certain tan-pits located on the adjoining land.

**§ 320. Use, when restricted.**—When the easement is of a certain quantity of water, the owner is not bound to use it in a particular manner, though the purpose for which it is used is mentioned in the grant. He may use the water in a different manner or at a different place, or increase the capacity of the machinery which is propelled by it, without affecting his right, if the quantity used is not increased and the change does not prejudice the rights of others.<sup>1</sup> This rule applies both to reservations and grants.<sup>2</sup> If the use of water is granted for a certain purpose, with a prohibition against certain other specified uses, the grantee may use it for any purpose not prohibited.<sup>3</sup> It is, however, within the power of the grantor to limit the use of the water granted to a specific purpose, and not merely in quantity, and, in determining whether such was the intention, the situation and circumstances of the parties may be taken into consideration.<sup>4</sup> If the grant be of water sufficient for a given purpose, and this is made by the owner of the whole stream, the grantor and his assigns are precluded from diminishing or defeating in any

<sup>1</sup> *Luttrell's Case*, 4 Co. 86; *Hale v. Oldroyd*, 14 M. & W. 789; *Watts v. Kelson*, L. R. 6 Ch. 166; *Casler v. Shipman*, 35 N. Y. 533; *Cromwell v. Selden*, 3 Comst. 253; *Merrill v. Calkins*, 74 N. Y. 1; 10 Hun, 495; *Terry v. Smith*, 47 Hun, 333; *Cress v. Varney*, 17 Penn. St. 496; *Biglow v. Battle*, 15 Mass. 313; *Adams v. Warner*, 23 Vt. 395; *Rogers v. Bancroft*, 20 Vt. 250; *Rood v. Johnson*, 26 Vt. 64; *Davis v. Muncey*, 38 Maine, 90; *Deshon v. Porter*, 38 Maine, 293; *Covil v. Hart*, 56 Maine, 518; *Blake v. Madigan*, 65 Maine, 522; *Doan v. Metcalf*, 46 Iowa, 120. See *Richards v. Koenig*, 24 Wis. 860.

<sup>2</sup> *Ibid.*; *Miller v. Lapham*, 44 Vt. 416; 46 Vt. 525.

<sup>3</sup> *Iszard v. Mays Landing Water-Power Co.*, 31 N. J. Eq. 511; 34 N. J. Eq. 556.

<sup>4</sup> *Strong v. Benedict*, 5 Conn. 210; *De Witt v. Harvey*, 4 Gray, 486; *Sibley v. Hoar*, 4 Gray, 222; *Tourtellot v. Phelps*, 4 Gray, 370, 374; *Garland v. Hodson*, 46 Maine, 511; *Ashley v. Pease*, 18 Pick. 268; *Peck v. Conway*, 119 Mass. 546; *Borst v. Empie*, 1 Selden, 33; *Shed v. Leslie*, 22 Vt. 498; *McKelway v. Seymour*, 29 N. J. L. 321; *Washabaugh v. Oyster*, 18 Penn. St. 497.



way what is thus conveyed.<sup>1</sup> To a suit for the violation of a covenant respecting the joint use of water, it is no answer to say that alterations would not be injurious, or to prove even that they are beneficial to the complainant.<sup>2</sup> Thus, a defendant has been held liable for increasing the size of a flume, although it was more advantageous to the plaintiff.<sup>3</sup> Where an indenture, made in 1841, provided that "in case there is not at any time a full supply of water for the simultaneous operations of the works connected with the dam, the grist-mill shall draw its requisite quantity of water exclusive of all other works," it was held that the right secured to the grist-mill was not merely a right to use the water exclusively in the manner and for the time it was then accustomed to be used, but a right to use the water in *quantity* as then used, and for such length of time during the season of scarcity as the custom and business of the mill might require; and that, if the work done in six hours by the wheel substituted for the one in the mill when the covenant was made, was as much as that done by the latter in twenty-four hours, and with the use of less water, there appeared to be no breach of covenant, if the business was of the same character as was done in 1841.<sup>4</sup> The grantee of the right to use the surplus water not required by a certain mill cannot interfere with the necessary supply of water for such mill, but may maintain an action against the mill-owner, if he prevents the passage of the water when there is no deficiency.<sup>5</sup>

§ 321. Statute of frauds.—Water rights are, in general, interests connected with the land, and, as such, are within the statute of frauds. The right to overflow another's land by a mill-dam,<sup>6</sup> or by the drippings from a roof,<sup>7</sup> to flow water

<sup>1</sup> *Jordan v. Mayo*, 41 Maine, 552;  
*Samuels v. Blanchard*, 25 Wis. 329.

<sup>2</sup> *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 260; *Hulme v. Shreve*, 3 Green Ch. 116; *Johnston v. Hyde*, 32 N. J. Eq. 446; *Dewey v. Bellows*, 9 N. H. 282; *Jewett v. Whitney*, 43 Maine, 242; *Howe Scale Co. v. Terry*, 47 Vt. 109; *Carver v. Miller*, 4 Mass. 558.

<sup>3</sup> *Dewey v. Bellows*, 9 N. H. 282.

<sup>4</sup> *Howe Scale Co. v. Terry*, 47 Vt. 109, 123; *Loverin v. Walker*, 44 N. H. 482. See *Davis v. Muncey*, 38 Maine, 90; *Star Manuf. Co. v. Fairbanks*, 3 Nova Scotia, 46.

<sup>5</sup> *Sumner v. Foster*, 7 Pick. 32.

<sup>6</sup> *Woodward v. Seely*, 11 Ill. 157; *Cook v. Pridgen*, 45 Ga. 331; *Harris v. Miller*, Meigs (Tenn.), 158; *Carter*

<sup>7</sup> *Tanner v. Volentine*, 75 Ill. 624.

through a drain,<sup>1</sup> or to erect a mill on another's land,<sup>2</sup> is an interest in land which cannot pass by parol, and if the right is to continue for more than a year, another clause of the statute of frauds applies also.<sup>3</sup> A parol agreement that a person may abut and erect a dam upon the land of another, not for a temporary, but for a permanent purpose, as the creation of mills or hydraulic works, is void under the statute.<sup>4</sup> The right to enter upon another's land for the purpose of repairing a dam and embankment necessary to the working of a mill, and erected by the consent of the owner of the land, can only be acquired by deed or prescription.<sup>5</sup> So, a ferry franchise is real estate, and can only be transferred by deed.<sup>6</sup> A verbal license to take water from a well on another's land gives the licensee no such interest in the well as will entitle him to recover damages for the pollution of the water therein.<sup>7</sup>

**§ 322. Parol license.**— While an easement can only be created by deed,<sup>8</sup> yet a license, which is a permission to do some act or series of acts on the licensor's land, without having any permanent interest in it, may be given verbally as well as by writing.<sup>9</sup> A parol grant of the privilege of floating timber down a private stream, not involving the occupation of the

*v. Harlan*, 6 Md. 20; *French v. Owen*, 2 Wis. 250; *Clute v. Carr*, 20 Wis. 531; *Thompson v. Gregory*, 4 Johns. 81.

<sup>1</sup> *Deyo v. Ferris*, 22 Ill. App. 154; 24 id. 416; *Total v. Bonnefoy*, 23 id. 55.

<sup>2</sup> *Trammell v. Trammell*, 11 Rich. (S. C.) 471; *Bostwick v. Leach*, 3 Day, 476.

<sup>3</sup> *Deyo v. Ferris*, *supra*.

<sup>4</sup> *Mumford v. Whitney*, 15 Wend. 380; *Moulton v. Faught*, 41 Maine, 298; *Phillips v. Tompson*, 1 John. Ch. 131.

<sup>5</sup> *Cook v. Stearns*, 11 Mass. 533; *Jackson v. Litch*, 62 Penn. St. 451.

<sup>6</sup> *Dundy v. Chambers*, 23 Ill. 369; *ante*, § 193, n.

<sup>7</sup> *Ottawa Gaslight Co. v. Thompson*, 39 Ill. 598; *Clark v. Close*, 48 Iowa, 92. An agreement to sink an arte-

sian well supplying a certain quantity of water does not require it to be potable or fit for washing or making steam. *American Well-works v. Rivers*, 36 Fed. Rep. 880. As to warranty of a certain quantity of water from a well to be dug, see *Johnston v. Johnston* (Neb.), 42 N. W. 754. As to reasonable enjoyment by a grantee whose grantor reserves the water not used, see *Wilcox v. Kendall*, 68 N. H. 609.

<sup>8</sup> *Ante*, § 300.

<sup>9</sup> *Morrill v. Mackman*, 24 Mich. 279; *Whitmarsh v. Walker*, 1 Met. 313; *Taylor v. Waters*, 7 Taunt. 374; *Fentiman v. Smith*, 4 East, 107; *Cook v. C., B. & Q. R. Co.*, 40 Iowa, 451; *Beaver v. Reed*, 9 Q. B. (Can.) 152; *Losh v. Penn. Canal Co.*, 103 Penn. St. 515.

land, is a mere license and not within the statute of frauds.<sup>1</sup> An agreement between the owner of an artificial watercourse and a railroad company, whereby the former permits the latter to divert the water into a new channel on its own land, in consideration that the company will open the old channel and restore the water thereto whenever requested, is not a contract for an interest in land within the statute.<sup>2</sup> An agreement to accept a certain annual compensation for damages occasioned by flowing land by a mill-dam,<sup>3</sup> or an agreement not to demand damages for flowing one's land, if the other party will erect a mill and dam,<sup>4</sup> does not create such a right, interest, or easement in land as requires a writing. A parol agreement to flow a neighbor's land, for a stipulated annual compensation, during an indefinite period, by means of a dam on one's own premises, is within the statute of frauds; but if that statute permits leases for a year to be created by parol, such an agreement may be treated as a valid lease from year to year, until terminated by notice.<sup>5</sup> If the owner of land assists as a laborer in building and repairing a dam which he knows will flow his land, says that the mill will benefit the neighborhood and urges other laborers to make the dam tight, these facts will not constitute either a valid license or estop him from claiming damages for the flowing of his land by the dam.<sup>6</sup> Upon such facts, it is for the jury to say whether a license was in fact given.<sup>7</sup> If acts are performed upon another's estate under licenses asked and obtained from time to time, or without causing any damage,<sup>8</sup> long enjoyment cannot be as of right so as to give rise to a custom or prescription.<sup>9</sup>

<sup>1</sup> *Rhodes v. Otis*, 33 Ala. 578; *Pursell v. Stover*, 110 Penn. 43.

<sup>2</sup> *Hamilton Hydraulic Co. v. Cincinnati R. Co.*, 29 Ohio St. 341.

<sup>3</sup> *Short v. Woodward*, 13 Gray, 86.

<sup>4</sup> *Smith v. Goulding*, 6 Cush. 154; *Clement v. Durgin*, 5 Greenl. 9. See *Seidensparger v. Spear*, 17 Maine. 123; *Smith v. Holloway (Ind.)*, 24 N. E. 886.

<sup>5</sup> *Morrill v. Mackman*, 24 Mich. 279. See *Banghart v. Flummerfelt*, 43 N. J. L. 28.

<sup>6</sup> *Batchelder v. Sanborn*, 24 N. H. 474; *Watkins v. Peck*, 13 N. H. 360.

<sup>7</sup> *Johnson v. Lewis*, 13 Conn. 803; *Swartz v. Swartz*, 4 Penn. St. 353; *Corning v. Gould*, 16 Wend. 531; *Christmas v. Oliver*, 10 Q. B. 181; *Corning v. Troy Iron Factory*, 40 N. Y. 191; 39 Barb. 311; *Smith v. Scott*, 1 Kerr (N. B.), 1.

<sup>8</sup> *Hathorn v. Stinson*, 12 Maine. 183; *Nelson v. Butterfield*, 21 Maine. 220.

<sup>9</sup> *Mills v. Colchester*, L. R. 2 C. P.

The right acquired by a license or agreement, whether oral or written, such as the right to flow land by a dam, differs from that acquired by prescription in that the privilege acquired by the contract need not be uniformly exercised to its full extent.<sup>1</sup> But an easement, whether acquired by grant or by prescription, may be extinguished, abandoned, or modified by a parol license granted by the owner of the dominant tenement and executed by the owner of the servient tenement.<sup>2</sup> Thus, evidence is admissible to prove a verbal agreement, which has been carried into effect, whereby a previously executed conveyance of a right to a watercourse through the granted premises, by courses and distances, was modified so as to change the course of the water for the mutual accommodation of the parties.<sup>3</sup>

§ 323. Same — When revocable.— When a parol license has been executed, in whole or in part, it is a justification for the acts done under it prior to its revocation or the completion of the work,<sup>4</sup> whether the acts affecting the licensor's land are done upon the land of the licensee or that of a third person.<sup>5</sup> Where a land-owner verbally authorized his neighbor to construct and use perpetually a ditch over the former's estate for the purpose of draining the latter's land, such license was held to be irrevocable by the grantee of the licensor, after the construction and continued use of the drain, although unforeseen injuries resulted therefrom.<sup>6</sup> If a licensee, under authority so conferred for a consideration, makes large invest-

476; *Cocker v. Cowper*, 1 Cr., M. & N. Y. 684; *Miller v. Auburn R. Co.*, R. 418; *Corning v. Troy Iron Factory*, 84 Barb. 485; 89 Barb. 811; 40 N. Y. 191; *Tinkham v. Arnold*, 8 Greenl. 120; *Stevens v. Morse*, 5 Greenl. 26.

<sup>1</sup> *Lacy v. Arnett*, 38 Penn. St. 169.

<sup>2</sup> *Morse v. Copeland*, 2 Gray, 302, 304; *Dyer v. Sandford*, 9 Met. 395; *Curtis v. Noonan*, 10 Allen, 406; *Winter v. Brockwell*, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682; 5 Moore & P. 712; 9 L. J. C. P. 202.

<sup>3</sup> *Le Fevre v. Le Fevre*, 4 S. & R. 241.

<sup>4</sup> *Selden v. Delaware Canal Co.*, 29

6 Hill, 61; *Carter v. Page*, 4 Ired. 424-8; *Baker v. Chicago R. Co.*, 57 Mo. 265; *Blaisdell v. Portsmouth Railroad*, 51 N. H. 483; *Sterling v. Warden*, id. 217; *Marston v. Gale*, 24 N. H. 176; *Clauser v. Jones*, 100 Ind. 128; *Allen v. Mansfield*, 82 Mo. 688; *Addison v. Hack*, 2 Gill, 221.

<sup>5</sup> *Magee v. St. John*, 28 N. Bruns. 275, 292, and cases cited above.

<sup>6</sup> *Hodgson v. Jeffries*, 52 Ind. 834; *Cook v. C. B. & Q. R. Co.*, 40 Iowa, 451, 455; *Bloomington v. Burke*, 12 Brad. (Ill.) 814.

ments for the enjoyment of a permanent easement, the licensor is estopped to revoke the license, unless the licensee can be placed in *statu quo*,<sup>1</sup> and equity will decree specific performance, as in other cases of part performance,<sup>2</sup> especially if adequate compensation in damages cannot be obtained.<sup>3</sup> The more recent decisions and the weight of authority are to the effect that, both at law and in equity, the doctrine that an executed license is irrevocable is confined to those licenses under which, when executed, it cannot be claimed that any estate or interest in lands passes,<sup>4</sup> and to licenses which are given upon a valuable consideration.<sup>5</sup> In case of laches,<sup>6</sup> or express ac-

<sup>1</sup> *Lane v. Miller*, 27 Ind. 534; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463; 19 N. J. Eq. 142; *Hall v. Chaffee*, 13 Vt. 150; *Foot v. New Haven Co.*, 23 Conn. 214; *Morse v. Copeland*, 2 Gray, 302; *Blanchard v. Baker*, 8 Greenl. 258; *Androscoggin Bridge v. Bragg*, 11 N. H. 102; *Hall v. Chaffee*, 13 Vt. 150; *Rerick v. Kern*, 14 S. & R. 267; *Mumford v. Whitney*, 15 Wend. 380; *Addison v. Hack*, 2 Gill, 221; *Van Ohlen v. Van Ohlen*, 56 Ill. 528; *Sheffield v. Collier*, 3 Kelly (Ga.), 82; *Risien v. Brown*, 73 Texas, 135.

<sup>2</sup> *McManus v. Cooke*, 35 Ch. D. 681; *Cook v. Pridgen*, 45 Ga. 331; *Winham v. McGuire*, 51 Ga. 578; *Wynn v. Garland*, 19 Ark. 23; *Le Fevre v. Le Fevre*, 4 S. & R. 241; *McKellip v. McIlhenny*, 4 Watts, 317; *Lee v. McLeod*, 12 Nev. 280; *Gooch v. Sullivan*, 13 Nev. 78; *Clark v. Glidden*, 60 Vt. 702; *Olmstead v. Abbott*, 61 Vt. 281; *Flickinger v. Shaw* (Cal.), 25 Pac. 268; *Ferguson v. Spencer* (Ind.), 25 N. E. 1035; *Nicol v. Tackaberry*, 10 Ch. (Can.) 109; *Hamilton Woolen Co. v. Moore*, 25 Fed. Rep. 4.

<sup>3</sup> *Snowden v. Wilas*, 19 Ind. 10; *Stephens v. Benson*, id. 367.

<sup>4</sup> *Clute v. Carr*, 28 Wis. 531; *Hazleton v. Putnam*, 3 Pin. (Wis.) 107; 3 Chand. 117; *French v. Owen*, 2 Wis. 250; *Fryer v. Warne*, 29 Wis. 511;

*Cook v. Stearns*, 11 Mass. 533; *Houston v. Laffee*, 46 N. H. 505; *Batchelder v. Hibbard*, 58 N. H. 269; *Van Ohlen v. Van Ohlen*, 56 Ill. 528. The rule, as sometimes stated, that an executed license cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement; but to licenses which, if given by deed, would extinguish or modify an easement. *Morse v. Copeland*, 2 Gray, 302.

<sup>5</sup> *Babcock v. Utter*, 1 Abb. Dec. 27; 1 Keyes, 115, 397. In *Cronkhite v. Cronkhite*, 94 N. Y. 323, 328, Miller, J., said of such licenses: "Even when a consideration is paid the right of revocation exists where the terms of the agreement are not of such a nature as to make out a valid agreement which could be enforced in equity. Nor does the fact of the performance of the agreement render it effectual and valid unless the acts of performance are so clear, definite and certain in their object and design, as to refer exclusively to a complete and perfect agreement of which they are a part execution." See, also, *Wheeler v. Reynolds*, 66 N. Y. 227; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Dermott v. State*, 99 N. Y. 101; *Kivett v. McKeithan*, 90 N. C. 106.

<sup>6</sup> *Weller v. Smeaton*, 1 Bro. Ch. 572; *Birmingham Canal Co. v. Lloyd*,

quiescence,<sup>1</sup> equity will not interfere by injunction to enforce the rights acquired under a parol license, but will leave the parties to first try the question at law. A license to flow the water from the licensee's land through the ditch of the licensor affords no justification for afterwards causing an increase in the quantity of the water so flowed.<sup>2</sup> A parol license to enlarge a canal justifies an increase in its depth as well as its width, and, while in force, relieves the licensee from any consequences which may naturally flow from such enlargement.<sup>3</sup> Such a license authorizing the plaintiff or his grantor to build a dam on another's land, in order to raise a reservoir of water for the use of his mill, confers no right upon the plaintiff to maintain such dam after it is built, or control the water raised by means of it.<sup>4</sup> A verbal license to erect a bridge, or aqueduct, or a dam and fish traps on another's premises is not a license to renew them as often as they fall to decay or are washed away, but is revocable at any time before they are renewed,<sup>5</sup> and, if the condition, upon which a license to build a dam is given, is that the licensor shall not be injured thereby, and the work is so imperfectly executed that the water sets back upon his wheels, the licensor is not bound by his consent, and the licensee is liable for the injury caused to him.<sup>6</sup> After the lessee has enjoyed the right secured by a verbal lease, such as a right of fishery, he is liable for the stipulated rent, notwithstanding the statute of frauds.<sup>7</sup> By a common agreement of all parties interested, though merely verbal, a new channel may doubtless be made for a stream, the water turned into it, and the old watercourse abandoned or obliterated, and the new channel be thereafter the only channel.<sup>8</sup> A contract by which

18 Ves. 517; *Anon.* 2 Eq. Cas. Abr. 523, pl. 3; *Williams v. Jersey*, 1 Cr. & Ph. Ch. 92; *Jones v. Royal Canal Co.*, 2 Molloy, 319; *Hulme v. Shreve*, 3 Green Ch. 116.

<sup>1</sup> *Cobb v. Smith*, 16 Wis. 661; 23 Wis. 261.

<sup>2</sup> *Carter v. Page*, 8 Ired. 190.

<sup>3</sup> *Selden v. Delaware Canal Co.*, 29 N. Y. 634; 24 Barb. 362.

<sup>4</sup> *Pitman v. Poor*, 38 Maine, 237; *Moulton v. Faught*, 41 Maine, 298.

<sup>5</sup> *Wingard v. Tift*, 24 Ga. 179; *Hall*

*v. Boyd*, 14 Ga. 1; *Farmer v. McDonald*, 59 Ga. 509; *Allen v. Fiske*, 42 Vt. 462; *Carleton v. Redington*, 21 N. H. 291; *Coles v. Kidder*, 24 N. H. 364; *Hepburn v. McDowell*, 17 S. & R. 388.

<sup>6</sup> *Brown v. Bowen*, 30 N. Y. 519.

<sup>7</sup> *Eastham v. Anderson*, 119 Mass. 526. As to husband acting as wife's agent, see *Emerson v. Bergen*, 71 Cal. 335.

<sup>8</sup> *Dunklee v. Wilton R. Co.*, 24 N. H. 489, 506; *Wetmore v. White*, 2 Caines, 87; *Pratt v. Lamson*, 2 Allen, 275.



one party is to build a dam and the other to pay therefor in certain instalments, which was signed only by the first party, is binding if it appears that the other party paid his instalments as required by the agreement and both acted upon it as binding.<sup>1</sup>

§ 324. *Same — Same.*— A parol license may be revoked, so long as it remains unexecuted, although a consideration for it has been paid,<sup>2</sup> and the licensor's offer is accepted,<sup>3</sup> and it terminates with the death of the licensor.<sup>4</sup> A license by a riparian proprietor for the building of a bridge on his premises is revocable, and is revoked by a conveyance of the property.<sup>5</sup> Where A. and B. agreed by an unsealed writing that A. might cut timber on B.'s land, and that B. might flow A.'s land to a certain extent by a dam, it was held that, although the licenses might have been mutual and given, each in consideration for the other, they were independent, and that either might be revoked without the other.<sup>6</sup> But where A., at B.'s request, agreed verbally to build his mill at a spot different from that which he had intended, and which was selected by B., and also to give B. possession of a strip of land required to straighten B.'s lines, and to saw B.'s lumber at less than the market rates, and B. agreed, in return, to permit A. to build a tramway across B.'s land, and to throw the waste from the mill into a stream running through B.'s land, it was held that, the contract having been executed by both parties, A.'s license to throw the waste from the mill into the stream was irrevocable.<sup>7</sup> Upon the revocation of a license to erect a dam upon another's land, and tender of the expenses thereof, it is as much the

<sup>1</sup> *Reedy v. Smith*, 42 Cal. 245.

<sup>2</sup> *Beidelman v. Foulk*, 5 Watts, 308; *Dark v. Johnston*, 55 Penn. St. 164; *Owen v. Field*, 12 Allen, 457; *Hewlins v. Shippam*, 5 B. & C. 222; *Bryant v. Whistler*, 8 B. & C. 288; *Totel v. Bonnefoy*, 123 Ill. 653; 23 Ill. App. 55; 28 Alb. L. J. 144, 165.

<sup>3</sup> *Taylor v. Gerrish*, 59 N. H. 569.

<sup>4</sup> *Bridges v. Purcell*, 1 Dev. & Bat. 492.

<sup>5</sup> *Jackson v. Babcock*, 4 John. 418;

*Drake v. Wells*, 11 Allen, 141; *Dark v. Johnston*, 55 Penn. St. 164, 171; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Clark v. Close*, 43 Iowa, 92; *Root v. Wadhams*, 107 N. Y. 384.

<sup>6</sup> *Dodge v. McClintock*, 47 N. H. 383; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248.

<sup>7</sup> *Thompson v. McElarney*, 82 Penn. St. 174; *Lacy v. Arnett*, 83 Penn. St. 199; *Johnson v. Skillman*, 29 Minn.

95, 144.

duty of the licensor as of the licensee to remove the dam.<sup>1</sup> A parol license cannot be assigned by the licensee,<sup>2</sup> and is presumed to be inoperative if not acted upon within a reasonable time.<sup>3</sup> The land-owner may even proceed to use his land as if the license had not been given, and thus revoke it without notice,<sup>4</sup> and it is revoked by his conveyance of the land without further notice.<sup>5</sup> But an abandonment will not be presumed where the enjoyment of the license is interrupted by a providential cause, without laches or fault on the part of the licensee.<sup>6</sup> If a license to butt a dam on the opposite shore, until the opposite owner should wish the privilege for his own use, is revoked, the licensee's right to the head of water thus raised and appropriated remains unimpaired.<sup>7</sup>

§ 325. **Misrepresentations.**—The right of a riparian proprietor to the use of a stream is so valuable that misrepresentations as to the benefits or disadvantages arising therefrom may afford a cause of action for fraud or deceit.<sup>8</sup> If the vendor of land which the vendee wishes, with the knowledge of the vendor, to purchase for a stock-ranch, represents that the land sold was upon a certain creek, when, in fact, the land was not supplied with water from that creek or any other source, and was worthless as a stock-ranch, the sale may be set aside at suit of the vendee, although the vendor made the statement in ignorance of the truth, and refused to enter such description in the warranty clause of the deed.<sup>9</sup> So, if the vendor of a river plantation makes positive representations as to its comparative safety from overflow, which are inducements to

<sup>1</sup> *Woodbury v. Parshley*, 7 N. H. 237.

<sup>2</sup> *Ruggles v. Lesure*, 24 Pick. 187; *Carleton v. Redington*, 21 N. H. 291; *Johnson v. Skillman*, 29 Minn. 41; *Beaver v. Reed*, 9 Q. B. (Can.) 152.

<sup>3</sup> *Hill v. Lord*, 48 Maine, 83; *Hoit v. Stratton Mills*, 54 N. H. 109.

<sup>4</sup> *Wilson v. St. Paul Ry. Co.*, 41 Minn. 56.

<sup>5</sup> *Winne v. Ulster C. S. Inst.*, 37 Hun, 349.

<sup>6</sup> *Southwestern R. Co. v. Mitchell*, 69 Ga. 114.

<sup>7</sup> *Blanchard v. Baker*, 8 Greenl. 253, which suggested that the right might still be "enjoyed by a diagonal or wing dam." See *Thomas v. Junction City Ir. Co. (Texas)*, 16 S. W. 324.

<sup>8</sup> *Farris v. Ware*, 60 Me. 482; *Hill v. Wilson (Cal.)*, 25 Pac. 1105; *Gilpin v. Smith*, 11 S. & M. 109; *Sargent v. Gutterson*, 13 N. H. 467; *Winston v. Gwathmey*, 8 B. Mon. 19, 23; *White v. Hardin*, 5 Dana, 154; *Long v. Weller*, 29 Gratt. 347.

<sup>9</sup> *Pendervis v. Gray*, 41 Texas, 326.

the vendee to purchase, the latter may recoup, to the extent of his injury, in a suit in chancery by the vendor to enforce security for the purchase-money;<sup>1</sup> and if the land is diminished in value by the overflow, and the representations are false and fraudulent, a court of equity will rescind the contract.<sup>2</sup> If a positive declaration is made that a sluiceway connected with a mill is firmly laid upon sand rock which is from four to five feet below the bed of the river at that point, the vendee may rely upon the representations, and may maintain an action for deceit against the vendor if such representations are false and fraudulent.<sup>3</sup> So, fraudulent representations, as to the extent of the right to the use of a sewer, are cause for an action for fraud and deceit.<sup>4</sup>

**§ 326. Promissory representations.**—Promissory representations, or expressions of opinion, that a dam will in the future continue to furnish the full amount of power conveyed, or that “the stream will furnish water to run the mill day and night eight months in the year,”<sup>5</sup> are not fraudulent, though proved to be erroneous;<sup>6</sup> nor are representations that the dam supplied “about three times as much” power as was conveyed, where the dam furnishes the vendee the full amount conveyed to him.<sup>7</sup> Where a navigation company laid out a town and sold the lots, the purchasers expecting that they would open the navigation to it, and the lots were rendered worthless because the funds of the company were insufficient, the vendees were held not entitled to relief in equity, upon the ground that the vendors had made no fraudulent concealment of their means.<sup>8</sup> If a deed conveys the right to flow so much of the grantor’s land as would be flowed by raising the

<sup>1</sup> *Estell v. Myers*, 54 Miss. 174; *Reynolds v. Cox*, 11 Ind. 262; *Durrett v. Simpson*, 3 Mon. 517. So, of misrepresentations which induce the vendee to believe that he is to have a right to a greater height of dam than he can rightfully maintain. *Scheible v. Slagle*, 89 Ind. 323.

<sup>2</sup> *Alexander v. Beresford*, 27 Miss. 747.

<sup>3</sup> *Faribault v. Sater*, 18 Minn. 223.

<sup>4</sup> *Whitney v. Allaire*, 1 N. Y. 805; *Green v. Collins*, 86 N. Y. 246, 258.

<sup>5</sup> *Morrison v. Koch*, 32 Wis. 254; *Banta v. Savage*, 12 Nev. 151.

<sup>6</sup> *Clark v. Ralls*, 50 Iowa, 275; *Roemer v. Conlon*, 45 N. J. Eq. 234.

<sup>7</sup> *Morrison v. Koch*, 32 Wis. 254; *Wells v. Day*, 124 Mass. 88.

<sup>8</sup> *Turner v. Cape Fear Navigation Co.*, 2 Dev. Eq. 236.

water of a stream by a dam to a certain height, it will not be cancelled upon a bill by the grantor, alleging that the deed was procured by the grantee's false representations as to the quantity of land that would be flowed by thus raising the water, if it appears that the prospective flowage could be ascertained by personal inspection; that neither party possessed any means of information not thus obtainable; that the grantor's agent inspected the land for this purpose before the sale, and the grantee did nothing tending to mislead the agent.<sup>1</sup> An affirmation that land which is, in fact, imperfectly watered is "uncommonly rich water meadow-land" will not render the contract voidable in equity by the purchaser, although the court might, on that account, be disinclined to enforce specific performance at the suit of the vendor.<sup>2</sup> And if a spring, which was represented to be upon the tract of land sold, could not, from its location and value, have formed a decided inducement to the purchase, there is no ground for rescission, if, in fact, it is found to be without the purchase.<sup>3</sup> Upon the sale of "eighty acres of land, be the same more or less," including a mill-site, if it is evident that such site was the main object of the purchaser, a deficiency of twenty acres in the land sold will not, in the absence of fraud, justify a rescission of the contract.<sup>4</sup>

§ 327. **Damages.**—Damages for the breach of a covenant against incumbrances, when the incumbrance is of a permanent character and impairs the value of the premises, such as an easement of a canal company to pass and repass along their canal upon the premises, upon which it abutted, for the purpose of cleaning and repairing it, will be measured by the diminished value of the premises.<sup>5</sup> Damages for failure to keep a dam in repair so as to furnish the necessary supply of water, as agreed in a lease of a saw-mill, the lessee to have a right to repair at the lessor's expense, is the difference between the rental value of the mill in its then condition and in the

<sup>1</sup> *Sanford v. Nyman*, 23 Mich. 326;  
*Wright v. Gully*, 28 Ind. 475. Cf.  
*Henry v. Pindar*, 22 Ch. (Can.) 257;  
*James v. Freeland*, 5 id. 302; *Hickson*  
*v. Clarke*, 25 id. 173.

<sup>2</sup> *Scott v. Hare*, 1 Sim. 13.

<sup>3</sup> *Winston v. Gwathmey*, 8 B. Mon.  
19, 23; *Jasper v. Hamilton*, 8 Dana,  
280.

<sup>4</sup> *Pollock v. Wilson*, 3 Dana. 25.

<sup>5</sup> *Mitchell v. Stanley*, 44 Conn. 312.

stipulated condition, or the cost of repairs; and profits that would have been made if kept in the latter condition, or for deterioration of machinery, etc., are too remote.<sup>1</sup>

§ 328. **Repairs.**— Mill-owners on either side of a stream are jointly liable to keep the dam between them in repair,<sup>2</sup> each being bound to keep his own flume in order, and one will not be liable, while using ordinary diligence, to the other, for damage accidentally caused in making the repairs.<sup>3</sup> The grantee of an ancient mill, the water from which has passed off, from time immemorial, through a raceway, which was an artificial channel, through land of another, has a right to enter on such land and clear out any obstructions in the ordinary manner doing no unnecessary damage,<sup>4</sup> and to make repairs<sup>5</sup> and improvements, etc., necessary to its full enjoyment.<sup>6</sup> A right to enter to cleanse a pool and repair a dam is incident to a grant to flow back water upon the grantor's premises,<sup>7</sup> and to take earth and stones from the bottom of the pond for that purpose.<sup>8</sup> A person with a right to use a well and pump on another's land, each being bound to pay for repairs proportionately, cannot maintain an action against the latter before a request and a refusal to repair.<sup>9</sup> Under the general rule that a lessor, in the absence of an express agreement, is not bound to make any repairs,<sup>10</sup> leases of a farm with "water

<sup>1</sup> *Winne v. Kelley*, 34 Iowa, 339; *Rogers v. Bemis*, 69 Penn. St. 432; *Fort v. Orndoff*, 7 Heisk. 167; *ante*, § 211b.

<sup>2</sup> *Runnels v. Bullen*, 2 N. H. 532.

<sup>3</sup> *Boynton v. Rees*, 9 Pick. 527; *Webb v. Laird*, 59 Vt. 108; *Tullar v. Baxter*, *id.* 467.

<sup>4</sup> *Prescott v. White*, 21 Pick. 341; *White v. Chapin*, 12 Allen, 516, 521; *Roberts v. Roberts*, 55 N. Y. 275.

<sup>5</sup> *Daniel v. Chaffin*, 28 Iowa, 327.

<sup>6</sup> *Beals v. Stewart*, 6 Lans. 408; *Huntington v. Asher*, 96 N. Y. 604; 26 Hun, 496. *Pico v. Colimas*, 32 Cal. 578, while admitting the general principle that a person, enjoying an easement in the land of another, may enter thereon to keep it in re-

pair, declared that a water commissioner, under the statute to regulate watercourses, etc., had no authority as such to repair a watercourse, or to make an entry to remove an obstruction. Upon an agreement for letting a farm, lands and mill, the tenant's covenant to repair the "messuages and buildings" includes repair of the mill-wheel. *Openshaw v. Evans*, 50 L. T. N. S. 156.

<sup>7</sup> *Frailey v. Waters*, 7 Penn. St. 221.

<sup>8</sup> *Miller v. Scolfield*, 12 Conn. 335.

<sup>9</sup> *Doane v. Badger*, 12 Mass. 65; *Calvert v. Aldrich*, 99 Mass. 74, 76.

<sup>10</sup> *Pomfret v. Ricroft*, 1 Wms. Saund. 321 n.; *Colebeck v. Girdlers Co.*, 1 Q. B. D. 234; *Hugall v. McKean*, 33 W. R. 588. *Sheets v. Selden*, 7 Wall.

privileges from the mill-pond for turning a wheel to drive a saddle-tree manufactory,"<sup>1</sup> and of "so much of the surplus water of a canal" as might be necessary to propel a mill of a certain kind,<sup>2</sup> have been held not to bind the former lessor to keep the mill-dam in repair, and sufficient water in the mill-pond to carry on the factory, or to prevent the latter from abandoning the navigation of the canal, and suffering it to go to decay. A general covenant in a lease of a mill property and land "to keep the mill in good repair," while it may embrace an obligation to keep the tail-race in as good repair as at the date of the agreement to lease, will not relieve the lessee of an obligation to clear the race of such deposits as result from the ordinary use of the mill.<sup>3</sup> A bond to build and keep a bridge in repair for four years binds the obligor to rebuild, even if it is washed away by an extraordinary flood, in default of which the damages will be the cost of rebuilding, with the premium requisite to insure it against the perils named in the bond for the time remaining.<sup>4</sup> One who cuts a race-way across a highway is bound to bridge it and to keep the bridge in repair.<sup>5</sup> The owner of a water-mill benefited by a reservoir higher up the stream, who promises to pay his proportionate share of the cost of necessary repairs, if made, is liable on their completion, in an ordinary action upon an account annexed.<sup>6</sup>

416, decided that a lessee, under a water-power lease, providing for an abatement of rent for every failure of water, cannot, having forfeited the estate by non-payment of rent after due proceedings had, set up a claim for repairs to the water-channel made necessary by the landlord's gross negligence. See *Oneto v. Restano* (Cal.), 26 Pac. 788.

<sup>1</sup> *Morse v. Maddox*, 17 Mo. 569.

<sup>2</sup> *Trustees v. Brett*, 25 Ind. 409.

<sup>3</sup> *Middlekauff v. Smith*, 1 Md. 329. See *Bird v. Elwes*, L. R. 3 Ex. 225.

<sup>4</sup> *Gathwright v. Callaway County*, 10 Mo. 663. *Contra*, *Livingston County v. Graves*, 32 Mo. 479, where the bridge was burned, on the ground that the agreement to repair was merely a means to find out if the builder had properly constructed the bridge.

<sup>5</sup> *West Bend v. Mann*, 59 Wis. 69.

<sup>6</sup> *Mullett v. Bemis*, 100 Mass. 92.



## CHAPTER XL

### PREScription — SEVERANCE OF TENEMENTS.

#### SECTION.

- 329. Prescriptive rights, how acquired.
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- 332, 333. Distinction between prescriptive rights in easements and land.
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- 335, 336. Ibid.— It must be continuous for the necessary period.
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- 342. Prescriptive rights limited by the user.
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- 359, 360. The effect of simultaneous and non-simultaneous grants.
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§ 329. Acquisition of prescriptive rights.—No one can acquire an easement in his own estate.<sup>1</sup> But, in the absence of an express grant of such right from another, an easement in water may arise: first, by prescription; second, upon severance of tenements. With respect to prescriptive rights, it is settled that the owner of land upon the margin of a natural stream may by long user acquire a right to use the water in a manner not justified by his natural rights. The term “pre-

<sup>1</sup> *Ritger v. Parker*, 8 Cush. 145; *White v. Chapin*, 12 Allen, 516, 518.

scription" is strictly applicable only to incorporeal hereditaments and not to land;<sup>1</sup> and, under the ancient rule of the common law, the use of the incorporeal right, in order to support a title by prescription, must have continued immemorially, that is, have had a commencement before the reign of Richard I.<sup>2</sup> Inasmuch as such length of user is now difficult of proof in England, and incapable of proof here, it came to be held that the existence of an earlier right may be inferred from evidence of enjoyment during a less period.<sup>3</sup> It is now generally held that a continued use in a particular manner and without opposition through twenty years, corresponding to the period usually prescribed by statutes of limitations for an entry on lands, is sufficient for the purpose.<sup>4</sup> Under this

<sup>1</sup> *Wilkinson v. Proud*, 11 M. & W. 33; *Carlyon v. Lovering*, 1 H. & N. 784; *Hall on the Seashore* (2d ed.), 22; *Caldwell v. Copeland*, 37 Penn. St. 427, 431; *Ferris v. Brown*, 3 Barb. 105; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Preston v. Hull*, 77 Iowa, 309.

<sup>2</sup> 1 Black. Com. 75; 2 id. 263; *Bract lib. 2, ch. 22*.

<sup>3</sup> *Falmouth v. Innys*, Mosely, 87; *Hillary v. Waller*, 12 Ves. 261; *Finch v. Resbridger*, 2 Vern. 390; *Hill v. Smith*, 10 East, 476; *Trotter v. Harris*, 2 Younge & J. 285; *Jackson v. Harvey*, 1 Cr. M. & R. 51; *Saunders v. Newman*, 1 B. & Ald. 258; *Bailey v. Applegard*, 8 Ad. & El. 161; *French Hoek Commissioners v. Hugo*, 10 App. Cas. 336; *Hazard v. Robinson*, 3 Mason, 272, 275; *Wallace v. Fletcher*, 30 N. H. 444; *Rogers v. Mabe*, 4 Dev. 180.

<sup>4</sup> *Lewis v. Price*, 2 W. Saund. 175; *Angus v. Dalton*, 3 Q. B. D. 85; *Clawson v. Primrose*, 4 Del. Ch. 643, 657; *Ricard v. Williams*, 7 Wheat. 59; *Coolidge v. Learned*, 8 Pick. 504; *Sargent v. Ballard*, 9 Pick. 251; *Melvin v. Whiting*, 10 Pick. 295; *Barnes v. Haynes*, 13 Gray, 188; *Blake v. Everett*, 1 Allen, 248; *Pierre v. Fernald*, 26 Maine, 436; *Mitchell v.*

*Walker*, 2 Aik. (Vt.) 269; *Shumway v. Simons*, 1 Vt. 53; *Wakins v. Peck*, 13 N. H. 360; *Wallace v. Fletcher*, 30 N. H. 434; *Olney v. Fenner*, 2 R. L. 211; *Horner v. Stillwell*, 35 N. J. L. 307; *Townsend v. McDonald*, 12 N. Y. 381; *Parker v. Foote*, 19 Wend. 309; *Miller v. Garlock*, 8 Barb. 153; *Shreve v. Voorhees*, 2 Green. Ch. 25; *Campbell v. Smith*, 3 Halst. 140; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Postlethwaite v. Payne*, 8 Ind. 104; *Smith v. Russ*, 17 Wis. 227; *Rooker v. Perkins*, 14 Wis. 79; *Cobb v. Smith*, 16 Wis. 661; 38 Wis. 21; *Sherwood v. Vliet*, 20 Wis. 441; *Haag v. Delorme*, 30 Wis. 591; *Arimond v. Green Bay Co.*, 31 Wis. 316; *Vail v. Mix*, 74 Ill. 127; *Sheuber v. Held*, 47 Wis. 340; *Manier v. Myers*, 4 B. Mon. 514; *Phinizy v. Augusta*, 47 Ga. 260; *Cuthbert v. Lawton*, 3 McCord, 194; *Felton v. Simpson*, 11 Ired. 84; *Griffin v. Foster*, 8 Jones, 337; *Powell v. Lash*, 64 N. C. 456. It is twenty-one years in Ohio and Pennsylvania. *Tootle v. Clifton*, 22 Ohio St. 247; *Buckingham v. Smith*, 10 Ohio, 288, 299; *Cooper v. Smith*, 9 S. & R. 26; *Strickler v. Todd*, 10 S. & R. 63; *Biedelman v. Foulke*, 5 Watts, 308; *Workman v. Curran*, 89 Penn. St. 226. Fifteen years in Vermont and

rule, the use must have assumed its character as adverse twenty years before the right can accrue; but recent acts, acquiesced in by the owner, may go the jury as evidence that the use has been in derogation of the owner's right for the full term of twenty years.<sup>1</sup> The modern doctrine of prescription has thus become a legal fiction adopted for the purpose of quieting ancient possessions.<sup>2</sup> A prescription differs from a custom in that it is personal, being alleged in the person, as in a man and his ancestors or predecessors in title, while a custom is local and serves for the inhabitants of a town, etc., or relates to insensible things, as a devise of lands.<sup>3</sup>

**§ 330. Proof rebutting lost grant — Pleading.**— According to some decisions, long-continued and uninterrupted pos-

Connecticut. *Norton v. Valentine*, 14 Vt. 239; *Ford v. Whitlock*, 27 Vt. 265; *Shrewsbury v. Brown*, 25 Vt. 197; *Arbuckle v. Ward*, 29 Vt. 43; *Rogers v. Bancroft*, 20 Vt. 250; *Ingraham v. Hutchinson*, 2 Conn. 584; *Parker v. Hotchkiss*, 25 Conn. 321; *Sherwood v. Burr*, 4 Day, 244; *Rogers v. Page*, *Brayt.* (Vt.) 169. Ten years in Texas and Alabama. *Haas v. Choussard*, 17 Texas, 588; *Baker v. Brown*, 55 Texas, 377; *Wright v. Moore*, 38 Ala. 593. Five years in California. *Campbell v. West*, 44 Cal. 646; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396. And seven years by the statutes of Georgia and Tennessee.

<sup>1</sup> *Nash v. Peden*, 1 Speers, 22. In *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605, 617, *Depue, J.*, said: "At common law there was no fixed period of prescription. Rights were acquired by prescription only when the possession or enjoyment was 'time whereof the memory of man ran not to the contrary.' By 20 Hen. III., ch. 8, the limitation in writs of right dated from the reign of Henry II. By 3 Edw. I., ch. 39, the limitation was fixed from the reign of Richard I. By 21 Jac. I., ch. 16, the time for bringing possessory actions

was limited to twenty years after the right accrued. These statutes applied only to actions for the recovery of land; none of them embraced actions in which the right to an incorporeal hereditament was involved. But by judicial construction an adverse user of an easement for the period mentioned in the statutes, as they were passed from time to time, became evidence of a prescriptive right; and finally, the fiction was invented of a lost grant, presumed from such user to have been once in existence and to have become lost. The fiction of a lost grant seems to have been devised after the statute of James. It was called a lost grant, not to indicate that the fact of the existence of the grant originally was of importance, but to avoid the rule of pleading requiring profert. Allegation of the loss of the grant excused profert and bringing the instrument into court."

<sup>2</sup> *Kingston v. Horner*, 1 Cowper, 102; *Eldridge v. Knott*, id. 214; *Jackson v. McCall*, 10 Johns. 377; *Folsom v. Freeborn*, 18 R. L. 200; 26 Sol. J. 122.

<sup>3</sup> *Foiston v. Crachroode*, 4 Co. 81 b.; *Jenkin v. Vivian*, Poph. 201.

session is merely evidence from which a jury would be justified in presuming a grant;<sup>1</sup> but, by the weight of authority in this country, while the presumption of a lost deed may be rebutted by contradicting or explaining the facts upon which it rests, yet it cannot be overcome by proof in denial of a grant.<sup>2</sup> The adverse enjoyment of the water in a stream for a less period than twenty years is not sufficient to warrant a presumption of a grant, and no superior right in the stream is acquired by mere priority of occupation.<sup>3</sup> If, therefore, a mill-dam is newly erected above an ancient mill on the same stream, the owner of the ancient mill cannot lawfully increase the height of his dam to a level with the wheel of the new mill, and thus obstruct it by backwater.<sup>4</sup> If the plaintiff in his declaration relies upon a prescriptive right to use the water, he cannot recover by proving only that the defendant's dam flows back the water on his mill-wheel, and that his rights as a riparian proprietor are thus infringed.<sup>5</sup> So, upon the other hand, a plea of a general right to a water-course is not sustained by proof of a particular right acquired

<sup>1</sup> Wallace v. Fletcher, 80 N. H. 446, citing Keymer v. Summers, B. N. P. 74; Campbell v. Willson, 8 East, 294; Gray v. Bond, 5 Moore, 327; 2 B. & B. 627; Cross v. Lewis, 2 B. & C. 686; Darwin v. Upton, 2 W. Saund. 175a; Livett v. Wilson, 8 Bing. 115; Jones v. Jones, 2 Kerr, 265.

<sup>2</sup> Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605; Coolidge v. Learned, 8 Pick. 504; Edson v. Munsell, 10 Allen, 568; Wallace v. Fletcher, 80 N. H. 434, 448; Pillsbury v. Moore, 44 Maine, 154; Burnham v. Kempton, 44 N. H. 88; Winnipisseogee Lake Co. v. Young, 40 N. H. 433; Tracy v. Atherton, 36 Vt. 510; 2 Greenl. Evid. § 539. To the same effect are numerous English authorities. Dougal v. Wilson, 2 W. Saund. 175a; Darwin v. Upton, id.; Hed v. Holcroft, 1 B. & P. 400; Balston v. Bensted, 1 Camp. 463; Bealey v. Shaw, 6 East, 208; Bright v. Walker,

1 Cr. M. & R. 217; Jenkins v. Harvey, id. 894; Hillary v. Waller, 12 Ves. 239; Wright v. Howard, 1 Sim. & Stu. 203; Mason v. Hill, 3 B. & Ad. 304; 5 B. & Ad. 1; Ring v. Pugsley, 2 Pugs. & B. (N. B.) 303. The right to flow land by a pond created by a dam attached to an ancient mill-site, is a prescriptive right in a *quæ estate*. Sargent v. Gutterson, 13 N. H. 467.

<sup>3</sup> Prescott v. Phillips, cited 6 East, 283; Rex v. Wardroper, 4 Burr. 2024; Tyler v. Wilkinson, 4 Mason, 397; Gilman v. Tilton, 5 N. H. 231; Campbell v. Smith, 3 Halst. 146; Sherwood v. Burr, 4 Day, 244; Buddington v. Bradley, 10 Conn. 213; Davis v. Fuller, 12 Vt. 178; Pugh v. Wheeler, 2 Dev. & Bat. 50.

<sup>4</sup> Sumner v. Tileston, 7 Pick. 198; *ante*, ch. 7.

<sup>5</sup> Rudd v. Williams, 43 Ill. 385.

by adverse enjoyment,<sup>1</sup> nor can the defendant, in an action for diverting a watercourse, avail of a right so acquired, unless set up in his answer.<sup>2</sup>

§ 331. **Disabilities.**—Prescription thus depends, at the present day, upon the presumption of a previous grant or agreement which has been lost by lapse of time.<sup>3</sup> But a grant cannot be presumed with respect to that which in its nature could not be granted, or against a person legally incapable of making it.<sup>4</sup> An insane person cannot make a binding grant of his real estate, and no prescription begins to run against him until his death or the removal of the disability.<sup>5</sup> So, no presumption of a grant arises, from the adverse enjoyment of an easement, against a minor or married woman.<sup>6</sup> In the case of a reversion, the time of prescription does not begin to run against the reversioner, until his interest becomes so vested, or he has such knowledge that a permanent easement is claimed, as to give him a cause of action, although the tenant for life or years may permit easements to be acquired by user which will be valid during his tenancy.<sup>7</sup> Where a company was authorized

<sup>1</sup> *Darlington v. Painter*, 7 Penn. St. 473; *Wetmore v. Robinson*, 2 Conn. 529; *Burbank v. Ditch Co.*, 13 Nev. 431; *Meyer v. Horst*, 106 Penn. St. 552.

<sup>2</sup> *Matthews v. Ferrea*, 45 Cal. 51.

<sup>3</sup> *Rust v. Low*, 6 Mass. 97; *Morse v. Copeland*, 2 Gray, 305; *Edson v. Munsell*, 10 Allen, 557, 567; *Howes v. Grush*, 131 Mass. 207; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605; *Re Clark*, 4 N. Y. S. 259.

<sup>4</sup> *Barker v. Richardson*, 4 B. & Ald. 579; *Ricard v. Williams*, 7 Wheaton, 109; *Hill v. Lord*, 48 Maine, 96; *Ayraud v. Babin*, 19 Martin (La.), 471; *Jackson v. Johnson*, 5 Cowen, 74.

<sup>5</sup> *Edson v. Munsell*, 10 Allen, 557; *Currier v. Gale*, 3 Allen, 328. The general rule is that an intervening disability between the commencement of the adverse enjoyment and the expiration of the twenty years will not defeat the prescriptive right.

*Wallace v. Fletcher*, 30 N. H. 434; *Tracy v. Atherton*, 36 Vt. 503; *Andrews v. Mulford*, 1 Hayw. (N. C.) 322; *Mercer v. Selden*, 1 How. 37; *Peck v. Randall*, 1 Johns. 176; *Moore v. White*, 6 Johns. 360; *Dekay v. Darrah*, 2 Green (N. J.), 288; *Clark v. Richards*, 8 id. 347; *McFarland v. Stone*, 17 Vt. 165. But the minority of an heir who succeeds to the dominant tenement during the twenty years has been held to interrupt the prescription. *Melvin v. Whiting*, 13 Pick. 184; *Watkins v. Peck*, 13 N. H. 360; *Lamb v. Crosland*, 4 Rich. (S. C.) 536.

<sup>6</sup> *Reiner v. Stuber*, 20 Penn. St. 458; *Watkins v. Peck*, 13 N. H. 360. See *Tyler v. Wilkinson*, 4 Mason, 402.

<sup>7</sup> *Saunders v. Annesley*, 2 Sch. & Lef. 101; *Baxter v. Taylor*, 4 B. & Ad. 72; *Barker v. Richardson*, 4 B. & Ald. 578; *Wood v. Veal*, 5 B. & Ald. 454; *Doe v. Reed*, id. 282; *Gray v. Bond*, 2

by act of Parliament to construct and operate a canal for public use, and the defendant pleaded a prescriptive right to draw water therefrom for operating a mill and steam engine erected upon the banks, the court held that such right could not be maintained, for it implied an original grant thereof by the company, which had no right to make such a grant or to use the water for any purpose except for that of a canal.<sup>1</sup> In *Burbank v. Fay*,<sup>2</sup> in New York, it was held that, as the canal commissioners could not grant the State canals, no right adverse to the State could be acquired by a private use of the waters of such canals, whether adverse or by permission. In *Goodman v. Mayor of Saltash*,<sup>3</sup> the defendants claimed, as two free inhabitants of ancient tenements in a borough, and also as free inhabitants of the borough and as subjects of the realm, to have, as of right and by immemorial usage, the privilege of dredging for oysters in a public navigable river, and the plaintiffs, who represented the borough corporation and its lessees, claimed to be possessed of a several oyster fishery in the river, which fishery the usage tended to destroy. The plaintiffs proved a prescriptive right to a several fishery, and it was held that the defendants' claim of immemorial user was not a profit *à prendre in alieno solo*, and that a reasonable presumption should be made as to the lawful origin of the usage, namely, that the original grant to the corporation was subject to a trust or condition in favor of the defendants. In a recent

Bro. & Bing. 667; *Dawson v. Norfolk*, 1 Price, 246; *Daniel v. North*, 11 East, 372; *Yard v. Ford*, 2 W. Saund. 175a; *McGregor v. Wait*, 10 Gray, 72; *Parker v. Framingham*, 8 Met. 260; *Lund v. New Bedford*, 121 Mass. 286; *Wallace v. Fletcher*, 80 N. H. 434; *Tinsman v. Belvidere R. Co.*, 25 N. J. L. 255; *Schenley v. Commonwealth*, 36 Penn. St. 29; *Reimer v. Stuber*, 20 Penn. St. 458. The same is true of a mortgagee. *Murphy v. Welch*, 128 Mass. 489. Leasing the servient estate to a tenant after the time of prescription has begun to run would not prevent the acquisition of the right. *Cross v. Lewis*, 2 B. & C. 686; *Mebane v. Patrick*, 1 Jones, 23.

<sup>1</sup> *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 815; *Staffordshire Canal v. Birmingham Canal*, L. R. 1 H. L. 254; 11 Jur. 71; *National Manure Co. v. Donald*, 4 H. & N. 8; *Preston v. Fulwood Local Board*, 84 W. R. 196; *Sapp v. Northern Central Ry. Co.*, 51 Md. 125; *Armstrong v. Pennsylvania R. Co.*, 38 N. J. L. 1; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605, 621; *ante*, § 225.

<sup>2</sup> 65 N. Y. 57. See *Jessup v. Loucks*, 55 Penn. St. 350; *Cass v. Pennsylvania R. Co.*, 51 Penn. St. 351; *Hoadley v. San Francisco*, 50 Cal. 265.

<sup>3</sup> 7 App. Cas. 633; 5 C. P. D. 481; 7 Q. B. D. 106. See *Re Haversham Free Fishermen*, 36 Ch. D. 329.



case, where there was no corporation and the persons exercising the privilege were not all of one class, it was held that the circumstances of the enjoyment must be carefully looked to.<sup>1</sup>

§ 332. **Easements—Land.**—The title to an easement by adverse user is also to be distinguished from a title to land claimed by adverse possession. In the latter case a mere verbal protest or prohibition to occupy the premises is not sufficient without entry to defeat the right acquired by disseisin.<sup>2</sup> But in the case of an easement, the title rests chiefly on the owner's acquiescence in the adverse use, and the presumption of a grant may be rebutted by proof of declarations without evidence of opposition to the use by suit at law or by forcible resistance.<sup>3</sup> Where, for example, an easement in an aqueduct on another's land was claimed by adverse user, and it appeared that the owner of the servient tenement had forbidden his neighbor to enter, and had ordered him off the land while there for the purpose of repairing the aqueduct, it was held that these verbal orders were admissible to show an interruption of the easement, and that it was not necessary to use actual force to eject, in order to break the continuity of possession and use.<sup>4</sup> If a suit is brought within twenty years against the occupants of a mill-dam and is compromised, this fact is admissible in evidence to rebut the presumption of an easement by prescription.<sup>5</sup> In *Kimball v. Ladd*,<sup>6</sup> the Supreme Court of Vermont held that acts may amount to acquiescence, even when there are verbal objections, and that the owner of a lower mill, who claims the right to have the water come to him through the flume and gates of an upper mill, may acquire a prescriptive right to the continued flow of the water as the

<sup>1</sup> *Tilbury v. Silva*, 45 Ch. D. 98.

<sup>2</sup> *Workman v. Curran*, 89 Penn. St. 226; *Smith v. Miller*, 11 Gray, 145; *Bowen v. Guild*, 180 Mass. 121.

<sup>3</sup> *Ibid.*; *Chicago Ry. Co. v. Hoag*, 90 Ill. 839; *Stillman v. White Rock Co.*, 8 Wood. & M. 538, 549; *Nichols v. Aylor*, 7 Leigh, 546; *Field v. Brown*, 24 Gratt. 74; *Tyler v. Wilkinson*, 4 Mason, 897; *Pierce v. Cloud*, 42 Penn. St. 102. Where a dam is built under authority from the State, acquiescence is not presumed on the

part of the owner of land flowed by the dam. *Jessup v. Loucks*, 55 Penn. St. 350.

<sup>4</sup> *Powell v. Bagg*, 8 Gray, 441; *Connor v. Sullivan*, 40 Ct. 26; *Tracy v. Atherton*, 36 Vt. 514; *Ingraham v. Hough*, 1 Jones, 89.

<sup>5</sup> *Postlethwaite v. Payne*, 8 Ind. 104; *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267. See *Langford v. Poppe*, 56 Cal. 73.

<sup>6</sup> 42 Vt. 747.

upper mill-owner permits it to run, whatever the latter may say in denial of his claim.

§ 333. **Same—Same.**—Long enjoyment of an easement establishes a right to the easement, but not to the land itself,<sup>1</sup> and the acquisition, by adverse enjoyment, of the privilege of ponding back water on another's land does not prevent the latter from conveying the right of soil.<sup>2</sup> A riparian proprietor whose title extends *usque ad filum aquæ*, may acquire by prescription the right to maintain a dam across the stream and to abut it on the opposite shore.<sup>3</sup> If there is no claim of right to the land on which the dam is built, only an easement will be gained; but the erection of a dam on the land of another, and maintaining it, uninterruptedly and under a claim of right to the land for a period of twenty years, with the acquiescence and knowledge of the owner of the land, and during all the same period flowing the land of a third person above on the stream with his knowledge and acquiescence, give a title by adverse possession to the land on which the dam is located, and a right by prescription to flow the land of such third person situated above on the stream.<sup>4</sup> If a highway extending across a stream is used as a dam for twenty years without interruption on the part of the State, or objection on the part of the owner of land which is flowed by the pond, the latter cannot maintain an action for the injury to his land.<sup>5</sup> In support of a claim of title to the whole bed of a river on which the plaintiff's land bounds, he is entitled to submit to the jury acts of ownership, such as the taking of stones, not only in that part of the river which lies between the lands of the plaintiff and the defendant, but along the bed of the river beyond the defendant's land.<sup>6</sup> In *Ridgway v. Ludlow*,<sup>7</sup> in Indiana, it was

<sup>1</sup> *Schuykill Navigation Co. v. Stoe-son v. Androscoggin Bridge*, 5 Maine, 2 Grant Cas. 462.

<sup>2</sup> *Everett v. Dockery*, 7 Jones (N. C.), 390. See *Keyser v. Covell*, 62 N. H. 283.

<sup>3</sup> *Bliss v. Rice*, 17 Pick. 23; *Pratt v. Lamson*, 2 Allen, 275, 288; *Beidelman v. Foulk*, 5 Watts, 308; *Burnham v. Kempton*, 44 N. H. 78.

<sup>4</sup> *Trask v. Ford*, 39 Maine, 437; *Chalk v. McAlily*, 11 Rich. (S. C.) 153; *Perrin v. Garfield*, 37 Vt. 304; *Thomp-*

*son v. Androscoggin Bridge*, 5 Maine, 62; *Dryden v. Jepherson*, 18 Pick. 392.

<sup>5</sup> *Borden v. Vincent*, 24 Pick. 301; *Lawrence v. Fairhaven*, 5 Gray, 114; *Perley v. Hilton*, 55 N. H. 444.

<sup>6</sup> *Jones v. Williams*, 2 M. & W. 326; *Attorney General v. Portsmouth*, 25 W. R. 559; *Moore on the Foreshore*, 558.

<sup>7</sup> 58 Ind. 248. See *Clarke v. Wagner*, 74 N. C. 791.

held that a title acquired by adverse possession to land adjoining an unnavigable lake within the congressional survey carried with it the bed of the lake to its thread, and that the entry of the original owner, within the period of prescription, upon the bed of the lake, from which the water had receded, and the removal therefrom of its natural products, did not affect the claimant's title, these acts not being with his knowledge, or accompanied by any assertion of ownership.

§ 334. **Prescriptive right — Consistency.**— In order to establish the presumption of a right or easement in the lands or waters of another person, the enjoyment must have been uninterrupted, adverse, and under a claim of right, and with the knowledge of the owner,<sup>1</sup> whose knowledge binds his grantee.<sup>2</sup> It must have been inconsistent with or contrary to the interests of the owner, and of such a nature that it is difficult or impossible to account for it except on the presumption of a grant from him.<sup>3</sup> If the use or enjoyment has been consistent with the continuance of his right or title, no such presumption arises. In order to establish a prescriptive right to a certain flow of water from another's reservoir higher up the stream, the owner of the dam must not have merely permitted the water to flow as demanded without intending to acknowledge any right on the part of the lower proprietor, for so equivocal an act would not justify a presumption of an adverse user or enjoyment.<sup>4</sup> So, the erection of a dam across a stream to raise a head of water for the purpose of driving wheels and machinery in a mill, and the cutting of canals, sluices, and water-ways to conduct, apply, and discharge the water, although they may change in some degree the natural flow of the stream and cause a temporary obstruction to the passage of the water, yet, if they do not essentially affect the

<sup>1</sup> *Livett v. Wilson*, 3 Bing. 115; *Perrin v. Garfield*, 37 Vt. 310; *Arnold Coalter v. Hunter*, 4 Rand. (Va.) 58; *v. Stevens*, 24 Pick. 110; *Wilson v. Stokes v. Upper Appomattox Co.*, 3 Wilson, 4 Dev. 154.

*Leigh*, 318; *Chicago Ry. Co. v. Hoag*, 90 Ill. 339; *Ingraham v. Hutchinson*, 2 Conn. 584; *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71; *Flora v. Carbean*, 38 N. Y. 111; *Trask v. Ford*, 39 Maine, 437; *Smith v. Miller*, 11 Gray, 145; *Kilburn v. Adams*, 7 Met. 33; *Hannefin v. Blake*, 102 Mass. 297;

<sup>2</sup> *Ibid.*; *Franklin v. Pollard Mill Co.*, 38 Ala. 318.

<sup>3</sup> *Morse v. Williams*, 62 Maine, 445; *Brace v. Yale*, 10 Allen, 444; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396.

<sup>4</sup> *Vliet v. Sherwood*, 35 Wis. 229; 38 Wis. 159.

reasonable use of the current by the riparian proprietors above and below for similar purposes, they would not be inconsistent with the rights of such proprietors, and would not be deemed to confer any right or to take away any title or privilege.<sup>1</sup> If, on the other hand, the mode of controlling and regulating the use of the water essentially interrupts the original and natural flow of the water, and interferes materially with the right of other riparian owners to appropriate and use the water, it is, in its nature, adverse, and, if continued for twenty years, affords a conclusive presumption of a grant of such appropriation and use.<sup>2</sup> The right when established by adverse user not only bars the remedy but extinguishes the original right.<sup>3</sup> Where a judgment of ouster is entered, upon an information in the nature of a *quo warranto*, against a corporation owning a mill privilege, upon which it has erected and maintained a dam, a grantee of the corporation who acquired his title before such judgment was entered, and who has maintained the dam for more than twenty years after the judgment, gains a prescriptive right to maintain the same as against the owner of the land which it flows.<sup>4</sup>

§ 335. Same — Continuity.— In order to support an easement by prescription, the adverse use must have been continuous.<sup>5</sup> A person cannot claim an easement in his own land,

<sup>1</sup> *Brace v. Yale*, 10 Allen, 444; *Thurber v. Martin*, 2 Gray, 394; *Gould v. Boston Duck Co.*, 13 Gray, 451; *Donnell v. Clark*, 19 Maine, 174; *Parker v. Hotchkiss*, 25 Conn. 321; *Keeney Manuf. Co. v. Union Manuf. Co.*, 39 Conn. 576; *Platt v. Johnson*, 15 Johns. 213; *Shreve v. Voorhees*, 2 Green Ch. 25. This is upon the principle that no prescriptive right is acquired where the person against whom the right is claimed could not have interrupted or prevented the exercise of the subject of the supposed grant. *Webb v. Bird*, 13 C. B. N. S. 841; *Winship v. Hudspeth*, 10 Exch. 5; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Nelson v. Butterfield*, 21 Maine, 220.

<sup>2</sup> *Ibid.*; *Newhall v. Ireson*, 8 Cush. 595. The erection of a new and higher dam in place of an old one is not an infringement of another's prescriptive right to use the water, if such use is not thereby prejudiced. *Rogers v. Bruce*, 17 Pick. 184.

<sup>3</sup> *Bicknell v. Comstock*, 113 U. S. 149; *Ballard v. Struckman*, 123 Ill. 636; *Weed v. Keenan*, 60 Vt. 74.

<sup>4</sup> *Campbell v. Talbot*, 132 Mass. 174.

<sup>5</sup> *Monmouth Canal Co. v. Harford*, 1 C. M. & R. 631; *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267; *Ward v. Robins*, 15 M. & W. 237; *Pollard v. Barnes*, 2 Cush. 191; *Tyler v. Mather*, 9 Gray, 177; *Bodfish v. Bodfish*, 105 Mass. 317; *Alta L. & W. Co. v. Hancock*, 85 Cal. 219.

and the time during which the claimant may have owned or leased the servient tenement cannot be counted in computing the length of enjoyment, nor can any length of user of a ditch or dam entirely on one's own land be connected with a consequential injury resulting therefrom to a neighbor's land and continued for an insufficient period.<sup>1</sup> But the times of enjoyment by an ancestor and his heir, or by a seller and the purchaser, may be counted together in order to make up the requisite period,<sup>2</sup> and it is sufficient *prima facie* proof of a prescription for a general easement, as of a right of way for all purposes, to show the actual exercise of the right for more than twenty years for all the purposes for which its exercise was required at different times, although for some of those purposes it was first used in fact within that period.<sup>3</sup> An occasional suspension or interruption of the enjoyment will not defeat the right, if it arises from such causes as the dryness of the season;<sup>4</sup> a temporary failure to exercise the right to the extent claimed;<sup>5</sup> or fluctuations in the flow of the stream.<sup>6</sup> So an entry by stealth, or for purposes other than those connected with the right to enter, will not break the continuity of exclusive possession in another.<sup>7</sup> So a temporary suspension

<sup>1</sup> *Mansur v. Blake*, 62 Maine, 38; *Polly v. McCall*, 37 Ala. 20; *Roundtree v. Brantley*, 37 Ala. 544; *Wilder v. Clough*, 55 N. H. 359; *Reed v. Earnhart*, 10 Ired. 516; *Haag v. Delorme*, 30 Wis. 594; *Holland v. Long*, 7 Gray, 486; *Olney v. Gardiner*, 4 M. & W. 496.

<sup>2</sup> *Sargent v. Ballard*, 9 Pick. 251; *Leonard v. Leonard*, 7 Allen, 277; *Hill v. Crosby*, 2 Pick. 466; *Kent v. Waite*, 10 Pick. 138; *Melvin v. Whiting*, 13 Pick. 184; *Williams v. Nelson*, 23 Pick. 141; *McFarlin v. Essex Co.*, 10 Cush. 304; *Sawyer v. Kendall*, id. 244; *Okeson v. Patterson*, 29 Penn. St. 22; *Benson v. Soule*, 32 Maine, 39.

<sup>3</sup> *Dare v. Heathcote*, 25 L. J. N. S. Ex. 245; *Cowling v. Higginson*, 4 M. & W. 245; *Davies v. Stephens*, 7 C. & P. 570.

<sup>4</sup> *Hall v. Swift*, 6 Scott, 167; *Tyler*

*v. Wilkinson*, 4 Mason, 397; *Geranger v. Summers*, 2 Ired. 229; *Haag v. Delorme*, 30 Wis. 591.

<sup>5</sup> *Wood v. Kelley*, 30 Maine, 47. See *Bodfish v. Bodfish*, 105 Mass. 317; *Branch v. Doane*, 18 Conn. 233; 17 Conn. 402. If the different parties do not claim under the same title, or one of them within the twenty years occupies by permission of the owner of the servient tenement, the continuity is broken. *Winship v. Hudspeth*, 10 Exch. 5; *Benson v. Soule*, 32 Maine, 39; *Perrin v. Garfield*, 37 Vt. 309.

<sup>6</sup> *Winnipisseogee Lake Co. v. Young*, 40 N. H. 436; *Tyler v. Wilkinson*, 4 Mason, 397; *Perrin v. Garfield*, 37 Vt. 310. See *Curtis v. Angier*, 4 Gray, 547; *Plympton v. Converse*, 42 Vt. 712; *Carr v. Foster*, 3 Q. B. 581.

<sup>7</sup> *Burrows v. Gallup*, 32 Conn. 493.

of the user by agreement, or the temporary substitution of another user for the particular one exercised, is not an interruption; as where A., by agreement with B., makes a canal across a way over his close and builds a bridge over the canal by which B. may cross.<sup>1</sup> But an agreement between the parties, upon sufficient consideration, that suit to recover possession shall not be brought during the life-time of either party, breaks up the adverse character of the holding.<sup>2</sup> If the possession is adverse to the real owner, it need not be adverse to the whole world.<sup>3</sup> Merely disputing the right is not sufficient.<sup>4</sup>

§ 336. *Same — Same.*— The diversion of water from a stream by means of a trench is substantially continuous, although subject to interruption during a part of each year by the owner of the land through which the trench is dug.<sup>5</sup> Where a prescriptive right to flow land is claimed, the question is not whether the claimant alone and exclusively has caused the land to be flowed, but whether he has flowed it uninterruptedly for a particular purpose; and it is, therefore, no objection to the acquisition of such a right by prescription that the flowing was caused by different dams owned by different persons, one of whom exercised the right of flowage for the purpose of floating logs, and another for the purpose of working mills.<sup>6</sup> If a watercourse is first obstructed by a temporary dam erected to aid in the construction of a permanent dam, which is afterwards built, and not as a means of enjoying or appropriating the water for any of the purposes for which the second dam is intended, the maintenance of the temporary dam is not an assertion of a permanent right to raise the water, and the time during which it is maintained is not to be computed as part of the period of prescription for setting back the stream.<sup>7</sup> So if a dam is permitted to be out of repair for

<sup>1</sup> *Payne v. Sheddon*, 1 Moo. & Rob. 882; *Lovell v. Smith*, 3 C. B. N. S. 120; *Reynold v. Edward*, Willes, 282; *Davis v. Morgan*, 4 B. & C. 8.

<sup>2</sup> *Dietrick v. Noel*, 42 Ohio St. 18.

<sup>3</sup> *Liddon v. Hodnett*, 22 Fla. 442.

<sup>4</sup> *Cox v. Clough*, 70 Cal. 345; *McGeorge v. Hoffman*, 183 Penn. St. 381.

<sup>5</sup> *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241; *Cowell v. Thayer*, 5 Met. 257.

<sup>6</sup> *Davis v. Brigham*, 29 Maine, 391; *Kent v. Waite*, 10 Pick. 138.

<sup>7</sup> *Branch v. Doane*, 17 Conn. 402, 419; 18 Conn. 233. See *Durgin v. Leighton*, 10 Mass. 56.



an unreasonable time, as for one or more years, during which the land above is not flowed, the prescriptive right of flowage is interrupted and must begin anew.<sup>1</sup> The use, without objection, of a stream during a period of abundance cannot be the foundation of a prescriptive right.<sup>2</sup>

§ 337. *Same — Notoriety.*—The user to be adverse must be attended by such circumstances of notoriety that the person against whom the right is exercised may have reasonable notice that the right is claimed against him, and be enabled to resist its acquisition by suit at any time before the period of prescription has elapsed.<sup>3</sup> Thus, the occasional use of flash boards for brief periods, when little or no injury may be done, does not amount to that open and uninterrupted use which is required.<sup>4</sup> Such boards may be used so continuously as to make them a part of the permanent structure, and by such user a right to flow to the height of such boards may be acquired;<sup>5</sup> but their use only during times of low water, though for more than twenty years, does not justify keeping the water to the height of such boards during the whole year.<sup>6</sup> It is a question of fact for the jury whether such user has established the right;<sup>7</sup> and if within twenty years the claimant has been ordered by an upper proprietor to remove the flash boards from his dam, and has acquiesced and admitted that he had no right to use them, the presumption of a grant is defeated.<sup>8</sup> The maintenance of a mill-dam is an act of sufficient notoriety to raise a presumption of knowledge on the

<sup>1</sup> *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Metz v. Darney*, 25 Penn. St. 519; *Barber v. Nye*, 65 N. Y. 221; *Olney v. Gardiner*, 4 M. & W. 500. See *Dana v. Valentine*, 5 Met. 8.

<sup>2</sup> *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185.

<sup>3</sup> *Gilford v. Winnipisseogee Lake Co.*, 52 N. H. 262; *Solomon v. Vintners' Co.*, 4 H. & N. 602; *O'Neil v. Blodgett*, 53 Vt. 213; *Emery v. Raleigh R. Co.*, 102 N. C. 209.

<sup>4</sup> *Pierce v. Travers*, 97 Mass. 806; *Marcy v. Shulta*, 29 N. Y. 346; *Hall v.*

*Augsbury*, 46 N. Y. 622; *Carlisle v. Cooper*, 21 N. J. Eq. 596.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*; *Marcy v. Shulta*, 29 N. Y. 346.

<sup>7</sup> *Noyes v. Silliman*, 24 Conn. 15; *Branch v. Doane*, 18 Conn. 233; 17 Conn. 402; *Pollard v. Barnes*, 2 Cush. 191.

<sup>8</sup> *Sumner v. Tileston*, 7 Pick. 198. Evidence of complaints made by those having no interest to others who have no interest and make no use of the dam is irrelevant. *Bucklin v. Truell*, 61 N. H. 508.

part of the land-owner;<sup>1</sup> but the long continued use of a drain beneath different houses would not give rise to such presumption, if the course of the drain was not known to any of the owners of the houses.<sup>2</sup> If the water in a mill-pond gradually subsides in consequence of the decay of the dam, the owner of an adjoining meadow, who has title to the edge of the pond when full, and whose cattle wander from the meadow over the bottom of the pond, does not thereby acquire title by adverse possession to the bed of the pond in the absence of further notice of such a claim to its owner.<sup>3</sup> The raising of grass upon land rendered unfit by overflow for other cultivation, if done openly, constitutes adverse possession.<sup>4</sup>

§ 338. **Same — Not permissive.**— The enjoyment must also be as of right, and not by license or merely permissive.<sup>5</sup> “If,” says Chapman, J.,<sup>6</sup> “the use of a way is under a parol consent given by the owner of the servient tenement to use it as if it were legally conveyed, it is a use as of right.<sup>7</sup> So an occupation of land under a parol gift from the owner is an occupation as of right.<sup>8</sup> So if under a parol contract by a tenant in common.<sup>9</sup> In such cases the law presumes, after the lapse of twenty years, that a legal conveyance was made. But the character of the use or occupation depends upon the language used and the manner of the enjoyment. If the language is

<sup>1</sup> *Perrin v. Garfield*, 37 Vt. 311.

<sup>2</sup> *Carbrey v. Willis*, 7 Allen, 368; *Hannefin v. Blake*, 102 Mass. 297.

<sup>3</sup> *Eddy v. St. Mars*, 53 Vt. 462.

<sup>4</sup> *Merrill v. Tobin*, 30 Fed. Rep. 788. See *ante*, § 22.

<sup>5</sup> *Cholmondeley v. Clinton*, 2 Jac. & W. 1; *Bright v. Walker*, 1 C. M. & R. 219; *Baker v. Boston*, 12 Pick. 184; *White v. Chapin*, 97 Mass. 101; *Kilburn v. Adams*, 7 Met. 33; *Paine v. Hutchins*, 49 Vt. 317; *Blaine v. Ray*, 61 Vt. 566; *Postlethwaite v. Payne*, 8 Ind. 104; *Mebane v. Patrick*, 1 Jones (N. C.), 23; *Hall v. McLeod*, 2 Met. (Ky.) 98; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Hoch v. Manhattan Ry. Co.*, 13 N. Y. S. 683;

*Corning v. Troy Iron Factory*, 40 N. Y. 191; *Babcock v. Utter*, 1 Keyes, 391, 115; 1 Abb. Dec. 27; *Ingraham v. Hough*, 1 Jones, 39; *Winter v. Winter*, 8 Nev. 129. The mere fact that the use began in a trespass does not show that it was not continued under a claim of right. *Sibley v. Ellis*, 11 Gray, 417.

<sup>6</sup> *Stearns v. Janes*, 12 Allen, 582.

<sup>7</sup> *Ashley v. Ashley*, 4 Gray, 197; *Kimbrall v. Walker*, 7 Rich. (S. C.) 422.

<sup>8</sup> *Sumner v. Stevens*, 6 Met. 337; *Legg v. Horn*, 45 Conn. 415.

<sup>9</sup> *Leonard v. Leonard*, 10 Mass. 281; *Ingalls v. Newhall*, 139 Mass. 268.

such as to create only a license or a lease, the enjoyment is regarded as permissive, and not as of right, and no title is acquired by it.”<sup>1</sup> The long-continued maintenance of pipes for a water supply across a lot of land will not justify the inference of a grant, if the right to the water supply was founded upon a revocable license which has been revoked.<sup>2</sup> Entry upon lands under a contract of purchase cannot be the foundation of an adverse possession, until the contract is renounced;<sup>3</sup> and if a grant is clear, possession beyond what is granted and admitted cannot be presumed adverse.<sup>4</sup> The owner of a ferry, who, having opened, as an approach thereto, a lane through his land, which he constantly kept in repair, and which the public used for more than twenty-one years, barred up the lane on ceasing to use the ferry, was held not liable to indictment for obstructing a highway, the public user being merely permissive.<sup>5</sup>

§ 339. Same—Same.—The presumption of a grant is rebutted if the person prescribing for the easement acknowledges the right of the owner within twenty years, though he does it under a mistake of his own rights.<sup>6</sup> So the asking leave to exercise the right from time to time within the period of prescription breaks the continuity of the enjoyment as of right, inasmuch as each asking of leave is an admission that, at that time, the person so asking had no title;<sup>7</sup> but the right, when

<sup>1</sup> Cheever v. Pearson, 16 Pick. 266; Tickle v. Brown, 4 Ad. & El. 369, 882; Becker v. Church, 115 N. Y. 562; Beasley v. Clarke, 2 Bing. N. C. 705, 709; Watkins v. Peck, 18 N. H. 860; Cronkhite v. Cronkhite, 94 N. Y. 323; Willey v. Hunter, 57 Vt. 479; Pierce v. Cloud, 42 Penn. St. 102. Any possession of land which is accompanied by the recognition of a superior title still existing, is not adverse to that title. Griswold v. Butler, 8 Conn. 246. But when a person takes possession under a parol agreement for a purchase, and pays for the land, or purchases it and takes a deed which is defective, the ensuing possession of the purchaser is *prima facie* under a claim of title in himself, and is, therefore, adverse. South School District v. Blakeslee, 18 Conn. 235.

<sup>2</sup> Johnson v. Knapp, 150 Mass. 267.

<sup>3</sup> New York v. Law, 125 N. Y. 880. See Brown v. King, 5 Met. (Mass.) 173.

<sup>4</sup> Heermans v. Schmaltz, 10 Biss. 823.

<sup>5</sup> Root v. Commonwealth, 98 Penn. St. 170.

<sup>6</sup> Mitchell v. Walker, 2 Aik. (Vt.) 266.

<sup>7</sup> Monmouthshire Canal Co. v. Harford, 1 C. M. & R. 614; 5 Tyrwh. 68;

fully established by adverse use, is not lost by asking and receiving a license from the original owner, although this may, in case of doubt, be strong evidence that the previous use was not under a claim of right.<sup>1</sup> It is not necessary that there should be an express claim of the right by the person who enjoys it, or an express admission of the right by the owner of the land.<sup>2</sup> If the owner of a dam admits that it has been raised, and promises to restore the former height when another dam is built, he may still gain a prescriptive right in favor of the increased height, as against other persons than the one to whom the admission and promise were made.<sup>3</sup> In *Outram v. Maude*,<sup>4</sup> the plaintiff was yearly tenant, from 1791 to 1836, of an underground channel for conducting water from the plaintiff's mill through the landlord's land. This demise was determined in 1836, and a demise of a new channel, for pure water only, continued in force until 1867, when it was determined by the defendant, the landlord's successor. The plaintiff, however, continued to use the old channel for foul water from 1836 to 1879. It was held, that, being a tenant, he had not acquired an easement by prescription in the old channel, although the user thereof was uninterrupted. There can be no prescription in conflict with a statute.<sup>5</sup> A statute which prohibits the discharge of polluting matter into sources of water supply for a city or town prevents the acquisition of a prescriptive right to foul a stream as against such city or town.<sup>6</sup>

**§ 340. Same — Conditions in the negative.**— Prescriptions may be upon condition in restraint of the mode in which the prescriptive right is to be enjoyed, or have annexed to them a duty to be performed for the benefit of the person against whom the prescription exists.<sup>7</sup> It was early declared that a

<sup>1</sup> *Tracy v. Atherton*, 36 Vt. 503; *Ir.* 524; *Martin v. Gleason*, 139 Mass. 183.  
*Perrin v. Garfield*, 37 Vt. 304.

<sup>2</sup> *Blake v. Everett*, 1 Allen, 248; *Johnson v. Gorham*, 38 Conn. 513; *Law v. McDonald*, 9 Hun, 23.  
<sup>6</sup> *Brookline v. Mackintosh*, 133 Mass. 215. So a statute which requires fishways in dams negatives any prescriptive right to maintain a dam previously authorized without such ways. *Parker v. People*, 111 Ill. 581.

<sup>3</sup> *Lynn v. Thomson*, 17 S. C. 129.

<sup>4</sup> 17 Ch. D. 391; 29 W. R. 818.

<sup>5</sup> See *Middleton v. Griffiths*, 30 L. T. N. S. 65; *Traill v. M'Allister*, 25 L. R.

*Ir.* 524; *Martin v. Gleason*, 139 Mass. 183.

<sup>7</sup> *Brook v. Willett*, 2 H. Black. 224;

custom may be in the negative, but that, by way of *prescription*, the claim must be affirmative.<sup>1</sup> But it is held, that, if a prescriptive right has been gained to divert a stream from its natural channel, the proprietors below along that channel may claim exemption from having their lands overflowed or their mills injured, by the restoration of the water to its natural course.<sup>2</sup> In *Felton v. Simpson*,<sup>3</sup> the Supreme Court of North Carolina held that the owner of land protected by a dam which ponded the water in heavy falls of rain until it was drained off by ditches leading from the pond through the plaintiff's land, could not gain a prescriptive right to the benefit of this protection, inasmuch as there was nothing which could be granted, and no adverse possession of anything which, without a grant, would expose the party to an action. The submission to the exercise of an easement by the owner of the dominant estate, for his own purposes and in his own way, does not necessarily give the servient owner a right to the continuance of the easement imposed, because it is attended with incidental advantages to the latter; but the former may, if he chooses, cease to exercise it entirely.<sup>4</sup> An active enjoyment for more than the statutory period is not an enjoyment as of right, if during the period it was known that it is only permitted so long as some particular purpose is served. Where a canal company was authorized, but not required, by statute to divert the waters of a stream, which they did for a period of forty years, it was held that the riparian proprietors below on the stream had no right to insist that the diversion

*Paddock v. Forrester*, 3 Man. & G. 903; *Gray's Case*, 5 Rep. 79; *Carlisle v. Cooper*, 21 N. J. Eq. 597; *Mitchell v. Walker*, 2 Aik. (Vt.) 270; *Watkins v. Peck*, 13 N. H. 360, 375.

<sup>1</sup> *Colchester v. Goodwin*, Carter, 68. As to the distinction between custom and prescription, see *ante*, § 829.

<sup>2</sup> *Shepardson v. Perkins*, 58 N. H. 354; *Middleton v. Gregorie*, 2 Rich. (S. C.) 631, 638; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Belknap v. Trimble*, 3 Paige, 577; *Smith v. Musgrove*, 32 Mo. App. 241; *Mathewson v. Hoffman*, 77 Mich. 420. So of the right

to keep the end of an ancient ditch closed which has been closed for twenty years. *Drewett v. Sheard*, 7 C. & P. 465.

<sup>3</sup> 11 Ired. 84. See *King v. Chicago R. Co.*, 71 Iowa, 696.

<sup>4</sup> *Beeston v. Weate*, 5 El. & Bk. 986; *Magor v. Chadwick*, 11 Ad. & El. 571; *North Eastern Railway v. Elliot*, 1 John. & H. 154; *Arkwright v. Gell*, 5 M. & W. 203; *Wood v. Waud*, 8 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 291; *White v. Chapin*, 12 Allen, 516; *Yale v. Brace*, 99 Mass. 488; *Read v. Erie Ry. Co.*, 97 N. Y. 841.

should be continued for their benefit, although the natural channel had meanwhile been choked up, and the restoration of the water to that channel caused their lands to be overflowed in times of flood.<sup>1</sup>

§ 341. **Same — Burden of proof.**— In order to make the use of an easement for twenty years conclusive of the right, the person who claims it has the burden of proof to establish that the use was adverse, uninterrupted, and known to the owner of the land, and each of these essential ingredients to the maintenance of the claim may be contradicted and disproved.<sup>2</sup> If the possession is adverse and unexplained, the jury should regard it as strong ground on which to found the presumption of a grant.<sup>3</sup> If the use of the easement for twenty years is unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and it is incumbent upon the owner of the servient tenement to show that the use was under some license or special contract inconsistent with a claim of right.<sup>4</sup> So proof of a qualified right as to time is to be produced by the party who

<sup>1</sup> *Mason v. Shrewsbury Ry. Co.*, L. R. 6 Q. B. 578; *Arkwright v. Gell*, 5 M. & W. 220; *Greatrex v. Hayward*, 8 Exch. 291; *ante*, § 225. In the first of these cases, Cochran, C. J., said that it is of the essence of an easement to divert a stream that it exists for the benefit of the dominant tenement alone; that its exercise for the benefit of that tenement cannot operate to create a new right for the benefit of the servient owner; and that, like any other right, its exercise may be discontinued, if it becomes onerous or ceases to be beneficial to the party entitled. See *Peter v. Caswell*, 38 Ohio St. 518, 522.

<sup>2</sup> *Haight v. Price*, 21 N. Y. 241; *Bradley Fish Co. v. Dudley*, 37 Conn. 136, 148; *Smith v. Miller*, 11 Gray, 149; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *American Co. v. Bradford*, 27 Cal. 360; *Miller v. Stowman*, 26 Ind. 143; *Ogle v. Dill*, 55 Ind. 130.

<sup>3</sup> *Campbell v. Wilson*, 8 East, 803; *Bullen v. Runnels*, 2 N. H. 255; *Stevens v. Taft*, 11 Gray, 83; *Chalk v. McAlily*, 11 Rich. 153; *Esling v. Williams*, 10 Penn. St. 126; *Ring v. Pugsley*, 2 Pugs. & B. (N. B.) 303.

<sup>4</sup> *White v. Chapin*, 12 Allen, 516, 519; *Perrin v. Garfield*, 37 Vt. 310; *Hammond v. Zehner*, 21 N. Y. 118; *Law v. McDonald*, 9 Hun, 23; *Melvin v. Locks & Canals*, 16 Pick. 137; *White v. Loring*, 24 Pick. 319; *Garrett v. Jackson*, 20 Penn. St. 331; *Steffy v. Carpenter*, 37 Penn. St. 41; *Wilson v. Wilson*, 4 Dev. 154; *Cross v. Lewis*, 2 B. & C. 686; *Miller v. Garlock*, 8 Barb. 153; *Hart v. Vose*, 19 Wend. 365. The force of the presumption is not diminished when the owners of the two tenements claim under a common grantor. *White v. Chapin*, 12 Allen, 520.



claims that it was so qualified.<sup>1</sup> Under the foregoing rules the presumption of a grant, according to the circumstances of each case, is to be generally regarded as one of fact and not of law,<sup>2</sup> but it is to be observed that is not the mere want of possession by the original owner, however long-continued, but the adverse possession of the claimant, which establishes the latter's right.<sup>3</sup>

§ 342. **Same — Limited by user.**—Rights gained by prescription are limited in extent by the previous enjoyment, and cannot be materially varied to the injury of others,<sup>4</sup> unless the new use has been the same continuously for a long period of years, and is itself a prescriptive right.<sup>5</sup> The long enjoyment of a ditch raises no presumption of the right to use another ditch which differs therefrom in an appreciable degree, either in locality or dimensions,<sup>6</sup> and establishes no right to permit it to overflow injuriously upon the land through which it is established.<sup>7</sup> Where certain mill-owners had maintained a dam across a river for thirty years, and taken the water through a village in an artificial channel which ran by the side of a highway and within its limits, it was held that the town was entitled to recover damages for injury to the highway caused by an increased flow of the water in the channel resulting from a higher and tighter dam erected in place of that first built.<sup>8</sup> So, the right to use an artificial ditch through

<sup>1</sup> *Matter of Water Commissioners*, 4 Edw. Ch. 545; *Finch v. Resbridger*, 2 Vernon, 391.

<sup>2</sup> *Townsend v. Downer*, 32 Vt. 183; *Bradley Fish Co. v. Dudley*, 37 Conn. 136.

<sup>3</sup> *Ketchum v. Mighton*, 14 Q. B. (Can.) 99.

<sup>4</sup> *Bealy v. Shaw*, 6 East, 208; *Brown v. Best*, 1 Wils. 174; *Strutt v. Bovingdon*, 5 Esp. 56; *Crossley v. Lightowler*, L. R. 2 Ch. 478; L. R. 3 Eq. 279; *Blackburne v. Somers*, 5 L. R. Ir. 1; *Carlisle v. Cooper*, 21 N. J. Eq. 594; 19 id. 256; 17 id. 525; *Middlesex Co. v. Lowell*, 149 Mass. 509; *Norway Plains Co. v. Bradley*, 52 N. H. 86, 103; *Russell v. Scott*, 9 Cowen, 279;

*Wilklow v. Lane*, 37 Barb. 244; *Prentice v. Geiger*, 74 N. Y. 841; *Baldwin v. Calkins*, 10 Wend. 167; *Peterson v. McCullough*, 50 Ind. 35; *Mitchell v. Parks*, 26 Ind. 354.

<sup>5</sup> *Prentice v. Geiger*, 9 Hun, 350; 74 N. Y. 841; *Cotton v. Pocasset Manuf. Co.*, 13 Met. 429; *Stein v. Burden*, 24 Ala. 130.

<sup>6</sup> *Porter v. Durham*, 74 N. C. 767. See *Dietz v. Mission Transfer Co.* (Cal.), 25 Pac. 423; *St. Croix Land Co. v. Ritchie* (Wis.), 47 N. W. 657; *Pioneer Wood-pulp Co. v. Chandos* (Wis.), 47 N. W. 661.

<sup>7</sup> *Tucker v. Salem Flouring Mills Co.*, 18 Oregon, 28.

<sup>8</sup> *Shrewsbury v. Brown*, 25 Vt. 197;

another's land for irrigation, with the privilege of entering and clearing the same, does not justify the conversion of the ditch into the tail-race of a mill, and its enlargement and deepening for that purpose.<sup>1</sup> Where the user consists in taking fish on a beach without a capstan and reel, this does not authorize setting up a capstan and reel on such beach for the purpose of taking fish more conveniently.<sup>2</sup> So the use of a private stream by about twelve persons, three or four times a year, for floating logs during thirty years does not establish a general right of public use.<sup>3</sup>

§ 343. Same — Height of the water.— The extent of the right of flowage acquired by adverse enjoyment over another's land is not determined by ascertaining how long the claimant's dam or mill has been in existence, or by the claim which he makes during the period of prescription.<sup>4</sup> The question is not how high the dam is, but whether the water has been held during the requisite period so high as to affect the land flowed as injuriously as it did at the time when the owner of such land brings his action,<sup>5</sup> and it is incumbent upon the claimant to show that his privilege entitles him to pond it as high as at present.<sup>6</sup> The period of limitation begins to run from the time when the land was first flowed or received actual injury,<sup>7</sup> and not from the erection and completion of the dam or ob-

Darlington v. Painter, 7 Penn. St. 473.

<sup>1</sup> Darlington v. Painter, 7 Penn. St. 473.

<sup>2</sup> Hart v. Chalker, 5 Conn. 811. See Melvin v. Whiting, 18 Pick. 184; McFarlin v. Essex Co., 10 Cush. 804.

<sup>3</sup> Meyer v. Phillips, 97 N. Y. 485.

<sup>4</sup> Hulme v. Shreve, 8 Green Ch. 116; Carlisle v. Cooper, 21 N. J. Eq. 594; 19 id. 256; 17 id. 525; Horner v. Stillwell, 35 N. J. L. 307; Burnham v. Kempton, 44 N. H. 78; Bucklin v. Truell, 54 N. H. 122; Russell v. Scott, 9 Cowen, 279; Baldwin v. Calkins, 10 Wend. 167; Rogers v. Bruce, 17 Pick. 184; O'Brien v. Enright, Ir. R. 1 C. L. 718; Flight v. Thomas, 10 Ad. & El. 590; Smith v. Russ, 17 Wis. 227; Sabine v. Johnson, 35 Wis. 185, 202;

Powell v. Lash, 64 N. C. 458; Jenkins v. Conley, 70 N. C. 353; Grigsby v. Clear Lake Co., 40 Cal. 407.

<sup>5</sup> Ibid.; Postlethwaite v. Payne, 8 Ind. 104; Mentz v. Darney, 25 Penn. St. 519; Stiles v. Hooker, 7 Cowen, 266; Ellington v. Bennett, 59 Ga. 286; Smith v. Russ, 17 Wis. 227; Murray v. Scribner, 70 Wis. 228. A claim by grant differs from one by prescription, in that the right of the grantee in the grant is not affected by the fact that he has not at all times exercised his privilege to its full extent. Lacy v. Arnett, 33 Penn. St. 169.

<sup>6</sup> Morris v. Commander, 3 Ired. 510.

<sup>7</sup> Hempstead v. Cargill (Minn.), 48 N. W. 558.

struction.<sup>1</sup> To an action for damages by the owner of lands adjoining a river, for obstructing the river and causing the water to overflow his lands, the defendant pleaded that he was possessed of a mill near said lands, and that for twenty years the occupiers thereof enjoyed, as of right and without interruption, the right of maintaining a weir and mill-dam across the river, and penning back the water for said mill, and that the grievances were a user by the defendant of this right. This plea was held to be bad, as it did not allege previous user that caused damage to the plaintiff's lands.<sup>2</sup>

§ 344. *Same — Same.*— The general rule is that the height of the dam, when in good condition and repair, including such parts and appendages as make its efficient height in its ordinary action and operation, fixes the extent of the right to flow, without regard to fluctuations in the flowage which are due to accidental causes, such as a want of the usual repairs, or variations in the stream caused by drought or in the pondage of the dam by its being drawn down by use.<sup>3</sup> This rule

<sup>1</sup> *Hurlburt v. Leonard*, Brayt. (Vt.) 202; *Nelson v. Butterfield*, 21 Maine, 220; *Wentworth v. Sanford Manuf. Co.*, 33 Maine, 547; *Delaware Canal Co. v. Wright*, 21 N. J. L. 469; *Williams v. Mills County*, 71 Iowa, 367; *Haisch v. Keokuk Ry. Co.*, id. 606; *ante*, § 210.

<sup>2</sup> *O'Brien v. Enright*, Ir. R. 1 C. L. 718; 15 W. R. 637. See *Murray v. Scribner*, 74 Wis. 602.

<sup>3</sup> *Carlisle v. Cooper*, 21 N. J. Eq. 595; *Cowell v. Thayer*, 5 Met. 258, 258; *Bliss v. Rice*, 17 Pick. 23; *Jackson v. Harrington*, 2 Allen, 242; *Gilford v. Winnipisseogee Lake Co.*, 52 N. H. 262; *Turner v. Hart*, 71 Mich. 128; 27 Cent. L. J. 407; *Manier v. Myers*, 6 B. Mon. 134; *Winnipisseogee Lake Co. v. Young*, 40 N. H. 420; *Vickerie v. Buswell*, 13 Maine, 289; *Wood v. Kelly*, 30 Maine, 47; *Alder v. Savill*, 5 Taunt. 454; *Gereger v. Summers*, 2 Ired. 229; *Baker v. McGuire*, 53 Ga. 245; *Maguire v. Baker*, 57 Ga. 109; *Lane v. Miller*, 27

Ind. 534. In *Cowell v. Thayer*, 5 Met. 258, it was held that the right to maintain a particular dam, acquired by prescription or grant, includes the right to tighten and repair such dam, although the consequence may be a greater flowing than had been usual. This rule does not apply where there is an express agreement, *Short v. Woodward*, 13 Gray, 86; and is disapproved in Wisconsin and New Hampshire. *Smith v. Rust*, 17 Wis. 227; *Sabine v. Johnson*, 35 Wis. 185; *Burnham v. Kempton*, 44 N. H. 90; *Griffin v. Bartlett*, 55 N. H. 123; *Carlisle v. Cooper*, *supra*. The height of a dam should be fixed by experiments, not by theoretical conclusions based upon surveys. *Decorah Woolen Mill Co. v. Greer*, 58 Iowa, 86; 49 Iowa, 490; *ante*, § 200. When an abatement ordered is to be made with reference to the "ordinary stage of the water," it means the ordinary stage when the stream stands at high-water mark. *Ibid*.

regulates the right of the owner of a dam who claims by prescription,<sup>1</sup> although it is not essential to the existence of such right that the same quantity was used each year, especially in streams subject to extraordinary rainfalls or droughts.<sup>2</sup> The owner of the easement is not bound to use the water in the same manner, or to apply it to the same mill or the same purpose.<sup>3</sup> He may at his pleasure make alterations or improvements or increase the capacity of the machinery which is propelled by the water, if the burden upon the servient tenement is not increased.<sup>4</sup> So, it is not necessary that the dam should have been maintained for the whole period upon the same spot, if the lines of the actual enjoyment of the easement are not changed.<sup>5</sup> The right to keep up the dam may be subject to limitations during a part of each year. If the modification of the right to flow is for the haying season, or the period required for the getting off of the hay from the meadow below, the extent of that modification is measured by the time reasonably required in each year for that purpose, and not by the extreme limits of time over which the haying season may have extended in any of the different years during the acquisition of the right.<sup>6</sup>

<sup>1</sup> *Daniels v. Citizens' Savings Institution*, 127 Mass. 534.

<sup>2</sup> *Jordan v. Lang*, 22 S. C. 159; *Johnson v. Boorman*, 63 Wis. 268.

<sup>3</sup> *Luttrell's Case*, 4 Rep. 87; *Saunders v. Newman*, 1 B. & Ald. 258; *Hale v. Oldroyd*, 14 M. & W. 789; *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Hall v. Swift*, 6 Scott, 167; *Whittier v. Cocheco Manuf. Co.*, 9 N. H. 454; *Casler v. Shipman*, 35 N. Y. 533; *Biglow v. Battle*, 15 Mass. 313; *Miller v. Lapham*, 46 Vt. 525; *McDonald v. Bear River Co.*, 13 Cal. 220.

<sup>4</sup> *Ibid.* So, as to surplus water escaping from a dam, which is rebuilt of different materials, the right to divert the water held by the dam having been gained by prescription. *Wong Kim v. Kioula*, 4 Hawaiian,

504. So the form of a reservoir cover used in the enjoyment of an aqueduct easement gained by prescription is not fixed by the prescription, but may be reasonably changed, if the aqueduct proprietors are not injured, by the owner of the servient tenement in the enjoyment of his grounds. *Olcott v. Thompson*, 59 N. H. 154.

<sup>5</sup> *Davis v. Brigham*, 29 Maine, 391; *Stackpole v. Curtis*, 32 Maine, 383; *Carlisle v. Cooper*, 21 N. J. Eq. 595; *Ogle v. Dill*, 55 Ind. 130; *Johnson v. Rand*, 6 N. H. 22.

<sup>6</sup> *Powers v. Osgood*, 102 Mass. 457; *Ray v. Fletcher*, 12 Cush. 200; *Daniels v. Citizens' Savings Institution*, 127 Mass. 534.

§ 345. **Same — Pollution.**— The right to pollute a stream to a greater extent than is permissible of common right may be acquired by prescription.<sup>1</sup> So may the right of placing cinders and other refuse of works on the banks and bed of a stream.<sup>2</sup> A tanner does not acquire the right to deposit bark upon the land of a lower proprietor by the continued casting of the bark into the stream for twenty years, unless it has been annually deposited on such land during the whole of that period.<sup>3</sup> So, the mere use for the statutory period of a ditch, the washings of which cause an accumulation of sand in a stream and a consequent flooding of the plaintiff's land, does not establish an injury to such land during the same length of time.<sup>4</sup> As the right is measured by the enjoyment, one proprietor cannot acquire a right by prescription to pollute the stream to a greater extent than it was polluted at the commencement of the twenty years.<sup>5</sup> "It may be difficult," says Lord Chelmsford, L. C.,<sup>6</sup> "to fix a limit to such a right where the quantity of fouling to which the prescription extends has not been far exceeded, but where the excess is considerable the proof will be comparatively easy. The user which originated the right must also be its measure, and it cannot be enlarged to the prejudice of any other person."

§ 346. **Same — Same.**— In order to establish such a right, there must be a perceptible amount of injury throughout the statutory period, and, if within that period, it appears, upon a

<sup>1</sup> *Crossley v. Lightowler*, L. R. 8 Ch. 478; L. R. 8 Eq. 279; *Wood v. Waud*, 3 Exch. 748; *Carlyon v. Lovering*, 1 H. & N. 784; *Moore v. Webb*, 1 C. B. N. s. 673; *Wright v. Williams*, 1 M. & W. 77; *Attorney General v. Halifax*, 39 L. J. Ch. 129; *Cater v. Lewisham*, 11 Jur. N. s. 340; *Warren v. Hunter*, 1 Phila. 414.

<sup>2</sup> *Murgatroyd v. Robinson*, 7 E. & B. 391.

<sup>3</sup> *Ibid.*; *Crosby v. Bessey*, 49 Maine, 539. A grant of land for a tannery with the right to take water from the grantor's mill-pond, "for carrying away the spent bark," does not con-

fer the right to discharge the bark into the stream, so that it will lodge upon the grantor's premises, or obstruct the flow of the water. *Winchester v. Osborne*, 61 N. Y. 555; reversing s. c. 62 Barb. 337.

<sup>4</sup> *Cooper v. Barber*, 3 Taunt. 99; *Roundtree v. Brantley*, 34 Ala. 544.

<sup>5</sup> *Crossley v. Lightowler*, L. R. 2 Ch. 478; L. R. 3 Eq. 279; *Moore v. Webb*, 1 C. B. N. s. 673; *McCallum v. Germantown Water Co.*, 54 Penn. St. 40; *Jones v. Crow*, 32 Penn. St. 398; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, 346.

<sup>6</sup> L. R. 2 Ch. 481.

bill for an injunction, that some degree of present nuisance exists, the court will take into account its probable continuance and increase.<sup>1</sup> So, acquiescence in a certain amount of nuisance is not acquiescence in a nuisance which is constantly increasing in magnitude, so as to constitute laches.<sup>2</sup> A city which for forty years has drained sewers into a private mill-pond, the waters of which have been impaired seriously thereby only during the last fifteen years, has no prescriptive right to continue the discharge under the limitation of twenty years, and may be enjoined from continuing it.<sup>3</sup> If a prescriptive right to pollute is proved, it is not sufficient for the plaintiff to show that the defendant uses in his mill materials different from those formerly employed, but he must show a greater amount of pollution and injury arising from the use of the new materials.<sup>4</sup> If it has been the practice to throw only saw-dust into a stream, this does not establish the right of discharging into it poisonous and noxious drugs,<sup>5</sup> or of establishing a business causing pollution of a totally different kind, even though less in degree.<sup>6</sup> So if a fulling mill is prescribed for, and it has been changed to a grist mill, it is still the use of the stream for a mill that is claimed;<sup>7</sup> and if the subject matter is a towing path along a navigable river, and a statute changes it into a floating harbor, the public aid to navigation continues.<sup>8</sup> A prescriptive right may also be acquired to go upon another's land for the purpose of cleansing a watercourse, or for purposes connected therewith, under a claim of right to the watercourse itself.<sup>9</sup> An easement which injures all whom it affects and benefits no one cannot be acquired by prescription.<sup>10</sup>

<sup>1</sup> *Goldsmid v. Tunbridge Wells Commissioners*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Attorney General v. Leeds Corporation*, L. R. 5 Ch. 583, 596; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Murgatroyd v. Robinson*, 7 El. & Bk. 391.

<sup>2</sup> *Woodruff v. North Bloomfield Gravel Mining Co.*, 8 Sawyer, 628; 9 id. 441.

<sup>3</sup> *Middlesex Co. v. Lowell*, 149 Mass. 509.

<sup>4</sup> *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Luttrell's Case*, 4 Rep. 86.

<sup>5</sup> *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, 346.

<sup>6</sup> *Clarke v. Somersetshire Drainage Com'rs*, 36 W. R. 890; 59 L. T. N. S., 670.

<sup>7</sup> *Luttrell's Case*, 4 Co. 86. See *Blanchard v. Baker*, 8 Greenl. 253.

<sup>8</sup> *Rex v. Tippet*, 3 B. & Ald. 193; *Codling v. Johnson*, 9 B. & C. 933.

<sup>9</sup> *Peter v. Daniel*, 5 C. B. 568; *Beeston v. Weate*, 5 E. & B. 986.

<sup>10</sup> *Louisville R. Co. v. Hays*, 11 Lea (Tenn.), 382.



§ 347. **Same—Different uses.**—The general rule is that when an easement is created by grant or reservation, no use of it will be held to be adverse which substantially conforms to such grant or reservation, and can be construed to be consistent with its terms.<sup>1</sup> When an express grant is made of the right to use the water for a particular purpose, or within certain limits, the grantee may acquire a prescriptive right to use it for a different purpose, or to a larger extent as if under a superadded grant.<sup>2</sup> In *Wheatley v. Chrisman*,<sup>3</sup> the right was granted by an upper to a lower proprietor to divert water from a stream for the irrigation of meadows, and the grantee used the diverted water for more than twenty-five years for watering horses and cattle. The mining operations of the upper proprietor, rendering the water unfit for the latter purpose, were held to be an infringement upon the prescriptive right of the lower proprietor to apply the water to that use.

§ 348. **Same—Abandonment—Acquiescence.**—After the acquisition of an easement by prescription is complete, it may be lost by abandonment, when the facts or circumstances clearly indicate such an intention.<sup>4</sup> Non-user is one element in determining such intention, and if long continued, is presumptive evidence that the right is lost.<sup>5</sup> But a jury is not bound to infer an abandonment from non-user alone, though continued for more than twenty years.<sup>6</sup> If the non-user was merely for the convenience of the owner of the dominant tenement and those under whom he claims, and without any

<sup>1</sup> *Atkins v. Boardman*, 20 Pick. 291; *E. Church v. Old Columbia P. G. Co.*, 2 Met. 457; *Gayetty v. Bethune*, 14 103 Penn. St. 608.

*Mass.* 49; *Barber v. Nye*, 65 N. Y. 211, 221.

<sup>2</sup> *Olmstead v. Loomis*, 9 N. Y. 428; *Gehman v. Erdman*, 105 Penn. St. 371.

<sup>3</sup> 24 Penn. St. 298.

<sup>4</sup> *Carlisle v. Cooper*, 19 N. J. Eq. 256; 21 N. J. Eq. 576; *Shields v. Arndt*, 8 Green Ch. 234; *Doe v. Hilder*, 2 B. & Ald. 791; *Jamaca Pond Aqueduct v. Chandler*, 121 Mass. 3; *Parkins v. Dunham*, 8 Strob. 224.

<sup>5</sup> *Hillary v. Waller*, 12 Ves. 265; *Farrar v. Cooper*, 34 Maine, 394; *Steere v. Tiffany*, 13 R. I. 568; *Meth-*

<sup>6</sup> *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 141; 21 N. J. Eq. 463; *Barnes v. Lloyd*, 112 Mass. 231; *Bannon v. Angier*, 2 Allen, 129; *Pratt v. Sweetser*, 68 Maine, 344; *Maguire v. Baker*, 57 Ga. 109; *Townsend v. McDonald*, 12 N. Y. 381; *Nitzell v. Paschall*, 3 Rawle, 76. A release of the original right will be inferred from non-user, though not extending over twenty years, when a way is substituted for a previous way with the consent of the person entitled. *Mulville v. Fallow*, Ir. R. 6 Eq. 458.

intention to abandon the right, such right still continues;<sup>1</sup> and if the non-user is not accompanied by acts showing an intention to abandon, evidence of adverse possession, as well as non-user, is necessary to effect the extinguishment,<sup>2</sup> although no declaration of abandonment is made.<sup>3</sup> In *Crossley v. Lightowler*,<sup>4</sup> it was held that the actual disuse of a prescriptive right to foul a stream for twenty years, during which time others had acquired adverse rights, destroys the right of fouling. In *Chandler v. Jamaica Pond Aqueduct Corporation*,<sup>5</sup> it was decided that the uninterrupted occupation of the land in question, for more than twenty years, under a claim of a title in fee, was an adverse use of the servient tenement, inconsistent with the existence of an easement established by grant, to raise a dam, and to check, impede, and use the water flowing through the land, and thus to flow it, and that the easement was extinguished. A misuse of an easement, however great the perversion, is not an abandonment;<sup>6</sup> and an easement does not become merged or lost by the assertion of a claim which is inconsistent therewith, as by a disseisin or wrongful claim of title against the owner of the servient tenement.<sup>7</sup> Upon the extinguishment of an easement the purchaser of the dominant tenement has no remedy against one who thereafter purchases the servient tenement.<sup>8</sup>

§ 349. Same — Same.— If the period of twenty years has not elapsed, the acts of the owner of one tenement, which are acquiesced in by the owner of the other, are often material on

<sup>1</sup> *Horner v. Stillwell*, 35 N. J. L. 307; *Ward v. Ward*, 7 Exch. 838.

<sup>2</sup> *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 141; 21 N. J. Eq. 463; *Browne v. Trustees*, 37 Md. 119; *Wright v. Freeman*, 5 H. & J. 467, 477; *Harvie v. Rogers*, 3 Bligh, n. s. 440; *Pillsbury v. Moore*, 44 Maine, 154; *Cuthbert v. Lawton*, 3 McCord, 195; *Smyles v. Hastings*, 22 N. Y. 217; *Eddy v. Chase*, 140 Mass. 471; *Smith v. Langewald*, id. 205; *McConnell v. American B. P. Co.*, 41 N. J. Eq. 447.

<sup>3</sup> *Middlesex Co. v. Lane*, 149 Mass. 101.

<sup>4</sup> L. R. 2 Ch. 478; L. R. 3 Eq. 277; *Ward v. Ward*, 7 Exch. 838; *Cook v. Bath*, L. R. 6 Eq. 178.

<sup>5</sup> 125 Mass. 544; *Owen v. Field*, 102 Mass. 90; *Barnes v. Lloyd*, 112 Mass. 224; *Jennison v. Walker*, 11 Gray, 423; 3 Kent Com. 448; *Hoffman v. Savage*, 15 Mass. 130; *Beardslee v. French*, 7 Conn. 125.

<sup>6</sup> *Locks & Canals v. Nashua & Lowell R. Co.*, 104 Mass. 8.

<sup>7</sup> *Ibid.*; *Tyler v. Hammond*, 11 Pick. 193, 220; *White's Bank v. Nichols*, 64 N. Y. 65.

<sup>8</sup> *Ballard v. Butler*, 30 Maine, 94.

the question of abandonment, and may create an equitable estoppel.<sup>1</sup> The creation by the parties of a new right, which is inconsistent with the nature or exercise of the servitude, however acquired, extinguishes the former right.<sup>2</sup> If tenants in common make partition of lands theretofore flowed by a dam, and execute mutual releases, in each of which the grantor conveys all his "right, title and interest" in the land, and agrees that neither the grantor, nor his heirs, nor any person claiming under him or them shall "claim or demand any right or title to the aforesaid premises or their appurtenances, or to any part or parcel thereof forever," the mill privilege is thereby voluntarily abandoned and extinguished.<sup>3</sup> The owner of land flowed by a dam, who permits it to be several times rebuilt without opposition, and who encourages by his silence the expenditure of money and labor thereon, is deprived of the right to the interference of a court of equity to restrain the rebuilding of the dam.<sup>4</sup> So the owner of an irrigation ditch constructed on public lands, who allows subsequent settlers to take up lands that can only be irrigated by the ditch, and labor upon and increase its capacity, is estopped to deny their right to use it.<sup>5</sup> So too an estoppel arises from a conveyance of the right to cut a ditch, made by an agent without authority, if the grantor accepts the purchase money, retains it for several months, and allows money to be expended upon the work.<sup>6</sup> But assent to the building of a dam which proves

<sup>1</sup> *Queen v. Chorley*, 12 Q. B. 515; *Stokoe v. Singers*, 8 EL. & BK. 31; *Davies v. Marshall*, 10 C. B. N. S. 697; *Case of the Watercourses*, 2 Eq. Cas. Alr. 522; *Johnson v. Hyde*, 33 N. J. Eq. 643; *Carlisle v. Cooper*, 21 N. J. Eq. 591; *Society v. Lehigh Valley R. Co.*, 32 N. J. Eq. 329; *Haight v. Proprietors*, 4 Wash. C. C. 601; *Hazard v. Robinson*, 3 Mason, 275; *Leonard v. Spencer*, 108 N. Y. 338; *Mowry v. Sheldon*, 2 R. I. 369; *Morrill v. Mackman*, 24 Mich. 279.

<sup>2</sup> *Taylor v. Hampton*, 4 McCord, 96; *Illinois Central R. Co. v. Allen*, 39 Ill. 205; *United States Life Ins. Co. v. Oswego Canal Co.*, 10 N. Y. S. 663.

<sup>3</sup> *Hamilton v. Farrar*, 128 Mass. 492; 131 id. 572. See *Griffin v. Lawrence*, 135 Mass. 365.

<sup>4</sup> *Sheldon v. Rockwell*, 9 Wis. 167; *Thomas v. Woodman*, 23 Kansas, 217; *Wilson v. Vaughn*, 40 Iowa, 179; *Jacox v. Clark*, Walk. Ch. 249. See *Fremont Ferry Co. v. Dodge County*, 6 Neb. 18; *Powers v. Bald Eagle Boom Co.*, 125 Penn. St. 175.

<sup>5</sup> *Lehi Irr. Co. v. Moyle*, 4 Utah, 327; *Campbell v. Shivers*, 1 Ariz. 161; *Curtis v. LeGrange H. W. Co. (Oregon)*, 25 Pac. 378, modifying 23 id. 808.

<sup>6</sup> *Franklin v. Pollard Mill Co.*, 88 Ala. 318.

to be a nuisance does not work an estoppel, unless the assent was given with knowledge or reason to believe that a nuisance would result.<sup>1</sup> Where the plaintiff, being the owner of land overflowed by the defendant's dam, told the defendant, before the erection of the latter's dam and mill, that the stream had a sufficient fall, and that he had leveled it, and then stood by and without objection saw the mill and dam erected at great expense, an injunction was refused to enjoin the maintenance of the dam and to obtain its removal.<sup>2</sup> But usually something more than mere silence is required to create such an estoppel, and a riparian owner who sees an opposite proprietor building a factory and digging a race for the diversion of water from the stream has been held not to lose his rights by not objecting.<sup>3</sup> This holds good particularly when the plaintiff and defendant are equally well informed.<sup>4</sup> A mere request to institute legal proceedings before an intended diversion of water is made, does not create a waiver of any right, if it is not complied with, and the person making the request knows that his right to divert is disputed.<sup>5</sup>

§ 350. **Same — Same.**— In *Birmingham Canal Co. v. Lloyd*,<sup>6</sup> the plaintiffs, who had the use of certain reservoirs, were notified by the defendants, owning coal mines, that they intended to make a level on their mines, the effect of which would be to draw off the water in the reservoirs. After the defendants had commenced their work and expended about two thousand

<sup>1</sup> *Corley v. Lancaster*, 81 Ky. 171; *Searing v. Saratoga Springs*, 39 Hun, 307.

<sup>2</sup> *Wilson v. Vaughn*, 40 Iowa, 179; *Anderson v. Hubble*, 93 Ind. 570; *Clement v. Gould*, 61 Vt. 573. Estoppel by conduct, as a defense, is equally available at law or in equity. *Concord v. Norton*, 16 Fed. Rep. 477; *Drexel v. Berney*, id. 522; *Alexander v. Woodford S. L. Fish Co.*, 89 Ky. 100; *Loud Gold M. Co. v. Blake*, 24 Fed. Rep. 249; *Brown v. Evans*, 18 Nev. 141; *Stockman v. Riverside Land Co.*, 64 Cal. 57. The defendant in a suit for maintaining a dam cannot show his expenditures, when

there is no element of estoppel in the case. *De Vaughn v. Minor*, 77 Ga. 809. See *Imboden v. Etowah M. Co.*, 70 Ga. 86; *Southwestern R. Co. v. Mitchell*, 69 Ga. 114.

<sup>3</sup> *New York Rubber Co. v. Rothery*, 107 N. Y. 310; *Flat River F. & P. Co. v. Kelley*, 70 Wis. 287; *Lux v. Haggin*, 69 Cal. 255; *Huddleston v. West Bellevue*, 111 Penn. St. 110. An estoppel *in pais*, to be available, must be pleaded. *Bray v. Marshall*, 75 Mo. 327.

<sup>4</sup> *Jones v. Proprietors*, 62 N. H. 488.

<sup>5</sup> *Williams v. Wadsworth*, 51 Conn. 277.

<sup>6</sup> 18 Ves. 515.

pounds, and nearly two years after the notice was given, the plaintiffs applied for an injunction. Lord Eldon said that the plaintiffs' opposition should have been made when they could have done so with justice, and that they must now take their chances at law. In *Farrar v. Cooper*,<sup>1</sup> it was held that, although twenty years may not have elapsed from the time of ceasing to use a mill privilege, prior to its being overflowed and destroyed by a lower dam, yet an abandonment of the upper privilege may be presumed, if its owner, witnessing the erection of the lower dam and of expensive works in connection therewith, and knowing that it must destroy his privilege, makes no effort to prevent it, or claim for remuneration, within the residue of the twenty years. In *Corning v. Troy Iron Factory*,<sup>2</sup> it was held that the owner of a water privilege who assents to the erection by another of expensive machinery for the diversion of water above him on the stream is not thereby estopped, upon afterwards purchasing the land on the stream opposite such machinery, from insisting upon the restoration of the water to its natural channel along the land so purchased. So, a license to overflow the plaintiff's land is not to be presumed from the fact that the plaintiff did not object to the building of the dam, and gratuitously assisted in its erection, if he did not know and could not foresee the injury.<sup>3</sup> A land-owner who sees the erection of a dam, by which the water will be flowed back to his injury, is not bound to give notice to the owner of the dam if the latter knows his rights or has means of knowing them, and obstinately proceeds with the work.<sup>4</sup> The acceptance, within twenty years, of a deed which grants a mill-site, and recites the existence of another mill-site above it, but does not show that the upper site had a prior right in the use of the water, does not estop the grantee from asserting the abandonment of the upper site by non-user.<sup>5</sup>

§ 351. *Same — Same.*— When an easement is once established by grant, or by prescription which presupposes a grant, it cannot be extinguished by a parol agreement,<sup>6</sup> at least, if

<sup>1</sup> 34 Maine, 394.

<sup>2</sup> 40 N. Y. 191.

<sup>3</sup> *Bell v. Elliott*, 5 Blackf. 113.

<sup>4</sup> *Hepburn v. McDowell*, 17 S. & R. 383; *Brown v. Spalding*, 1 Pitts. 361.

See *Haven v. Seeley*, 59 Cal. 494; *Stockman v. Riverside Land Co.*, 64 Cal. 57.

<sup>5</sup> *Farrar v. Cooper*, 34 Maine, 394.

<sup>6</sup> *Pue v. Pue*, 4 Md. Ch. Dec. 386;

such agreement is unexecuted.<sup>1</sup> In the case of an express grant, the same period of time and the same acts of enjoyment are necessary for the acquisition of rights, adverse to the existence of the easement, that are required in order to establish an easement by prescription.<sup>2</sup> It would seem that a title acquired by prescription is as strong as a title acquired by grant, and that, where no element of estoppel enters into the case, such as witnessing without objection the erection of a dam and expensive works upon the stream,<sup>3</sup> the prescriptive right would not be abandoned without a non-user for twenty years,<sup>4</sup> although according to the decisions in England and in several States, the intention is the material consideration in determining whether there has been an abandonment, and a cesser of use for a less period than twenty years, accompanied by acts clearly indicative of the intent to abandon the prescriptive right, is sufficient.<sup>5</sup> This doctrine, if correct, would not apply

*Dyer v. Sanford*, 9 Met. 395; *Bronson v. Coffin*, 108 Mass. 186.

<sup>1</sup> *Dyer v. Sanford*, 9 Met. 395; *Pope v. Devereux*, 5 Gray, 412; *Morse v. Copeland*, 2 Gray, 304; *Curtis v. Noonan*, 10 Allen, 409; *Wallis v. Harrison*, 4 M. & W. 538; *Bannon v. Angier*, 2 Allen, 128.

<sup>2</sup> *Veghte v. Raritan Canal Co.*, 19 N. J. Eq. 142; 21 N. J. Eq. 463; *Hayford v. Spokesfield*, 100 Mass. 491; *Owen v. Field*, 102 Mass. 90, 114; *Arnold v. Stevens*, 24 Pick. 106; *Knapp v. Douglas Axe Co.*, 13 Allen, 1; *White v. Crawford*, 10 Mass. 188; *Wetmore v. Fiske*, 15 R. I. 354; *Commissioners v. Hugo*, 10 App. Cas. 336; *Smyles v. Hastings*, 22 N. Y. 217; *Casler v. Shipman*, 85 N. Y. 542; *Jewett v. Jewett*, 16 Barb. 150; *Townsend v. McDonald*, 12 N. Y. 381; *Doe v. Butler*, 8 Wend. 149; *Maguire v. Baker*, 57 Ga. 109; *Nitzell v. Paschall*, 3 Rawle, 76; *Butz v. Ihrie*, 1 Rawle, 218; *Teakle v. Nace*, 2 Whart. 128; *Noll v. Dubuque Railroad*, 32 Iowa, 66. An easement created by grant does not become extinguished merely because the necessity for its

use has ceased. *Atlanta Mills v. Mason*, 120 Mass. 244. But an easement, created by grant, to take water from one tenement to be used for the running of a mill situated on another, and appurtenant to the mill only, and not to any parcel of land, is lost if the mill is destroyed and not rebuilt. *Day v. Walden*, 46 Mich. 575.

<sup>3</sup> *Stokoe v. Singers*, 8 El. & Bk. 31; *Farrar v. Cooper*, 34 Maine, 394; *Taylor v. Hampton*, 4 McCord, 96.

<sup>4</sup> *Bower v. Hill*, 1 Bing. N. C. 549; *Johnston v. Hyde*, 33 N. J. Eq. 648; *Curtis v. Jackson*, 18 Mass. 507; *Jennison v. Walker*, 11 Gray, 423; *Hurd v. Curtis*, 7 Met. 94; *Williams v. Nelson*, 23 Pick. 141; *Day v. Walden*, 46 Mich. 575; *Corning v. Gould*, 16 Wend. 581; *Warren v. Syme*, 7 W. Va. 474; *Dyer v. Dupui*, 5 Whart. 584; *Bowen v. Team*, 6 Rich. (S. C.) 305.

<sup>5</sup> *Queen v. Chorley*, 12 Q. B. 515; *Moore v. Rawson*, 3 B. & C. 382; 5 Dowl. & Ryl. 234; *Liggins v. Inge*, 7 Bing. 682; *Mann v. Brodie*, 10 App. Cas. 378; *Dyer v. Sanford*, 9 Met. 395;



to the abandonment of an easement within the twenty years during which the right thereto is accruing.<sup>1</sup>

§ 352. **Same — Temporary enjoyment.**— The right to artificial watercourses, as against the party creating them, depends upon the character of the watercourse, whether it is of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, presumably of a temporary character, and liable to variation. The flow of water for twenty years from the eaves of a house could not give a right to the neighbor to insist that the house shall not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. So, the flow of water from a drain for twenty years, for the purposes of agricultural improvements, would not enable the neighbor to preclude the proprietor from altering the level of his drains for the greater improvement of the land. In such cases, the circumstances show that one party never intended to give, nor the other to enjoy, the use of the water as matter of right.<sup>2</sup>

§ 353. **Same — Statutory right.**— In Massachusetts it is held that the unexplained enjoyment for twenty years, and without any claim or payment of damages, of the statutory right to flow another person's land by means of a mill-dam, is evidence of a right to flow without such payment, and bars a claim for damages.<sup>3</sup> But in Maine, actual damage to the landowner must be shown in order to give rise to the presumption of a grant or license of the right to flow, or to bar proceedings under the statute.<sup>4</sup>

*Pope v. Devereux*, 5 Gray, 412; *Mississippi Central R. Co. v. Mason*, 51 Miss. 234.

<sup>1</sup> *Ibid.*; *Dana v. Valentine*, 5 Met. 8; *Cuthbert v. Lawton*, 3 McCord, 195.

<sup>2</sup> *Wood v. Waud*, 3 Exch. 777; *Greatrex v. Hayward*, 8 Exch. 291;

*Rawstron v. Taylor*, 11 Exch. 380; *Broadbent v. Ramsbotham*, id. 602.

<sup>3</sup> *Williams v. Nelson*, 23 Pick. 141.

<sup>4</sup> *Nelson v. Butterfield*, 21 Maine, 220; *Augusta v. Moulton*, 75 Maine, 284; *Underwood v. North Wayne Scythe Co.*, 41 Maine, 291; *Gleason v. Tuttle*, 46 Maine, 288; *Tinkham v.*

§ 354. **Severance of tenements.**—The general rules relating to severance of tenements are that a grant by the owner of a tenement or part of that tenement, as it is then used and enjoyed, passes to the grantee by implication, and without the use of the word “appurtenances” or similar words, all those easements which the grantor can convey, which are necessary to the reasonable enjoyment of the granted property, and have been, and are, at the time of the grant, used by the owners of the entirety for the benefit of the granted tenement; and that, except in the case of ways or easements of necessity,<sup>1</sup> there is no corresponding implication in favor of the grantor, who, if he wishes to reserve any right over the granted part, should reserve it expressly in the grant.<sup>2</sup> If, therefore, the owner of land conveys away a portion of his premises, a part of which is, at the time of the conveyance, flowed by a mill dam belonging to him, and makes no reservation of the right to continue to flow the land, he loses the right, and cannot set up an implied reservation; but if he sells and conveys the mill, the right to flow the land passes as an incident to the purchaser, and cannot be cut off by the grantor.<sup>3</sup> So, the grant of a dam on another’s soil entitles the grantee to enter for the purpose of repairing the dam.<sup>4</sup> It is, however, a matter of

Arnold, 3 Greenl. 120; Seidensparger v. Spear, 17 Maine, 123; *post*, § 602.

<sup>1</sup> See Pearson v. Spencer, 3 B. & S. 761; Pettingill v. Porter, 8 Allen, 1; Morrison v. Marquardt, 24 Iowa, 35.

<sup>2</sup> Wheeldon v. Burrows, 12 Ch. D. 31; Russell v. Watts, 25 Ch. D. 559; Tenant v. Goldwin, 2 Ld. Raym. 1089, 1093; Hinchcliffe v. Kinnoul, 5 Bing. N. C. 1; Barnes v. Loach, 4 Q. B. D. 494; Wardle v. Brocklehurst, 1 El. & El. 1058; Palmer v. Fletcher, 1 Lev. 122; Swansborough v. Coventry, 9 Bing. 305; Cox v. Mathews, 1 Vent. 237; Compton v. Richards, 1 Price, 27; Watson v. Troughton, 48 L. T. N. S. 508; Jamaica Pond Aqueduct Corporation v. Chandler, 9 Allen, 164; Spaulding v. Abbott, 55 N. H. 423; Tourtellot v. Phelps, 4 Gray, 378; Michell v. Seipel, 53 Md. 251; Oak-

ley v. Stanley, 5 Wend. 528; Elliott v. Rhett, 5 Rich. (S. C.) 405; 57 Am. Dec. 750, note; Hammond v. Woodman, 41 Maine, 177; Tredwell v. Inslee, 120 N. Y. 458; Munison v. Reid, 46 Hun, 399; Smith v. Smith, 62 N. H. 429; Smith v. Beaupied, *id.* 652; Wentworth v. Philpot, 60 N. H. 193; Hair v. Downing, 96 N. C. 172; Crosland v. Rogers, 32 S. C. 130; McMakin v. Magee, 13 Phila. 105; Francis’s Appeal, 96 Penn. St. 200; Root v. Wadhams, 35 Hun, 57; Erickson v. Michigan Land Co., 50 Mich. 614.

<sup>3</sup> Burr v. Mills, 21 Wend. 290; United States v. Appleton, 1 Sumner, 492. But see Dunklee v. Wilton R. Co., 24 N. H. 490.

<sup>4</sup> Frailey v. Waters, 7 Penn. St. 221; Skull v. Glenister, 11 W. R. 368;

contract depending entirely upon the construction of the conveyance, and the above rules are applicable, according to the character, state and use of the premises at the time of the grant, only where the intention of the parties in this respect is not expressed in terms.<sup>1</sup>

§ 355. **Same—Implied grants.**—A grant will be implied especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and water-pipes or spouts, all these being continuous easements technically so called, that is, easements which are enjoyed without any active intervention of the party entitled to enjoy them; but ways are not in this sense continuous easements, being enjoyed only as they are traveled.<sup>2</sup> The application of the doctrine to ways has been quite uniformly denied,<sup>3</sup> although there are cases, especially in Pennsylvania, in which it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another, will, upon a severance of the estate, pass as implied or constructive easements appurtenant to the part of the estate for the benefit of which they were established.<sup>4</sup> Whether the estate sold be the servient or dominant tenement, the easement, or other incident of property, in order to pass by implication, must be open, apparent, and continuous.<sup>5</sup> The right to go to a well and there take water is not a continuous easement nor is it an easement of necessity.<sup>6</sup>

Goodhart v. Hyett, 82 W. R. 165; Phear's Rights of Water, 72-74. See Mansfield v. Shepard, 134 Mass. 520.

<sup>1</sup> Hall v. Lund, 1 H. & C. 676; Johnson v. Jordan, 2 Met. 234, 239.

<sup>2</sup> Cox v. Forrest, 60 Md. 74.

<sup>3</sup> Pheysey v. Vicary, 16 M. & W. 484; Whalley v. Thompson, 1 B. & P. 371; Worthington v. Grimson, 2 El. & El. 618; Dodd v. Burchell, 1 H. & C. 113; Polden v. Bastard, 4 B. & S. 258; L. R. 1 Q. B. 155; Barlout v. Rhodes, 1 C. & M. 448; Thompson v. Waterlow, L. R. 6 Eq. 86; Langley v. Hammond, L. R. 3 Ex. 161; Daniel v. Anderson, 31 L. J. N. S. 610; Fetters v. Humphreys, 19 N. J. Eq. 471; O'Rourke v. Smith, 11 R. L. 259; Prov-

idence Tool Co. v. Corliss Steam Engine Co., 9 R. L. 564; Evans v. Dana, 7 R. L. 806; Kenyon v. Nichols, 1 R. L. 411; Lampman v. Milks, 21 N. Y. 505.

<sup>4</sup> Kieffer v. Imhoff, 26 Penn. St. 488; McCarty v. Kitchenman, 47 Penn. St. 289; Francis's Appeal, 96 Penn. St. 200; Cannon v. Boyd, 73 Penn. St. 179; Thompson v. Miner, 30 Iowa, 386; Huttemeier v. Albro, 18 N. Y. 48; 2 Bosw. 546.

<sup>5</sup> Kutz v. McCune, 22 Wis. 628; Scott v. Bentel, 23 Gratt. 1; Hardy v. McCullough, id. 251.

<sup>6</sup> Polden v. Bastard, L. R. 1 Q. B. 156, 161; Wentworth v. Philpot, 60 N. H. 193.

§ 356. *Same.*—In *Nicholas v. Chamberlain*,<sup>1</sup> it was held upon demurrer, “that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary, *et quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is, if a lessee for years of a house and land erect a conduit upon the land, and, after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them. But by Popham, *Chief Justice*, if the lessee erect such a conduit, and afterward the lessor, during the lease, sell the house to one, and the land wherein the conduit is to another, and after the lease determines; he who hath the land wherein the conduit is, may disturb the other in the using thereof, and may break it; because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is if a disseisor of an house and land erect such a conduit, and the disseisee re-enter, not taking conusance of any such erection nor using it, but presently after his re-entry sells the house to one, and the land to another; he who hath the land is not compellable to suffer the other to enjoy the conduit.” This decision appears never to have been questioned, and is recognized as authority in numerous decisions.<sup>2</sup>

<sup>1</sup> Cro. Jac. 121; *Palmer v. Fletcher*, 1 Lev. 122; *Sury v. Pigott*, *Palmer*, 444; 3 Bulst. 339; *Poph.* 166.

<sup>2</sup> *Suffield v. Brown*, 33 L. J. N. S. Ch. 249; *Pyer v. Carter*, 1 H. & N. 916; *Robins v. Barnes*, *Hobart*, 131; *United States v. Appleton*, 1 Sumner, 492; *Hazard v. Robinson*, 3 Mason, 272; *British North America Bank v. Miller*, 7 Sawyer, 168; *Philbrick v. Ewing*, 97 Mass. 133; *Coolidge v.*

*Hagar*, 48 Vt. 9, 14; *Lampman v. Milks*, 21 N. Y. 405; *Burr v. Mills*, 21 Wend. 290; *Ogden v. Jennings*, 62 N. Y. 526, 531; *New Ipswich Factory v. Batchelder*, 3 N. H. 190; *Shaw v. Etheridge*, 3 Jones (N. C.), 300; *Elliott v. Sallee*, 14 Ohio St. 10; *Farmer v. Ukiah Water Co.*, 56 Cal. 11; *Pickering v. Stapler*, 5 S. & R. 107; *Seymour v. Lewis*, 13 N. J. Eq. 439.

§ 357. *Pyer v. Carter*.— With respect to the rights of the vendor upon the severance of tenements, the decision in *Pyer v. Carter*<sup>1</sup> has given rise to much discussion, and has been approved in certain cases in England and in this country.<sup>2</sup> In that case the action was for stopping a drain discharging into a common sewer and running through the adjoining premises of the plaintiff and the defendant, which had formerly been one estate and were converted into two by a former owner after the construction of the drain. It appeared that the plaintiff might have made a drain directly from his house into the sewer at a trifling expense, and the defendant testified that he did not know of the existence of the drain at the time of the conveyance to him. Judgment was for the plaintiff, and Watson, B., said: "It seems in accordance with reason that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his

<sup>1</sup> 1 H. & N. 916; *Ewart v. Cochran*, 4 Macq. 117; *Hall v. Lund*, 3 B. & S. 761; 1 H. & C. 676; *Pearson v. Spencer*, 3 B. & S. 762; *Chadwick v. Marsden*, L. R. 2 Ex. 289; *Taylor v. Browning*, 11 Vict. L. R. 158.

<sup>2</sup> *Ibid.*; *Ewart v. Cochran*, 4 Macq. 117; *Watts v. Kelson*, L. R. 6 Ch. 166; *Worthington v. Gimson*, 2 El. & El. 618; *Dillman v. Hoffman*, 38 Wis. 559; *Seibert v. Levan*, 8 Penn. St. 383; *Fetters v. Humphreys*, 18 N. J. Eq. 260, 263; 19 N. J. Eq. 471; *Janes v. Jenkins*, 34 Md. 1; *Calhoun v. Rourke*, 3 Pugs. & B. (N. B.) 591, 596. In *Wheeldon v. Burrows*, 12 Ch. D. 31, 48, 52, 59, Thesiger, L. J., while dissenting from the broad doctrine laid down in *Pyer v. Carter*, and regarding that case as of a special character, said: "Though the circumstances were special in their character, there is no doubt that the principles laid down by the Court of Exchequer were as wide as possibly could be. That Court laid down that there was no distinction between im-

plied reservation and implied grant; and this, as it appears to me, broke the hitherto unbroken current of authority upon this subject." "I cannot see that there is anything unreasonable in supposing that in such a case, where the defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer v. Carter* is right comes up for discussion, to consider that point."

house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*. If that were not so, the inconveniences and nuisances in towns would be very great." "We think that it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of his purchase."

§ 358. *Same*.—In the subsequent case of *Suffield v. Brown*,<sup>1</sup> the owner of a dock and an adjoining wharf conveyed the wharf without reservation, and it was held that no reservation of an easement was implied, in favor of the vendor, and for the perfect enjoyment of the dock, to have the bowsprits of vessels project over the wharf. Lord Westbury, L. C., said: "I cannot agree that the grantor can derogate from his own absolute grant, so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor." Of *Pyer v. Carter*, his lordship said: "I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority." The doctrine of *Pyer v. Carter* has also been disapproved in other cases in England,<sup>2</sup> and in Massachusetts,<sup>3</sup> Maine,<sup>4</sup> and Maryland.<sup>5</sup>

§ 359. *Simultaneous and non-simultaneous grants*.—In *Johnson v. Jordan*,<sup>6</sup> in Massachusetts, the owner of two adjoining lots, one occupied by himself and the other leased by him, constructed a drain leading into a common sewer from the leased premises through those which he occupied, and permitted his tenants to use it for about ten years. He then sold

<sup>1</sup> 4 De Gex, J. & S. 185; 10 Jur. N. S. N. 722; *Allen v. Taylor*, 16 Ch. D. 111; 6 Jur. N. S. 999; *Morland v.* 855; *Russell v. Watts*, 25 Ch. D. 559. *Cook*, L. R. 6 Eq. 252. •

<sup>2</sup> *Dodd v. Burchell*, 1 H. & C. 113; 369; *Randall v. McLaughlin*, 10 Allen, 366; 6 Allen, 201.

478, 486; *Wheeldon v. Burrows*, 12 <sup>4</sup> *Warren v. Blake*, 54 Maine, 276.

Ch. D. 81; *Polden v. Bastard*, L. R. 1 <sup>5</sup> *Mitchell v. Seipel*, 53 Md. 251.

Q. B. 156, 160; *White v. Bass*, 7 H. & <sup>6</sup> 2 Met. 234.



both lots by simultaneous conveyances<sup>1</sup> to different purchasers, and did not refer to the drain in the deed of the premises which he had previously leased. This deed was held to pass no right to the use of the drain through the other lot, if, by reasonable labor and expense, the grantee could make a drain without going through that land. In delivering the opinion of the court, Shaw, C. J., distinguished an artificial gutter, made for the purpose of drainage, from a natural watercourse, of which each adjoining proprietor has a natural right to the benefit, as it passes through his land, not as an easement or appurtenance, but as parcel, for all useful purposes to which it may be applied,<sup>2</sup> and from those cases wherein the declivity of the land and the relative position of the tenements are such that a drain cannot be formed with reasonable labor and expense for the benefit of one without passing through the other. As the conveyances from the owner of the whole estate under which the parties claimed were simultaneous, the case was considered to be more like a partition between tenants in common, where each party takes his estate with the rights, privileges, and incidents inherently attached to it, than the case of grantor and grantee, where the grantor conveys a part of his land by metes and bounds, and retains another part to his own use, and where the question is, upon the terms of the deed, whether an easement for drainage was granted with the estate conveyed over that retained, or reserved over that conveyed for the benefit of that retained.

§ 360. **Same.**—In *Carbrey v. Willis*,<sup>3</sup> in the same State, it was held that, where the grant of the lower estate precedes that of the other, no easement can be taken as reserved by implication, unless it is *de facto* annexed and in use at the time of the grant, and is necessary to the enjoyment of the estate which the grantor retains, such necessity not being deemed to exist, if a similar privilege can be secured by rea-

<sup>1</sup> See, also, *Kilgour v. Ashcom*, 5 Mass. 453; *Pettingill v. Porter*, 8 H. & J. 82; *Elliott v. Sallee*, 14 Ohio St. 10. Allen, 1; *Thayer v. Payne*, 2 Cush. 827; *Warren v. Blake*, 54 Maine, 276;

<sup>2</sup> *Sury v. Pigott*, Palmer, 444; 3 Bulst. 339; *ante*, ch. 7. Dolliff v. Boston & Maine Railroad, 68 Maine, 173; *Parker v. Bennett*, 11

<sup>3</sup> 7 Allen, 364; *Collier v. Pierce*, 7 Gray, 18; *Hapgood v. Brown*, 102 Allen, 388; *Green v. Collins*, 86 N. Y. 246; 40 Am. Rep. 531, and note.

sonable trouble and expense; and that where there is a grant of land by metes and bounds, without express reservation, and with full covenants of warranty against incumbrances, there is no just reason for holding that there can be any reservation by implication, unless the easement is strictly one of necessity. In *Roberts v. Roberts*,<sup>1</sup> in New York, it was held that, if a land-owner changes the course of a stream running through his land by cutting an artificial ditch to carry off its waters, the change in the condition of the land being permanent and visible, and afterwards conveys to different grantees the respective portions of the land on which are the old and new channels, the one grantee holds his portion relieved from the stream and the other burdened with it. In other cases, in this State, it is held that the presumption that the parties contract with reference to the visible physical condition of the property at the time of the conveyance, may be rebutted by proof that there is no apparent sign of the servitude indicating its existence to a person reasonably familiar with the subject upon an inspection of the premises, or by proof of actual knowledge on the part of the parties of facts which negative any deduction to be drawn from their apparent condition.<sup>2</sup>

§ 361. *Seymour v. Lewis*.—The decision in *Seymour v. Lewis*,<sup>3</sup> in New Jersey, inclines more strongly to support the doctrine of the French law. It was there held that when the owner of two tenements sells one of them, the purchaser takes his tenement with all the burdens as well as benefits, as between it and the property which the grantor retains, which appear at the time of the sale to belong to it; and that, upon the facts of the case, the privilege of diverting water, by means of conduits and pipes, from a spring in one parcel of land to a mill upon other land belonging to the same owner, was reserved by implication to the grantor, under his grant of the

<sup>1</sup> 55 N. Y. 275; *Lampman v. Milks*, 1058; *Shaw v. Etheridge*, 3 Jones 21 N. Y. 505; *Dunklee v. Wilton* (N. C.), 300.  
*Railroad*, 24 N. H. 489.

<sup>2</sup> *Butterworth v. Crawford*, 46 N. Y. 349; *Simmons v. Cloonan*, 47 N. Y. 3; *Curtis v. Ayrault*, 47 N. Y. 73. See *Wardle v. Brocklehurst*, 1 El. & El.  
<sup>3</sup> 13 N. J. Eq. 439; *Denton v. Leddell*, 23 N. J. Eq. 64; 24 N. J. Eq. 567; *Fetters v. Humphreys*, 18 N. J. Eq. 260; 19 N. J. Eq. 471.

first parcel by metes and bounds, without reservation of or reference to the easement.

§ 362. **Ground of implied grants.**—No implication of a grant of an easement arises from proof that the land granted could not be conveniently occupied without it. Its foundation rests in a necessity for it, not in convenience.<sup>1</sup> In *New Ipswich Factory v. Batchelder*,<sup>2</sup> a tract of land was conveyed, described by metes and bounds, with a mill upon the same. At the time of the conveyance, a raceway to conduct the water from the mill ran along the side of the natural stream, beyond the land granted, into other land of the grantor, and then discharged the water into the natural stream. This raceway had been used with the mill for several years, and was necessary for the convenient working of the mill. It was held that the right to have the water flow off through the whole extent of the raceway passed as appurtenant to the mill. A right of way by necessity does not depend upon the existence of such right prior to the conveyance of the land,<sup>3</sup> but it has never been held that the grantee has any right, on the ground of necessity, to construct a new drain through his grantor's land;<sup>4</sup> and although the necessity is evidence to establish an implied grant or reservation of an easement, the easement is never created by mere necessity.<sup>5</sup>

<sup>1</sup> *Dodd v. Burchell*, 1 H. & C. 113, 122; *Pearson v. Spencer*, 3 B. & S. 761; *Nichols v. Luce*, 24 Pick. 102; *Gayetty v. Bethume*, 14 Mass. 49; *Thayer v. Payne*, 2 Cush. 327; *Carbrey v. Willis*, 7 Allen, 364, 369; *Leonard v. Leonard*, 2 Allen, 543; *Trask v. Patterson*, 29 Maine, 499, 503; *Wentworth v. Philpot*, 60 N. H. 193; *Howell v. McCoy*, 3 Rawle, 256; *Smyles v. Hastings*, 22 N. Y. 217; *Brakely v. Sharp*, 9 N. J. Eq. 9; 10 N. J. Eq. 206; *McTairsh v. Carroll*, 7 Md. 352.

<sup>2</sup> 3 N. H. 190; *ante*, § 355.

<sup>3</sup> *Powers v. Harlow*, 53 Mich. 507. One whose lands are surrounded by others' land has a right of access to a public highway over such land, even though he may have access to the highway by a difficult and cir-

cuitous route. *Re Brecknock Township Road*, 2 Endlich (Pa.), 437.

<sup>4</sup> *Russell v. Jackson*, 2 Pick. 578; *Hart v. Cramer*, 25 Conn. 331; *Collins v. Prentice*, 15 Conn. 39; *Pierce v. Selleck*, 18 Conn. 321.

<sup>5</sup> *Wiswell v. Minogue*, 57 Vt. 616. Upon a like principle, by the grant of trees is granted withal, unless the right of cutting be restrained, power to cut them down and take them away; by the grant of mines is granted the power to dig them; and by the grant of fish in a man's pond, is granted power to come upon the banks and fish for them, but not to dig a trench to let the water out to take the fish, when they can be taken by nets or other devices. *Sheppard's Touchstone*, 89; *Finch's Law*, 63.

## CHAPTER XII.

### REMEDIES AT LAW.

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§ 363. Nuisance — Abatement.— A person specially injured by a nuisance may lawfully enter upon the premises of another who maintains it, for the purpose of abating it, or of removing the obstruction which is the cause of the injury, when this can be done without a breach of the peace.<sup>1</sup> This right appears to exist in favor of a lessee, or any other person lawfully in possession, as well as the owner in fee.<sup>2</sup> Under this rule a dam which causes the water to flow back to an unreasonable extent may be removed, so far as necessary, by an upper proprietor whose land is thereby flowed without his license;<sup>3</sup> an obstruction to the free flow of the water to or from a mill may be removed;<sup>4</sup> an artificial channel, through which the water is unlawfully diverted, may be filled up;<sup>5</sup> or if the stream is so polluted as to be injurious to the working of a mill, or the health of the community, a person thereby injured may abate the source of the corruption. If a natural stream is made foul by impurities cast therein, the source from

<sup>1</sup> Batten's Case, 9 Rep. 54b; Raikes v. Townsend, 2 Smith, 9; Baldwin v. Smith, 82 Ill. 162; Day v. Day, 4 Md. 262; Hamilton v. White, 5 N. Y. 9; ante, § 128.

<sup>2</sup> Great Falls Co. v. Worster, 15 N. H. 435, 436.

<sup>3</sup> Heath v. Williams, 25 Maine, 209; Brown v. Chadbourne, 31 Maine, 26; Hodges v. Raymond, 9 Mass. 316; Jewell v. Gardiner, 12 Mass. 311; Colburn v. Richards, 13 Mass. 420; Knoll v. Light, 76 Penn. St. 268; Overton v. Sawyer, 1 Jones (N. C.), 308; Brisbane v. O'Neill, 3 Strob. 348. So of a surveyor of highways removing ice and snow from a private water-course. Johnson v. Dunn, 134 Mass. 522. See Grace v. Newton Board of Health, 135 Mass. 490; Neally v. Bradford, 145 Mass. 561. In the absence of statute, neither the board of

health nor the city council of a city can proceed *in invitum* to abate a nuisance on adjacent land by erecting a dam. Cavanagh v. Boston, 139 Mass. 426. Upon the power of boards of health to abate nuisances, see, also, 24 Am. L. Rev. 559; Raymond v. Fish, 51 Conn. 80; Gould v. Rochester, 105 N. Y. 46.

<sup>4</sup> Prescott v. Williams, 5 Met. 429; Colburn v. Richards, 13 Mass. 420. If A. erects a dam on B.'s land without license, B. may cause it to be removed as a nuisance, but cannot compel A. to maintain any portion of it. A. may permit the dam to fall to decay, or the water to run to waste, and will not thereby subject himself to any liability to B. Bradford v. Cressey, 45 Maine, 9.

<sup>5</sup> Hodges v. Raymond, 9 Mass. 319; Lee v. Stevenson, 27 L. J. Q. B. 263.

which the impurities originate may be removed, but the stream itself cannot be lawfully destroyed or filled up;<sup>1</sup> and if a sewer is made by a municipal corporation, under competent authority, but in such an unskilful manner as to cause injury to private property, the owner may maintain an action against the city, but cannot remedy the injury by filling up the sewer.<sup>2</sup> But if commissioners of highways, or road surveyors, change the course of a stream to the injury of a riparian proprietor, he may make such reasonable abatement as may be necessary to secure his rights.<sup>3</sup> So if a town fails to keep in repair a culvert in a highway crossing a stream, whereby lands above are flooded, the land-owners may, after due notice, open the culvert in a proper manner, doing no unnecessary damage.<sup>4</sup> In California the appropriator of the waters of a natural stream may go upon the land of a patentee from the United States above and there remove obstructions to its flow.<sup>5</sup>

§ 364. Same — Same.— No one can rightfully abate either a public or private nuisance who could not maintain an action for damages caused thereby;<sup>6</sup> but the abatement of the nuisance does not preclude a person entitled to maintain an action from recovering the damages sustained by him before the nuisance was removed.<sup>7</sup> And in an action to recover damages for the nuisance, it is no ground for mitigation of damages that the plaintiff might have abated the nuisance but did not.<sup>8</sup> The right to recover nominal damages caused by the nuisance is sufficient to justify an entry for the purpose of abating it.<sup>9</sup> In general, an erection cannot be abated as a nuisance unless it is such at the time; but it may be a nuisance at a time

<sup>1</sup> *Finley v. Hershey*, 41 Iowa, 394; *Miller v. Burch*, 32 Texas, 208; *Bloomer v. Morss*, 68 N. Y. 628.

<sup>2</sup> *McGregor v. Boyle*, 34 Iowa, 268.

<sup>3</sup> *McCord v. High*, 24 Iowa, 336; *Thompson v. Allen*, 7 Lans. 459. A county is not liable for the acts of the county court in causing a mill race which crosses a road to be filled up. *Reardon v. St. Louis Co.*, 36 Mo. 279; *Swineford v. Franklin Co.*, 73 Mo. 279.

<sup>4</sup> *Groton v. Haines*, 36 N. H. 388.

<sup>5</sup> *Ware v. Walker*, 70 Cal. 591.

<sup>6</sup> *Ante*, § 128.

<sup>7</sup> *Kendrick v. Bartland*, 2 Mod. 253; *Call v. Buttrick*, 4 Cush. 345; *Tate v. Parrish*, 7 Mon. (Ky.) 325; *Gleason v. Gary*, 4 Conn. 418; *Pilcher v. Hart*, 1 Humph. 524; *Heather v. Hearn*, 5 N. Y. S. 85.

<sup>8</sup> *White v. Chapin*, 102 Mass. 138; *Wolf v. St. Louis Co.*, 15 Cal. 319.

<sup>9</sup> *Amoskeag Manuf. Co. v. Goodale*,



when it is not causing actual damage.<sup>1</sup> The right of abatement must be exercised in the manner least injurious to the rights of others, and can be justified only against the wrongdoer. Thus, in the case of a nuisance by diversion, there is no right to enter upon the lands of those not parties to the wrong, for the purpose of regaining the use of the diverted water.<sup>2</sup> If there are two ways of abating the nuisance, the least mischievous of the two must be chosen, and if by one of these alternative methods wrong would be done to innocent third parties, or to the public, that method cannot be justified at all as against them, and it may become necessary to abate the nuisance in a manner more onerous to the wrongdoer.<sup>3</sup>

§ 365. *Same — Same.*—The abatement may be made, although greater damage results to the wrongdoer than the loss of that which causes the nuisance. Thus, if the owner of land upon one side of a stream builds a dam across the stream, the opposite proprietor may remove that part of the dam which is upon his land, even though the rest of the structure is thereby so weakened as to cause its destruction.<sup>4</sup> So, if a person who has a prescriptive right to discharge clean water through another's drain, sends down foul water so that the nuisance cannot be abated without interfering with the enjoyment, the whole drain may be stopped.<sup>5</sup> But no greater injury can be done than is strictly necessary to make the abatement effectual;<sup>6</sup> and the right to abate an unlawful structure does not justify the removal of anything connected therewith which is

46 N. H. 53, 56; *Adams v. Barney*, 25 Vt. 231; *Fish v. Dodge*, 4 Denio, 311.

<sup>1</sup> *Fay v. Prentice*, 1 C. B. 828; *Rex v. Wharton*, 12 Mod. 510; *Norris v. Baker*, 1 Roll. 393, pl. 15; *Beach v. Trudgain*, 2 Gratt. 219; *Strong v. Benedict*, 5 Conn. 210, 222; *Tuthill v. Scott*, 43 Vt. 525.

<sup>2</sup> *Agawam Canal Co. v. Edwards*, 86 Conn. 476.

<sup>3</sup> *Roberts v. Rose*, L. R. 1 Ex. 82.

<sup>4</sup> *Wigford v. Gill*, Cro. Eliz. 269; *Adams v. Barney*, 25 Vt. 225; *Richardson v. Emerson*, 8 Wis. 319; *Marsh v. Brooks*, 2 Hill (S. C.), 42;

*Biedelman v. Foulk*, 5 Watts, 308; *Lindeman v. Lindsey*, 69 Penn. St. 93; *Woolrych on Waters*, 225.

<sup>5</sup> *Cawkwell v. Russell*, 26 L. J. Ex. 314; *Hill v. Cock*, 26 L. T. N. s. 185.

<sup>6</sup> *Prescott v. Williams*, 21 Pick. 241; *White v. Chapin*, 12 Allen, 521; *Veazie v. Dwinel*, 50 Maine, 479, 496; *Great Falls Co. v. Worster*, 15 N. H. 489; *Groton v. Haines*, 36 N. H. 398; *Gates v. Blencoe*, 2 Dana, 158; *Moffett v. Brewer*, 1 G. Greene, 348; *Bush v. Dubuque*, 69 Iowa, 233; *Ankeny v. Fairview Milling Co.*, 10 Oregon, 390.

rightful.<sup>1</sup> The person injured cannot convert to his own use the materials of the structure which causes the nuisance,<sup>2</sup> and if his land is overflowed by the dam of a lower proprietor, which is of an unauthorized height, he may enter upon the land and lower the level of the dam, but is not justified in removing it altogether,<sup>3</sup> or in diverting the water, to the injury of the lower proprietor, by cutting a ditch upon his own land.<sup>4</sup> He has not even the right to take such measures as will relieve his land in the most speedy manner, if unnecessary injury will thereby be caused to the wrong-doer.<sup>5</sup> If a dam erected in a public river interferes with the navigation, and is a public nuisance, a lower proprietor, if specially aggrieved, may interfere by abating the nuisance, but this would afford no justification for the erection of a dam upon his own land, and thereby flooding the dam above, and the wrong-doer's land with it.<sup>6</sup>

§ 366. **Cleansing stream.**— A riparian proprietor is under no obligation to cleanse the stream, or to remove any obstructions that may arise without fault on his part.<sup>7</sup> But each proprietor has a natural easement in the land below for the passage of the water in the natural channel of the stream away from his land, and may enter upon the land of a lower pro-

<sup>1</sup> *Greenslade v. Halliday*, 6 Bing. 379; *Great Falls Co. v. Worster*, 15 N. H. 439.

<sup>2</sup> *Larson v. Furlong*, 50 Wis. 681; *State v. Taylor*, 27 N. J. L. 117. Such conversion makes him a trespasser *ab initio*. *Little v. Ince*, 3 C. P. (Can.) 528.

<sup>3</sup> *Wright v. Moore*, 38 Ala. 598; *Heath v. Williams*, 25 Maine, 209; *Dyer v. Dupui*, 5 Wharton, 584.

<sup>4</sup> *Wright v. Moore*, 38 Ala. 598. A person who attempts unlawfully to abate a sluiceway to a mill, is liable not only for the materials destroyed, but for damages sustained by the owner of the sluiceway in being deprived of its use. *Hammett v. Russ*, 16 Maine, 171.

<sup>5</sup> *Great Falls Co. v. Worster*, 15 N. H. 412, 439.

<sup>6</sup> *Odiorne v. Lyford*, 9 N. H. 502.

A person who suffers peculiar and special damage from a public nuisance, may maintain an action against its continuance, although a recovery for its creation is barred by the statute of limitations. *New Salem v. Eagle Mill*, 38 Mass. 8. As to the right of an individual to abate a nuisance, see 32 Cent. L. J. 445; 27 Alb. L. J. 424; *ante*, § 121.

<sup>7</sup> *Taylor v. Whitehead*, 2 Doug. 745; *Pomfret v. Ricroft*, 1 W. Saund. 321; 1 Sid. 429; *Bell v. Twentyman*, 1 Q. B. 766; *Bower v. Hill*, 1 Bing. N. C. 549; *McSwiney v. Haynes*, 4 Ir. Eq. 322; *Prescott v. Williams*, 5 Met. 429. A person who is required to construct an artificial vent for water, to prevent its overflowing another's land, is bound to keep it in repair. *Brisbane v. O'Neill*, 3 Stroob. (S. C.) 348.

prietor for the purpose of clearing the channel from obstructions to the flow of the water.<sup>1</sup> This privilege arises from the necessity of the case, and like a way of necessity, or the right to abate a private nuisance, is to be exercised only when the party has no other reasonable and suitable mode of effecting the object, and in such a manner as to cause no unnecessary damage to the owner of the land below.<sup>2</sup>

§ 367. **Same.**— A similar rule applies where the owner of a mill has acquired by grant, or has immemorially enjoyed, the right of conducting off the water necessary to the working of the mill through an artificial canal or raceway constructed on another's land.<sup>3</sup> The right thus acquired carries with it the right to do all necessary and proper acts to keep the raceway in a condition fit for the purposes for which it was intended. "It carries," says Shaw, C. J.,<sup>4</sup> "an implied authority and license to enter upon the land to examine and clear the canal in a reasonable and proper manner, and of what is reasonable the usual and customary mode is good evidence. As to placing the materials taken from the bed of the stream on the adjoining bank, the right and the duty to do so may depend upon circumstances. If the canal is walled up, and the stones have fallen in, it would seem to be the right and the duty of the mill-owner, in removing the stones from the bed of the raceway, to replace them on the wall of the ditch. If the material be soil, which has fallen from the adjoining bank, and which may be useful or beneficial to the owner of the land, for the purpose of enriching the soil or otherwise, it would be the duty of the mill-owner to place it on the bank for his use. But if it be material not useful or beneficial, it would be the duty of the mill-owner to remove it off the land in a reasonable time, and in a manner least prejudicial to the owner of the land."<sup>5</sup>

<sup>1</sup> Ibid.; *Pico v. Colimas*, 32 Cal. 578; *Darlington v. Painter*, 7 Penn. St. 473; *Chapman v. Thames Manuf. Co.*, 13 Conn. 269; *ante*, § 362.

<sup>2</sup> Ibid.

<sup>3</sup> *Prescott v. White*, 21 Pick. 341; *White v. Chapin*, 12 Allen, 516, 522.

<sup>4</sup> *Prescott v. White*, 21 Pick. 341,

343. So of a right to repair pipes and to put a spring in order. *Legg v. Horn*, 45 Conn. 409.

<sup>5</sup> In the case of an aqueduct of a chartered water company, as in that of a highway, the company may peaceably pursue its right against obstructions which the land-owner

§ 368. **Original private remedies at law.**—The original private remedies at law for injuries done to or by means of waters were the old assize of novel disseisin, the writs of *quod permittat prosternere* and *præcipe quod reddat*, the assize of nuisance, and the actions of trespass and trespass on the case. The assize of novel disseisin lay for obstructing a right to convey water through land,<sup>1</sup> and probably was the original remedy for nuisances. The *quod permittat prosternere* was a writ in the nature of a writ of right, commanding the defendant to permit the plaintiff to abate the nuisance, and, in case of his refusal, summoning him to appear in court and show cause therefor. The plaintiff, if successful, had judgment of abatement, and for damages. The writ was confined to the tenant of the freehold, but could be maintained by the alienee of the injured party, and against the alienee of the tort-feasor, if the nuisance were continued after notice.<sup>2</sup> The writ of *præcipe quod reddat* lay for an acre of ground covered with water.<sup>3</sup> The *assize of nuisance* was a writ wherein it was stated that the party injured complained of some act done to the injury of his freehold, and commanded the sheriff to summon an assize or jury and view the premises, and have the jury at the next commission of assizes, that justice be done therein. It also was confined to the tenant of the freehold, and to things appendant or appurtenant thereto.<sup>4</sup> The plaintiff, if successful, had judgment as in the writ of *quod permittat*, for abatement and damages. This remedy was extended by St. Westm. 2, 13 Edw. I., ch. 24, so as to lie against the tortfeasor's alienee.<sup>5</sup> But these writs were both out of use in Blackstone's time,<sup>6</sup>

throws in its way; and if the land-owner, by blasting within the limits of its location, deprives it of its former support, its full enjoyment may be reclaimed by adopting new means of enjoyment, as by a broader base for the new support, or even a change in the course of the aqueduct so far as such change is made necessary by the land-owner's act. *Rockland Water Co. v. Tillson*, 75 Maine, 170; 69 Maine, 255.

<sup>1</sup> Bracton, bk. 4, chs. 42, 43, pp. 231, 232. See *Vin. Abr. Nuisance*, 27 (H.).

<sup>2</sup> 3 Bl. Com. 220, 221; *Penruddock's Case*, 5 Rep. 100b.

<sup>3</sup> 16 *Vin. Abr.* 509, pl. 10; *Woolrych*, 277.

<sup>4</sup> *Vin. Abr. Nuisance*, 27 (H.); *Britton*, Bk. 2, ch. 30, § 1 (Nichols' ed. p. 398); *Langly v. Norris*, Lilly, 54. No assize lay for an easement without profit, as a way; nor of a suit for a mill, though it lay of the tolls of a mill. *Webb's Case*, 8 Co. 46b.

<sup>5</sup> *Baten's Case*, 9 Rep. 55a (note); 3 Bl. Com. 220, 221.

<sup>6</sup> 3 Bl. Com. 220, 221.

and were expressly abolished by St. 3 & 4 Wm. IV., ch. 27, § 36.<sup>1</sup> In New York, in the case of an indictment for a nuisance, the writ commanding the sheriff to prostrate the nuisance was issued only after a record was regularly made out and returned of the conviction of the defendant.<sup>2</sup> The assize of nuisance was retained by statute in this State under the name of writ of nuisance, and the proceedings thereunder simplified; but the remedy was not favored by the courts.<sup>3</sup> In proceedings upon the writ of nuisance, as retained by the Revised Statutes of New York of 1830, in the action of nuisance substituted therefor, and by the former code, § 454, it was necessary for the plaintiff to aver that he was the owner of the freehold at the time the acts complained of were committed; and in cases where the action was brought to abate the nuisance, it was required to be against the owner of the fee at that time, or, if he had aliened, against him or his alienee,<sup>4</sup> and these rules are retained by the Code of Civil Procedure of 1880.<sup>5</sup> A similar equitable action is maintainable in the Supreme Court, by any person specially injured by a nuisance, in which a judgment would be granted directing the removal or abatement of the nuisance.<sup>6</sup>

**§ 369. Action of trespass.**—Trespases include all torts to real property corporeal by acts wrongful in themselves and immediately injurious. Nuisances include all injuries to the

<sup>1</sup> These remedies have been held obsolete in America. *Blunt v. Aikin*, 15 Wend. 522; *Kintz v. McNeal*, 1 Den. 436; *Waggoner v. Jermaine*, 3 Den. 806; *Plumer v. Harper*, 3 N. H. 88.

<sup>2</sup> *People v. Valentine*, 1 Johns. Cas. 336.

<sup>3</sup> *Clark v. Storrs*, 4 Barb. 562; *Brown v. Woodworth*, 5 Barb. 551; *Cornes v. Harris*, 1 Comst. 223; and see *Ellsworth v. Putnam*, 16 Barb. 565; *Hutchins v. Smith*, 63 Barb. 251.

<sup>4</sup> *Ellsworth v. Putnam*, 16 Barb. 565; *Hubbard v. Russell*, 24 Barb. 404; *Brown v. Woodworth*, 5 Barb. 550. So held in case of a noxious trade. *Hutchins v. Smith*, 63 Barb. 251.

<sup>5</sup> See Code, c. 14, art. 7, §§ 1660–1663.

<sup>6</sup> *Knox v. Mayor*, 55 Barb. 404; s. c. 38 How. 67; *Delaney v. Blizzard*, 7 Hun, 7; *Van Brunt v. Ahearn*, 13 Hun, 388. For a similar equitable action in Minnesota, see *Eastman v. St. Anthony Water Power Co.*, 12 Minn. 137; *Ames v. Cannon River Manuf. Co.*, 27 Minn. 245. In the last case the judgment directed the cutting down of the dam. In *Bemis v. Clark*, 11 Pick. 452, the Mass. statute of 1828. c. 137, § 6, providing that where judgment should be rendered for the plaintiff, in an action on the case for a nuisance, the court may on motion of the plaintiff, in addition to

realty, in which the harm done is consequential and not immediate. A trespass implies an illegal entry, or direct injury to land in the plaintiff's possession; a nuisance implies an act or omission injurious only in its consequences. The action of trespass lies for the former injury, and the action on the case for the latter.<sup>1</sup> If a person pours water on another's land, the injury is immediate, and trespass lies; but if he places a spout on his own building, in consequence of which water afterwards runs therefrom into my land, the injury is consequential, because the flowing of the water, which is the immediate injury, is not the wrong-doer's immediate act, but only the consequence thereof, which will not render the act itself a trespass or immediate wrong.<sup>2</sup> Where the defendant caused water to overflow the plaintiff's fishery by throwing down a weir, trespass was brought, and a count was joined for the consequential damages; the act was held to be a plain trespass, and the injury, which was laid with a *per quod*, mere aggravation.<sup>3</sup> Where the defendant dug ditches and diverted a

the common execution, issue a warrant to abate the nuisance, was held to leave it within the discretion of the court whether to issue the warrant on such motion or not. See *Bemis v. Upham*, 13 Pick. 170; *Codman v. Evans*, 7 Allen, 431. This provision is retained by Mass. Pub. Sta. 1882, c. 180, § 1. By § 3 of this chapter, the plaintiff is entitled to abatement as of right in a second suit. A similar judgment of abatement may be had in Wisconsin. Rev. Stats. 1878, c. 137. And this jurisdiction, which at first was in bar of equitable jurisdiction, is no longer so. St. 1882, c. 190; *Denner v. Chicago R. Co.*, 15 N. W. Rep. 158. For a similar jurisdiction in Oregon, see *Oregon Gen. Laws*, 1872, § 330, p. 179; *Marsh v. Trullinger*, 6 Oregon, 356; *post*, § 555, n.; *Blood v. Light*, 31 Cal. 115. The assize of nuisance was formerly in use in Pennsylvania. *Livezey v. Gorgas*, 1 Binn. 251; s. c. 2 Binn. 192. For a full report of all the proceedings in

this case, see *Brackenridge's Law Miscellanies*, 438. See *Lyle v. Richards*, 9 S. & R. 322, at 367; *Barnet v. Ihrie*, 17 S. & R. 174; s. c. 1 Rawle, 44; *Maris v. Parry*, 3 Rawle, 413. But it was sustained only because the remedies of the English common law were in force unless expressly abolished. *Barnet v. Ihrie*, 17 S. & R. 174. Other references to these remedies may be found in *Great Falls Co. v. Worster*, 15 N. H. 412, 435; *Tate v. Parish*, 7 Mon. (Ky.) 325.

<sup>1</sup> 1 Chitty Pl. 142, 194; and see *Scott v. Shepard*, 1 Smith's Lead. Cas. 549.

<sup>2</sup> *Reynolds v. Clarke*, 1 Stra. 634, 635; 2 Ld. Raym. 1399.

<sup>3</sup> *Courtney v. Collet*, 1 Ld. Raym. 272; s. c. *Carthew*, 436; 12 Mod. 164; and cited *Stra.* 635, and 2 Wm. Bl. 898. This case has generally been considered one where the act was done on the plaintiff's close by the defendant as a trespasser (*Angell*, § 395; *Woolrych*, 278), but this, it seems, is not the true view. The



watercourse, and case was brought, it was objected that the diversion had not been shown to be a consequence of the digging, but the court held that it would be so intended after verdict, and that case was the proper form of action.<sup>1</sup> So the turning of water which washes a highway upon one's land has been held ground for an action on the case.<sup>2</sup>

§ 370. **Same — Case.**— It is laid down by Mr. Dane that when the plaintiff is possessed of the soil and a wrong is done directly to his estate, he may have trespass, but generally, where the defendant so disturbs the plaintiff in his stream or watercourse as to occasion consequential damages, case is the proper action in all cases where the defendant does the original act on his own land.<sup>3</sup> The rule is laid down by Shaw, C. J., in *Fiske v. Framingham Manuf. Co.*,<sup>4</sup> that where the act complained of is not an entry upon the plaintiff's land, or other direct injury, but the opening of a sluice upon the defendant's own land, or land upon which he has a right to enter, in consequence of which the plaintiff's land is flooded, case and not trespass is the proper form of action. Where trespass was brought for breaking the plaintiff's close and erecting thereon a wall by which the plaintiff was prevented from using the water in her well, and it appeared that the well belonged to the defendant, and was on his land, but that the plaintiff had a right to use the water in it, it was held that the plaintiff's remedy was in case and not in trespass.<sup>5</sup>

§ 371. **Same — Same.**— To maintain trespass, the plaintiff must have actual or constructive possession of the *locus in quo*. A lessor cannot recover for diversion of water when there has been no diminution of rent and no damage to his

syllabus in Lord Raymond's report reads: "Causing water to overflow another's fishery or land, though by an act on the party's own soil, is a direct trespass." And the same version is given in *Carthew*, 436. In *Stra.* 635, Lord Raymond, C. J., states the case as one "for the defendant's diverting his own watercourse in his own land," which was *held* a trespass. In 2 Wm. Bl. 898, it is cited as for an act done

"in the plaintiff's own land," which seems an obvious substitution of "plaintiff" for "defendant."

<sup>1</sup> *Leveridge v. Hoskins*, 11 Mod. 257.

<sup>2</sup> *Broughton v. Carter*, 18 Johns. 405.

<sup>3</sup> 3 Dane Abr. ch. 71, art. 3, p. 10.

<sup>4</sup> 12 Pick. 68.

<sup>5</sup> *Shafer v. Smith*, 7 Har. & J. 67.

interest is shown.<sup>1</sup> The plaintiff must show that the portion of land on which the wrongful act was committed was in his inclosure, or that he had paramount title if it was vacant, or that he was in the actual possession of a part under a deed for the whole, embracing the part upon which the act was committed. Trespass will not lie against a person for digging a ditch upon his own land, whereby water is thrown upon the land of the plaintiff, the remedy in such case being by an action on the case for consequential damages.<sup>2</sup> Where it was alleged that the plaintiff was the owner of a mill on the same stream with the mill owned by the defendant, and that the defendant, wilfully and with intent to injure the plaintiff, frequently shut down his gates, so as to accumulate a large head of water, and then raised them, by which means an immense volume of water ran with great force against the plaintiff's dam and swept it away, it was held that case could not be maintained, and that trespass was the only remedy.<sup>3</sup> The decision here turned on the violence and continuous force by which the injury was effected, and, it seems, is not in conflict with the ruling of Shaw, C. J., above cited, which made allowance for direct injuries.

§ 372. *Same — Same.*—The case of *Smith v. Fletcher*,<sup>4</sup> in England, was tried before the passage of the Judicature Acts. It was an action against the defendant for injuries caused by water which he had accumulated upon his land, and which burst the banks in its course during a flood and escaped into the plaintiff's mine. The plaintiff alleged that the defendant "broke and entered a close of the plaintiff called C., and certain mines thereunder, and flooded them with water." The form of the action was not considered, but a recovery was had as for a trespass. But where new systems of procedure have abolished the different forms of action, the distinction between trespass and case has become unimportant.<sup>5</sup>

<sup>1</sup> *Moody v. King*, 74 Maine, 497. If the plaintiff, though in possession, attempts to prove a good paper title and fails, he cannot recover for permanent depreciation in the value of the property. *Winchester v. Stevens Point*, 58 Wis. 850.

<sup>2</sup> *Winkler v. Meister*, 40 Ill. 349.

<sup>3</sup> *Kelly v. Lett*, 13 Ired. L. 50; *Hogwood v. Edwards*, Phil: Law. 850.

<sup>4</sup> L. R. 7 Ex. 305; 2 App. Cas. 781. See *Wells v. Ody*, 1 M. & W. 452; s. c. *Tyrwh. & Gr.* 715.

<sup>5</sup> "This distinction between trespass

§ 373. **Case.**—For injuries to incorporeal rights in waters, such as easements, trespass cannot be supported, and case is the proper remedy.<sup>1</sup> Where the rights of the parties to the water are regulated by a contract, case will still lie for any negligence or misfeasance in the execution of the contract, or where there is a breach of duty imposed by law, independent of the contract.<sup>2</sup> Where mill-owners, who were entitled to all a certain stream except what they had leased to the defendants, brought suit against the defendants for diverting more water than they had a right to take, case was held the proper remedy, and not covenant.<sup>3</sup> A grantee may maintain case for diversion of water by a grantor, which is in derogation of his grant.<sup>4</sup> Where the defendant contracted for the privilege of floating logs through the plaintiff's mill-dam and flume at a stipulated price, and agreed to repair and pay all damage done, it was held that case would lie for damage carelessly and negligently done to the plaintiff's dam.<sup>5</sup> The action on the case is the proper remedy for the owner of property who is injured by the nuisance of projecting eaves or roofs of an adjoining building causing rain to overflow upon his land.<sup>6</sup>

and nuisance," say Coulson and Forbes (on Waters, p. 649), "so far as the form of action is concerned, is now of little value, as by the Common Law Procedure Act, 1852, and the Judicature Acts, 1873 and 1875, all forms of action are abolished." The same is true in many of the States which have abolished the old forms.

<sup>1</sup> 1 Chitty Pl. 142; Nuttall v. Bracewell, L. R. 2 Ex. 1; Wilson v. Wilson, 2 Vt. 68; Case v. Webber, 2 Ind. 108. So held of an injury to a right to convey water through another's land. Baer v. Martin, 8 Blackf. 317. So where one conveyed a mill, and granted an easement in the dam and pond, and afterwards injured the dam, the grantee's remedy was held to be case, and not trespass. Whitehead v. Garvis, 3 Jones L. 171. But where the conveyance of a water privilege is of "all the land that the

dam flows," trespass is the proper remedy for an injury to such land. Morse v. Marshall, 13 Allen, 288.

<sup>2</sup> See Thomas v. Utica R. Co., 97 N. Y. 245.

<sup>3</sup> Bigelow v. Battle, 15 Mass. 313. See Batavia Manuf. Co. v. Newton Wagon Co., 91 Ill. 230.

<sup>4</sup> Cromwell v. Selden, 3 N. Y. 253; Eshelman v. Snyder, 82 Ind. 498.

<sup>5</sup> Dean v. McLean, 48 Vt. 412. Where the defendant had for several years flowed the plaintiff's land, paying an annual compensation therefor, under an oral agreement, it was held, in an action to recover damages for such flowage, that the relation of landlord and tenant existed between the parties, and that the plaintiff could maintain no action except for the yearly compensation, without giving notice to quit. Morrill v. Mackman, 24 Mich. 279.

<sup>6</sup> Rolfe v. Rolfe, F. Moore, 853,

§ 374. **Same.**—An action on the case lies for any wrongful diversion of water from a mill,<sup>1</sup> or for any diversion or obstruction to the injury of a riparian proprietor,<sup>2</sup> the damages being computed to the date of the writ;<sup>3</sup> and if the defendant has the right to maintain a dam at a certain height, or at a certain point in a river, the action will lie against him for wrongfully increasing the height,<sup>4</sup> or for constructing the dam and causing flowage at another point on the river.<sup>5</sup> So the action lies if a person, having a preferred right to the water, uses it wrongfully to the injury of one entitled to the surplus.<sup>6</sup>

cited there in *Beswick v. Combdon*; s. c. cited, 5 Rep. 101; *Penruddock's Case*, 5 Rep. 101; *Battishill v. Reed*, 18 C. B. 696; *Codman v. Evans*, 7 Allen, 481; *Whitney v. Sanders*, 8 Pitts. 226; *Gould v. McKenna*, 86 Penn. St. 297. In *Aikin v. Benedict*, 89 Barb. 400, overruling *Sherry v. Frecking*, 4 Duer, 452, it was held that trespass on the case or the statutory action for nuisance was the proper remedy for such an injury, and not ejectment. The erection of eaves projecting over another's land is a nuisance, for which case will lie without proof that rain has fallen since the erection. *Fay v. Prentice*, 1 C. B. 828. See *Bellows v. Sackett*, 15 Barb. 96. But where the injury complained of is caused by rain thrown on his premises by such eaves, the injury must be proved as laid. *Simmons v. Pollard*, 53 Vt. 348. It is held that the landlord of the injured premises may maintain case as a reversioner for such a nuisance during the term, if the jury think the reversion is injured. *Tuckerman v. Newman*, per Lord Denman, C. J., 11 A. & E. 40. Compare *Jackson v. Pesked*, 1 M. & S. 234, where Lord Ellenborough held that injury to the reversion must be alleged in such case. See *ante*, §§ 292, 293.

<sup>1</sup> So held in case of an ancient mill. *Broome v. Mordant*, Cro. Eliz. 112.

See *Ingraham v. Hutchinson*, 2 Conn. 504. If the right claimed is that of an ancient mill, a prescriptive right must be shown. *Platt v. Johnson*, 15 Johns. 213. Mere inconvenience to an ancient mill by increase of rubbish in the stream gives no cause of action. *Palmer v. Mulligan*, 8 Caines, 307. Wrongful diversion from new mill. *Dyer*, 248b; *Cox v. Matthews*, 1 Vent. 237. An injury by a dam, causing a growth of grass in a stream, which impedes its flow, is actionable in case, unless the grass would have grown without the dam. *Knoll v. Light*, 76 Penn. St. 268.

<sup>2</sup> *Wright v. Howard*, 1 Sim. & Stu. 190; *Mason v. Hill*, 8 B. & Ad. 304; s. c. 5 B. & Ad. 7; 8 Kent Com. 442; *Meyer v. Horst*, 106 Penn. St. 552; *Martin v. Bigelow*, 2 Aik. (Vt.) 184.

<sup>3</sup> *Williams v. Camden Water Co.*, 79 Maine, 513.

<sup>4</sup> *Phillips v. Sherman*, 64 Me. 171; *Sackrider v. Beers*, 10 Johns. 241; *Merritt v. Brinkerhoff*, 17 Johns. 306. So where the defendant (maintaining a dam under the Mill Acts) wrongfully closes his gates at night to collect water, the remedy is in case. *Thompson v. Moore*, 2 Allen, 350.

<sup>5</sup> *Davis v. Mattawamkeag L. D. Co.*, 82 Maine, 346.

<sup>6</sup> *Batavia Manuf. Co. v. Newton Wagon Co.*, 91 Ill. 290.

So, if water is accustomed to flow to a well and thence to one's house for his use, and one diverts the stream from coming to the well.<sup>1</sup> If one disturbs the plaintiff in the use of his well by putting rubbish therein, case will lie if the water is shallowed and rendered less convenient for use.<sup>2</sup>

§ 375. *Same.*—Case is also the appropriate remedy for the pollution of a watercourse to the injury of another. It was decided, in a case reported in the Year Books, that if two several owners of houses have a river in common between them, which one corrupts, the other shall have an action upon the case;<sup>3</sup> and the action has been allowed without question ever since.<sup>4</sup> So, if one abandons waters artificially collected, and turns them into a natural stream, he cannot afterwards reclaim them; and if he attempts to withdraw them from the stream, he is liable in case to any one injured thereby.<sup>5</sup> Where the canal commissioners of Illinois turned the surplus water of a certain canal into a natural stream to get rid of it, and so increased the volume of the stream, and their lessee, succeeding to their rights, diverted a portion of the water from the stream to drive his mill, and returned it to the stream below the plaintiff's mill, thereby diminishing the volume of water at the plaintiff's mill, it was held that the plaintiff could maintain case.<sup>6</sup>

<sup>1</sup> 1 Com. Dig. Title Action upon the Case for a Nuisance (A.); *Prickman v. Tripp*, Skin. 389.

<sup>2</sup> *Taylor v. Bennett*, 7 C. & P. 329.

<sup>3</sup> Y. B. 13 H. 7, 26, cited in Co. Litt. 200 b.

<sup>4</sup> *Ante*, §§ 219–223. Leading cases illustrating the use of the action on the case are: *Wood v. Waud*, 3 Exch. 748; *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; *Norton v. Scholefield*, 9 M. & W. 565; *Hodgkinson v. Ennor*, 4 B. & S. 229. See *Cator v. Lewisham Board*, 5 B. & S. 115; *Locks & Canals v. Lowell*, 7 Gray, 223; and *Mills v. Hall*, 9 Wend. 315; *Thomas v. Brackney*, 17 Barb. 655; *Carhart v. Auburn Gas Co.*, 22 Barb. 297; *O'Riley v. McChesney*, 3

*Lana*, 278; *Merrifield v. Worcester*, 110 Mass. 216; *Woodward v. Aborn*, 85 Maine, 271; *Washburn v. Gilman*, 64 Maine, 163; *Wheatley v. Chrisman*, 24 Penn. St. 298; *Little Schuylkill Nav. Co. v. Richards*, 57 Penn. St. 142; *Seely v. Alden*, 61 Penn. St. 302; *Sanderson v. Penn. Coal Co.*, 113 Penn. St. 126; 86 Penn. St. 401; s. c. 94 id. 302; *Snow v. Parsons*, 28 Vt. 459; *Gladfelter v. Walker*, 40 Md. 1; *Story v. Hammond*, 4 Ohio, 376.

<sup>5</sup> *Adams v. Slater*, 8 Brad. (Ill. App.) 72; *Druley v. Adams*, 102 Ill. 177; and see *Davis v. Gale*, 32 Cal. 26.

<sup>6</sup> *Adams v. Slater*, 8 Brad. (Ill. App.) 72.

§ 376. **Parties plaintiffs.**—Actions for torts affecting rights in water, and also for torts done by means of water, must in general be brought in the name of the person whose *legal* right has been affected, and who had a legal interest in the property injured at the time the injury was committed.<sup>1</sup> For any injury affecting the present enjoyment of water-rights, the person entitled to the present enjoyment thereof is the proper party to bring the suit; but for any permanent injury to such rights the reversioner may maintain an action.<sup>2</sup> The same rule holds true of all injuries to real property by means of water.<sup>3</sup> The remedies of the tenant in possession and the reversioner may be concurrent. The act which injures the reversioner usually injures the tenant in possession also, and each may maintain his action for the injury to his separate right.<sup>4</sup> This principle applies to all injuries to lands or water-rights in the possession of lessees.

§ 377. **Same — Same.**—Where the tenant in possession brings suit for the disturbance of his present enjoyment, possession alone is sufficient evidence of his title *prima facie*,

<sup>1</sup> 1 Chitty, Pleading, 69.

<sup>2</sup> Mr. Dicey says (Parties, p. 332, note) that the term reversioner is used as a convenient though not strictly correct description of any person who, not being in possession of land, has a future interest in it.

<sup>3</sup> 1 Chitty, Pl. 63; Com. Dig. Action upon the Case for a Nuisance, B.; Dicey on Parties, 333, 340; Prior of Southwark's Case, Year Book, 13 Hen. 7, 26, cited by Wray, C. J., in Aldred's Case, 9 Rep. 59a; Bedingfield v. Onslow, 3 Lev. 209; Jackson v. Pesked, 1 M. & S. 234; Tucker v. Newman, 11 A. & E. 40; Battishill v. Reed, 18 C. B. 696; Bell v. Twentyman, 1 Q. B. 766; Lord Egremont v. Pulman, M. & M. 404; Dobson v. Blackmore, 9 Q. B. 991.

<sup>4</sup> 1 Chitty Pl. 63; Com. Dig. Title Action on the Case for a Nuisance, B.; 1 Wms. Saund. 322, note 5; Rust v. Victoria Dock Co., 86 Ch. D. 113; Dynevor v. Tennant, 13 App. Cas. 279;

Bedingfield v. Onslow, 3 Lev. 209; Ripka v. Sergeant, 7 Watts & S. 9; Hart v. Evans, 8 Penn. St. 13; Seely v. Alden, 61 Penn. St. 302; Potts v. Clarke, Spencer (N. J.), 536; Tinsman v. Railroad Co., 1 Dutch. (N. J.) 255; Brown v. Bowen, 80 N. Y. 519; Woodbury v. Wills, 50 Maine, 403; Davis v. Jewett, 13 N. H. 881; Baker v. Sanderson, 3 Pick. 348; Sumner v. Tileston, 7 Pick. 195; Ashley v. Ashley, 4 Gray, 197. The following leading cases further illustrate the rule, but do not affect waters: Baxter v. Taylor, 4 B. & Ad. 72; Hopwood v. Schofield, 2 Moo. & Rob. 34; Alston v. Scales, 9 Bing. 3; Johnstone v. Hall, 2 K. & J. 414; Mumford v. Oxford Ry. Co., 1 H. & N. 34; Kidgill v. Moor, 9 C. B. 364; Simpson v. Savage, 1 C. B. N. s. 347; Metropolitan Building Association v. Petch, 5 C. B. N. s. 504; Bell v. Midland Ry. Co., 10 C. B. N. s. 287.



and will support a recovery against a wrong-doer.<sup>1</sup> So a *cestui que trust* in possession may maintain the appropriate legal actions against a wrong-doer for injuries to his possession.<sup>2</sup> In *Sumner v. Tileston*,<sup>3</sup> where the owner of the freehold brought suit for flowage, it was held that the possession of a tenant at will was that of the owner of the freehold, and that the latter could recover for present injury. The lessee of water-rights may maintain an action against a stranger for any interference therewith to the injury of the lessee.

§ 378. **Same — Reversioner.**— The reversioner may sue for any wrongful interference with the future enjoyment of the property. This includes all acts directly injuring his freehold, and all adverse uses tending to establish easements or to abridge his rights. He may also sue for any acts interfering with his title. In the Prior of Southwark's Case,<sup>4</sup> as cited by Wray, C. J., in *Aldred's case*,<sup>5</sup> the landlord was allowed to recover for an injury to land in the possession of a tenant by corrupting water with the refuse of a lime-pit. In *Bedingfield v. Onslow*,<sup>6</sup> flowage was held an injury to the reversion. The overhanging of eaves or walls has been held not such an injury *per se*;<sup>7</sup> and in another case,<sup>8</sup> this question was left to the jury by Lord Denman, with the suggestion that it was a fair

<sup>1</sup> *Bassett v. Salisbury Manuf. Co.*, 28 N. H. 488; *Branch v. Doane*, 17 Conn. 401; s. c. 18 Conn. 233; *Brown v. Bowen*, 30 N. Y. 519; *Lincoln v. Chadbourne*, 56 Maine, 197; *King v. Tarlton*, 2 H. & McHen. 473; *Ferguson v. Witsell*, 5 Rich. (S. C.) 280; *Kimbrall v. Walker*, 7 Rich. (S. C.) 422; *Patrick v. Ruffners*, 2 Rob. (Va.) 209; *Morris v. McCahey*, 9 Ga. 160; *Ran v. Minnesota Valley R. Co.*, 13 Minn. 442; *Norris v. Glenn*, 1 Idaho, N. S. 590. In *Dyson v. Collick*, 5 B. & Ald. 600, a contractor for building a canal, having by permission of the owner of land built a dam for the purpose of aiding navigation, was held to have sufficient possession to enable him to maintain trespass against a wrong-doer.

<sup>2</sup> 1 Chitty, Pl. 69.

<sup>3</sup> 7 Pick. 198 (Putnam, J., dissented). And see, to same effect, *Cushing v. Adams*, 18 Pick. 110.

<sup>4</sup> Year Book, 13 Hen. 7, 26.

<sup>5</sup> 9 Rep. 59 a.

<sup>6</sup> 3 Lev. 209. To same effect see *Bell v. Twentyman*, 1 Q. B. 766.

<sup>7</sup> *Jackson v. Pesked*, 1 M. & S. 234.

<sup>8</sup> *Tucker v. Newman*, 11 A. & E. 40. In another case, where the reversioner brought suit for the same injury, it was held that he could recover only such damages as the jury should think sufficient to compel the defendant to abate the nuisance, and not the damage to the salable value of the premises. *Battishill v. Reed*, 18 C. B. 696.

case of injury to the reversion. The washing away of soil, resulting from the non-repair of a conduit or gutter leading to the defendant's mill, has been held an injury to a reversioner;<sup>1</sup> but a general allegation of an injury to the reversion by an obstruction of navigation has been held insufficient.<sup>2</sup>

§ 379. *Same — Same.*— In America it has been held that the freehold is injured by causing water to flow back upon the plaintiff's land,<sup>3</sup> or into his race,<sup>4</sup> or by the obstruction of his mill by backwater;<sup>5</sup> or again by withholding the water from his mill;<sup>6</sup> or by diverting a natural watercourse from his land;<sup>7</sup> or by polluting the stream;<sup>8</sup> and that the reversioner may recover for such injuries. The owner of land leased at will for purposes of pasturage may maintain an action for the obstruction of a right to drain the land through an ancient watercourse, but must show and can only recover for the injury to the reversion.<sup>9</sup>

§ 380. *Same — Same.*— Anything which will create a permanent disturbance of the enjoyment of property if not altered is in this inquiry considered an injury to the freehold. Thus the building of a railway embankment in a stream, obstructing the passage of rafts to and from a lumber mill, was held by Green, C. J., to be an injury to the reversion, for which the owner of the mill might recover, although the mill was leased for a term which had several years to run. The concurrent right of the tenant to sue for his injury was considered no objection, nor was the possibility that the cause of injury might be removed during the term.<sup>10</sup>

<sup>1</sup> *Egremont v. Pulman, M. & M. Ashley v. Ashley*, 4 Gray, 197; *Potts v. Clarke, Spencer* (N. J.), 536.

<sup>2</sup> *Dobson v. Blackmore*, 9 Q. B. 991. In *Shadwell v. Hutchinson*, 4 C. & P. 833; s. c. *M. & M.* 350 (affecting ancient light), case was held maintainable by a reversioner for a nuisance which produced no present injury beyond that to the reversionary right, and which may be removed before the reversioner would come into possession. See also *Bell v. Midland Ry. Co.*, 10 C. B. N. s. 287.

<sup>3</sup> *Davis v. Jewett*, 18 N. H. 88; *N. J. L.* 255, Green, C. J., approved

<sup>4</sup> *Ripka v. Sergeant*, 7 Watts & S. 9.

<sup>5</sup> *Baker v. Sanderson*, 3 Pick. 348; *Sumner v. Tileston*, 7 Pick. 198; *Brown v. Brown*, 30 N. Y. 519.

<sup>6</sup> *Woodbury v. Willis*, 50 Maine, 403.

<sup>7</sup> *Hart v. Evans*, 8 Penn. St. 14. See *Rogers v. Dickson*, 10 C. P. (Can.) 481.

<sup>8</sup> *Seely v. Alden*, 61 Penn. St. 802.

<sup>9</sup> *Hastings v. Livermore*, 7 Gray, 194; s. c. 15 Gray, 10.

<sup>10</sup> In *Tinsman v. Belvidere R. Co.*, 25

§ 381. **Same — Same.**— When the disturbance is continued, fresh actions may be maintained from time to time by the persons occupying the positions of tenant in possession and reversioner.<sup>1</sup> A purchaser may maintain an action for a nuisance created before the purchase, if continued,<sup>2</sup> and an heir or devisee, for the continuance of a nuisance created in the lifetime of the ancestor or devisee;<sup>3</sup> but an executor cannot recover for a nuisance committed in the lifetime of his testator.<sup>4</sup> A mortgagee's right of action for an infringement upon his mill privilege vests upon his taking possession of the premises.<sup>5</sup>

§ 382. **Same — Co-tenants.**— At common law, parceners and joint tenants were required to join in all actions respecting their tenancy; and tenants in common, who sued separately in the ancient real actions, because claiming by different titles, were compelled to join in personal actions, as for trespass and nuisance, "because in those actions, though their estates are several, yet the damages survive to all."<sup>6</sup> It is sometimes stated that tenants in common *may* join in actions for such

the rule in *Shadwell v. Hutchinson*, *supra*, allowing the reversioner to recover nominal damages in the first instance, and then substantial damages; and criticised the rule in *Baker v. Sanderson*, 3 Pick. 348, where it was held that he could recover only for loss of rent. So in *Ripka v. Sergeant*, 7 Watts & S. 9, it was held that the law implied a damage to the reversion from back flowage upon a mill race.

<sup>1</sup> *Penruddock's Case*, 5 Rep. 101; *Shadwell v. Hutchinson*, 2 B. & Ad. 97; s. c. 4 C. & P. 333; *Battishill v. Reed*, 18 C. B. 696; and see *Gale on Easements* (5th ed.), 658; *ante*, § 210.

<sup>2</sup> *Beswick v. Combden*, Cro. Eliz. 402; *Russell and Handford's Case*, 1 Leon. 273; *Vedder v. Vedder*, 1 Den. 257.

<sup>3</sup> *Some v. Barwish*, Cro. Jac. 231.

<sup>4</sup> *McLaughlin v. Dorsey*, 1 H. & McHen. (Md.) 224. An action for diversion dies with the plaintiff, and cannot be continued by his executor. *Holmes v. Moore*, 5 Pick. 257.

<sup>5</sup> *Hatch v. Dwight*, 17 Mass. 289; *ante*, § 211b.

<sup>6</sup> *Bacon's Abr. Joint Tenants*, K. (Bouvier's ed.) p. 301; Litt. § 316; Co. Litt. 198a; 1 Chitty Pl. 74; Dicey on Parties, 380, Rule 80; *Thompson v. Hoskins*, 11 Mass. 419; *Crippen v. Morss*, 49 N. Y. 68, 69. In *Stone v. Bromwich*, Yelv. 161, where tenants in common brought an action for diverting a watercourse and set out their titles, it was objected that they should not be joined, but the court overruled the objection, saying: "This action . . . does not concern the title, but only the possession whereby the profits of the land are diminished."

injuries;<sup>1</sup> but Shaw, C. J., in deciding upon a bill in equity between tenants in common, for the wrongful detention of water from a mill, said: "Though the phrase 'may join' is used, yet the reason given brings the case within the general rule of law, that where a personal claim is joint, and the right survives, all must join, otherwise the process may be abated."<sup>2</sup> Owners in common of a mill, who have derived their respective rights under different conveyances, may join in an action of tort for a diversion of water from their mill, but cannot join in an action for breach of the defendant's covenants in reference to such water.<sup>3</sup> If tenants in common of lands, owning adjoining lands in severalty, grant a license to a stranger to erect and maintain a dam on their land, each is estopped from claiming damages occasioned thereby to land held by him in severalty.<sup>4</sup>

**§ 383. Suits between co-tenants.**— One tenant in common has no right, by means of a dam erected on land of which he is sole owner, to flow the land owned in common without the assent of his co-tenant, and thus exclude his co-tenant from

<sup>1</sup> Angell on Watercourses, § 400.

<sup>2</sup> May v. Parker, 12 Pick. 84.

<sup>3</sup> Samuels v. Blanchard, 25 Wis. 329.

<sup>4</sup> Francis v. Boston & Roxbury Mill Co., 4 Pick. 865. In England, by Order xvi. of the Judicature Act of 1875, all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the court, in disposing of the costs of the motion, shall otherwise direct. L. R. 10 Gen. St. p. 791 (38 & 39 Vict. ch. 77).

See Coulson & Forbes on Waters, 656. By the rules of chancery, which are followed in the Judicature Acts, the owners of several properties affected by a nuisance might join in suing. If one failed to make out his case, the suit as to him was dismissed with costs. Such costs were deducted from those of the successful plaintiff. Coulson & Forbes on Waters, 656. In a Scotch case, for a pollution of the River Esk, the House of Lords held that, by the Scotch practice, the several sufferers may bring a joint action against the several authors of the nuisance, asking a declarator and interdict, but not claiming damages; and Lord Blackburn said that this rule, though different from the English law, was preferable. For the English rule, *contra*, see Cowan v. Buccleuch, 2 App. Cas. 844; Hudson v. Maddison, 12 Sim. 416.

the possession. It is a wrong to his co-tenants of the same character, and which allows of similar remedies, as if they had been severally seized.<sup>1</sup> So one tenant in common may have an action on the case against his co-tenant for diverting, obstructing, or polluting water to the injury of their common rights, or for any infringement upon their common rights in water, or for flowing common lands or properties, without the consent of the co-tenant.<sup>2</sup> In the earliest case in point it is said that if two several owners of houses have a river in common between them, if one of them corrupt the river, the other shall have an action upon the case.<sup>3</sup> The leading American case was an action by one co-tenant against another, for diverting a stream from their common mill for purposes of his own. It was held that case was the proper remedy, and this case has generally been followed.<sup>4</sup>

<sup>1</sup> Per Parker, C. J., in *Great Falls Co. v. Worster*, 15 N. H. 312, 460, and in *Odiorne v. Lyford*, 9 N. H. 502.

<sup>2</sup> Y. B. Hen. 7, 26; *Blanchard v. Baker*, 8 Greenl. (Me.) 253; *Hutchinson v. Chase*, 39 Maine, 508, 514; *Pillsbury v. Moore*, 44 Maine, 154; *Hines v. Robinson*, 57 Maine, 324; *Odiorne v. Lyford*, 9 N. H. 502; *Great Falls Co. v. Worster*, 15 N. H. 412, 460; *Beach v. Child*, 18 Wend. 343; s. c. 22 Wend. 538; *Crippen v. Morss*, 49 N. Y. 63; *McLellan v. Jenness*, 43 Vt. 183 (5 Am. Rep. 270); *Jones v. Weathersbee*, 4 Strob. (S. C.) 50.

<sup>3</sup> 2 Waterman on Trespass, p. 392. So if one co-tenant hinders another from cleansing a common well. *Newton v. Newton*, 17 Pick. 201, 207. So one may have case against his co-tenant for cutting down or injuring a dam held in common. *Linton v. Wilson*, 1 Kerr (N. B.), 223, 231.

<sup>4</sup> *Blanchard v. Baker*, 8 Maine, 253 (1839). The Massachusetts case of *May v. Parker*, 12 Pick. 34, in equity, cited in § 382, was decided in the preceding year. Shaw, C. J., there said: "The consideration that the right to recover damage is joint, and sur-

vives, suggests the application of another rule of law, that where there is a joint right to claim damage, each has a right to claim the whole, holding himself liable to account, and if the claim be against one of the parties, he has as good a right to retain the amount as they have to recover it, and it would involve the legal solecism of a man's having an action against himself. The same reason, therefore, which prohibits co-partners from suing one of their number, who is debtor to the firm, and obliges them to go into equity for relief, seems to apply strongly to the case of a joint claim for consequential damages against one of the co-tenants." This dictum has been disregarded. In *Odiorne v. Lyford*, 9 N. H. 502, decided in 1838, Parker, C. J., said: "It is not decided in that case that an action at law would not lie, but only that the remedy at law, if one existed, would be inadequate for the redress of the wrong done." Since this decision, the dictum of Shaw, C. J., must be considered as not giving a correct statement of the law. The reason he gives, viz., that

§ 384. Same.— Where the plaintiff and defendant were tenants in common of a salmon fishery, the plaintiff was held entitled to recover damages in an action on the case for the continued deprivation of the enjoyment of his rights in being kept out of the occupation of any part of the fishery, after he was first deprived of it by the defendant, without having first regained possession by entry or otherwise.<sup>1</sup> One tenant in common of a saw-mill and mill privilege may maintain an action of trespass *quare clausum* against a co-tenant for the destruction of the mill,<sup>2</sup> but not for his entry upon the entire common property and exclusive occupation thereof.<sup>3</sup> And where two tenants in common of land including a water privilege made a division of the land, leaving the water privilege

the wrong-doer would have the same legal title to the amount of damages as the injured party, is not sound in principle, and has not been applied to other cases of torts between co-tenants. In *Hines v. Robinson*, 57 Maine, 324, the action was against a tenant in common and a stranger, for using the water of a stream so as to impair the use of the mill held in common, and for erecting another mill which obstructed the use of the former. Barrows, J., said: "If the plaintiff can maintain a suit against any person for doing these acts, the fact that one of these defendants is his co-tenant in the property injured will not bar the action." In *Beach v. Child*, 13 Wend. 343, where three tenants in common constructed a basin for navigation and water-power, connecting it with a public canal, and laid out their lands fronting thereon in lots which they divided among themselves and afterwards conveyed, but left the basin common property, and one of the grantees built a pier in the basin in front of his lot, obstructing the adjacent owner's use of the basin, it was held that the latter could maintain an action on the case against his co-tenant for the obstruc-

tion. This decision was affirmed in the court of errors, 22 Wend. 538, and followed in *Crippen v. Morss*, 49 N. Y. 68. In *McLellan v. Jenness*, 43 Vt. 183; 5 Am. Rep. 270, the plaintiff and defendant and three others owned an aqueduct together, and each had a branch of his own, and was entitled to one-fifth of the water. The plaintiff brought the action against the defendant for using or wasting more than his fifth of the water, and the action was sustained. The court say: "The true principle is stated by Kenyon, Ch. J., in *Martyn v. Knowllys*, 8 T. R. 145, that 'if one tenant in common misuse that which is in common with another, he is answerable to the other in an action as for misfeasance.'" That was an action on the case by one tenant in common against his co-tenant, for cutting certain trees upon the common land. As to ouster by one tenant in common of his co-tenants, see *Bellis v. Bellis*, 122 Mass. 414; *Ingalls v. Newhall*, 139 Mass. 268.

<sup>1</sup> *Duncan v. Sylvester*, 24 Maine, 482.

<sup>2</sup> *Maddox v. Goddard*, 15 Maine, 218.

<sup>3</sup> *Porter v. Hooper*, 18 Maine, 25.



in common, which was of sufficient power to drive but one mill, and each of them erected a mill on his own land, it was held that neither acquired a priority of right by first erecting his mill, that each had an equal right to the use of the water, and that neither could maintain an action founded in tort for such use of the water thus owned in common before their rights became several by the partition.<sup>1</sup>

§ 385. **Vendor and vendee.**—When land injured by a nuisance is conveyed, the purchaser stands in the same position as the vendor. He may sue the original wrong-doer who erected and maintains the nuisance, without notice or request to abate, for damages done to the land, during his ownership and occupancy. And the same is true of any number of successive purchasers against whom the nuisance is continued.<sup>2</sup> In *Ives v. Cress*,<sup>3</sup> it was held that a vendor of lands, retaining the legal title, could not maintain an action on the case for such injuries to the inheritance during the possession of the vendee under the contract, though it did not appear that the vendee had become entitled to a conveyance.

§ 386. **Transfer of action.**—A right of action for a nuisance could not at common law be transferred to another by an instrument in writing for the purpose, or by conveying the land affected.<sup>4</sup> Such a right of action is not appurtenant to the land, nor does it, like a covenant for title, inhere to or run with the land. When accrued, it is a personal right and not transferable. Where a railway company placed a protection to a drawbridge in a river, whereby the approach of vessels to a dock was obstructed, and the value of the land on which

<sup>1</sup> *Bailey v. Rust*, 15 Maine, 440.

<sup>2</sup> *Branch v. Doane*, 17 Conn. 402; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 148, overruling *Woodman v. Tufts*, 9 N. H. 91, so far as *contra*; *Plumer v. Harper*, 3 N. H. 88. See *Penruddock's Case*, 5 Rep. 101a; *ante*, §§ 364, 365.

<sup>3</sup> 5 Penn. St. 118. Where the lessee of a term having several years to run diverted a watercourse at considerable expense, and made extensive

improvements thereon, it was held that the injuries would not be presumed to be of such a permanent character as necessarily to affect the reversion, and that the lessor could not be required to enter a protest under the penalty of otherwise being estopped in equity, from objecting to the diversion. *Corning v. Troy Iron Factory*, 39 Barb. 311; 40 N. Y. 191; 34 Barb. 485.

<sup>4</sup> *Dacey on Parties*, 382; *Baldwin v.*

the dock was placed was permanently depreciated, and afterwards the owner of the lot and dock sold the same to his wife, and conveyed the legal title to her, it was held that she could not maintain any action against the company for placing the obstruction in front of the dock, or for any damages arising since the conveyance. When such an injury is permanent in its nature, the owner may recover not only for the present, but also for future damages, and such a recovery will be a bar to any other suits for damages growing out of the continuance of the injury.<sup>1</sup> The grantee of such injured party cannot in such case recover for the continuance of the injury, although the former owner may not have brought any suit for the original injury.<sup>2</sup> Where, from the improper grading of a street, the water flowing therein formed a gully which caused a permanent injury to a lot, it was held that the right of action for such injury accrued to the owner of the lot at the time the gully was made, and upon the sale of the lot, did not pass to the grantee.<sup>3</sup> Where a railway company filled up a trestle-work and so caused a river to overflow certain flats, and the owner of the flats built cattle-pens thereon, in which a third party placed cattle under a contract with the owner of the land to feed them, it was held that the owner of the cattle could not recover for an injury to them by the overflow of the river, on the ground that his rights were only in contract with the owner of the pens, and on the further ground that he had placed himself in a position to be injured, or in other words, had come to the nuisance. The remedy, if any, against the company lay with the owner of the pens.<sup>4</sup>

**§ 387. Parties defendant.**—Every person who creates or continues a nuisance is liable to be sued by any person specially injured thereby.<sup>5</sup> Each continuance of the nuisance is a fresh one,<sup>6</sup> for which each successive occupier of the premises on which the nuisance is maintained is liable.<sup>7</sup> The liability of

Calkins, 10 Wend. 167; *Ortwine v. Mayor of Baltimore*, 16 Md. 387.

<sup>1</sup> *McLeod v. Lee*, 17 Nev. 103.

<sup>2</sup> *C. & A. R. Co. v. Maher*, 91 Ill. 812. For a similar question under the Wisconsin Mill Act, see *Faville v. Greene*, 12 Wis. 11.

<sup>3</sup> *Ortwine v. Baltimore*, 16 Md. 387.

<sup>4</sup> *Toledo Railroad Co. v. Hunter*, 50 Ill. 325; 16 Sol. J. 459.

<sup>5</sup> *Dicey on Parties*, 422.

<sup>6</sup> 3 Bl. Com. 220; 1 Cent. L. J. 307.

<sup>7</sup> *Moore v. Brown*, Dy. 819b; *Ryp-pon v. Bowles*, Cro. Jac. 378; 3 Dane

one erecting and maintaining a nuisance is twofold; he is liable to an action for the erection, and for each continuance of the nuisance; and each action, being in respect of a new wrong, is not barred by former recoveries growing out of the same matter.

§ 388. **Same — Creator of nuisance.**— If one creates a nuisance upon his premises, and then conveys them to another, he continues liable so long as it exists for all damages subsequently accruing, although a like liability may attach to other persons by their becoming purchasers; and in such cases the person injured may sue either the original wrong-doer or the person in possession of the premises.<sup>1</sup> The same rule applies if the owner creates a nuisance and then lets the premises to a tenant.<sup>2</sup> In Penruddock's case,<sup>3</sup> it is said of the *quod permittat*: "But against him who did the wrong it lies without any request made, for the law doth not require any request to be made to him who doth the wrong himself." In Rosewell v. Prior,<sup>4</sup> a tenant for years erected a nuisance by darkening the ancient lights adjoining, and then underlet the premises, and it was held that the action lay against either him or the under tenant.

Abr. 57; Staples v. Smith, 10 Mass. 72; Hodges v. Hodges, 5 Met. 205; Baldwin v. Calkins, 10 Wend. 167; Beidelman v. Foulk, 5 Watts, 308; Ramsdale v. Foote, 55 Wis. 557; Pierce v. German S. Society, 72 Cal. 180; McGowan v. Mo. Pac. Ry. Co., 28 Mo. App. 203; Bizer v. Ottumwa Hydraulic Power Co., 70 Iowa, 145. The heir will be liable for continuing a nuisance erected by the ancestor. 3 Dane Abr. 57. But one who acquires by descent a certain mill-dam, which is a public nuisance, is not liable to indictment, if he has done no act in connection with the dam. Bruce v. State, 87 Ind. 450.

<sup>1</sup> Penruddock's Case, 5 Rep. 100b; Rosewell v. Prior, 2 Salk. 460; 1 Ld. Raym. 713; 12 Mod. 635; Mason v. Shrewsbury Ry. Co., L. R. 6 Q. B. 578; Plumer v. Harper, 8 N. H. 88,

92; Woodman v. Tufts, 9 N. H. 88; Curtice v. Thompson, 19 N. H. 471; Eastman v. Amoskeag Manuf., 44 N. H. 143; Prentiss v. Wood, 132 Mass. 486; Hughes v. Mung, 3 H. & McHen. 441; Dorman v. Ames, 12 Minn. 451; Fow v. Roberts, 108 Penn. St. 489.

<sup>2</sup> Griffith v. Lewis, 17 Mo. App. 605.

<sup>3</sup> 5 Rep. 100b; Rosewell v. Prior, *supra*; 3 Dane Abr. 57; Conhocton Stone Co. v. Buffalo R. Co., 52 Barb. 890; Knauss v. Brua, 107 Penn. St. 85. For cases affirming the landlord's continued liability, but not affecting watercourses, see Christian Smith's case, Sir Wm. Jones, 272; Todd v. Flight, 9 C. B. N. S. 877; Rex v. Pedley, 1 A. & E. 822.

<sup>4</sup> 2 Salk. 460; 1 Ld. Raym. 713; 12 Mod. 635.

§ 389. *Same — Same.*— In *Mason v. Shrewsbury Ry. Co.*,<sup>1</sup> the principle of the former case was extended to a conveyance in fee. A railway company was authorized to discontinue and fill up a canal. In so doing they made a cut into its bank and returned a supply of water formerly feeding it to the brook from which it was taken. The company then conveyed the land on which the cut was made to a purchaser in fee. The changes in the course of the water caused injury to the plaintiff's premises during a flood. It was held for other reasons that the action would not lie, but the judges agreed that the fact that the defendants had parted with the property would not have affected their liability. In *Plumer v. Harper*,<sup>2</sup> more than forty years before the English case above, it was contended in argument that the rule was confined to cases of leases, but the court said it would be difficult to find a good reason why the original wrong-doer should be discharged by conveying the land, and denied the distinction. The later New Hampshire cases<sup>3</sup> lay down the principle without limitation that the wrong-doer continues liable notwithstanding his alienation; and in a late Massachusetts case it is held that a mill-owner, whose mill is injured by a dam erected and kept up without right, may maintain an action against the person who erected it, for injuries sustained after the wrong-doer has conveyed the dam to a third person.<sup>4</sup>

<sup>1</sup> L. R. 6 Q. B. 578.

<sup>2</sup> 3 N. H. 88.

<sup>3</sup> *Woodman v. Tufts*, 9 N. H. 88; *Curtice v. Thompson*, 19 N. H. 471; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143.

<sup>4</sup> *Prentiss v. Wood*, 132 Mass. 486. The decision in *Wendell v. Pratt*, 12 Allen, 464, is not inconsistent with this rule. In *Dorman v. Ames*, 12 Minn. 451, 458 (a flowage case), the court said: "The erection of the obstruction is sufficient to constitute a liability, and the disposition of his interest subsequently, if it were established, would not defeat the action for damages arising from a nuisance erected by him." *Sellick v. Hall*, 47 Conn. 260, seems to depart from the

rule in the text. A land-owner had covered a stream flowing through his land, and diminished its channel; and the city in which the land was situated had afterwards taken steps toward converting the stream into a sewer. The court said: "If the defendant had surrendered the possession and control of it to the city, in the belief that the proceedings of the city were regular and complete, and the city had taken such possession and control in that belief, the defendant would clearly no longer be liable for its insufficiency; in other words, he would no longer be maintaining a nuisance. The city alone would be responsible for any further damage." It is to be noticed that in this case

§ 390. **Same—In New York.**—In New York the law is different. In *Blunt v. Aikin*,<sup>1</sup> it was held that one erecting a dam was not liable for damages caused by its continuance after he had left the possession of the premises, and others had assumed it, when there was no evidence that they held as tenants in common of such former owner. This was modified in *Waggoner v. Jermaine*,<sup>2</sup> and the rule given that if a person erects a nuisance upon his own lands, as by obstructing a watercourse, and then conveys his premises to another with warranty, he remains liable for damages caused by the continuance of the nuisance after the conveyance. The warranty of the land as then used is taken as an upholding of the nuisance. In *Mayor of Albany v. Cunliff*,<sup>3</sup> the rule is thus stated: that “a party who has erected a nuisance will sometimes be answerable for its continuance after he has parted with the possession of the land. But it is only where he continues to derive a benefit from the nuisance, as by demising the premises and receiving rent, or where he conveys the property with covenants for the continuance of the nuisance.” This is followed in *Hanse v. Cowing*,<sup>4</sup> and the rule in *Blunt v. Aikin*, with the foregoing modifications, affirmed.

§ 391. **Same—Landlord and tenant.**—Generally the landlord is not liable for nuisances created by the tenant during his tenancy,<sup>5</sup> but may become so if he relets the premises with

the city proceeded to commit a new nuisance by wrongfully increasing the volume of the stream.

<sup>1</sup> 15 Wend. 521.

<sup>2</sup> 8 Den. 306; 45 Am. Dec. 474, note; *Rockland Water Co. v. Tillson*, 75 Maine, 170, 183.

<sup>3</sup> 2 Comst. 165, 174.

<sup>4</sup> 1 Lans. 288. See, also, *Walsh v. Mead*, 8 Hun, 387.

<sup>5</sup> Woodfall, *Landlord and Tenant* (11th ed.), 690; Wood, *Landlord and Tenant*, § 539; *Kastor v. Newhouse*, 4 E. D. Smith, 20; *Jansen v. Varnum*, 89 Ill. 100; *Harris v. Cohen*, 50 Mich. 324. A declaration charging the defendant with the duty of cleansing drains, merely as owner and pro-

prietor thereof, is bad. *Russell v. Shenton*, 3 Q. B. (A. & E. N. S.) 449. The same rule is applied in *Carter v. Berlin Mills Co.*, 58 N. H. 52, cited in 19 Alb. L. J. 3, where the defendants owned a water-power, of which third persons obtained the use under a contract; and the defendants were held not liable for damages caused by the negligent use of the power by the third persons. If a married woman owns land, and it is occupied by a tenant, or cultivated by her husband, and either of them erects a dam thereon, or digs a ditch, so as to overflow the land of another, she will not be liable unless the act was done under her direction or with her

the nuisance continuing; or if after the creation of the nuisance, and before the damage caused, he might have put an end to the tenancy and did not (which is equivalent to a re-letting<sup>1</sup>); if he retains control of that part of the property in which the nuisance is caused;<sup>2</sup> or if he lets the premises in a condition adapted and intended to be used in the manner complained of.<sup>3</sup> In the case of nuisances from the non-repair of the premises, if the landlord takes from a tenant a covenant to repair, he is not liable, since he does not authorize the continuance of the nuisance.<sup>4</sup>

**§ 392. Same — Continuer — Notice.**— The person occupying the premises is, for the same reason, liable for the continuance of a nuisance created before his occupancy.<sup>5</sup> But the

approval, or she knowingly maintained it. *Jansen v. Varnum*, 89 Ill. 100.

<sup>1</sup> *Rex v. Pidley*, 1 A. & E. 822; *Gandy v. Jubber*, 5 B. & S. 78, 485; 38 L. J. Q. B. 151. And see Dicey on Parties, 422.

<sup>2</sup> *Shipley v. Fifty Associates*, 101 Mass. 251; *Marshall v. Cohen*, 44 Ga. 489; *Brown v. Bussell*, L. R. 3 Q. B. 251, 261. In the latter case the landlord retained control of a drain which became a nuisance from the tenant's use of it.

<sup>3</sup> *Jackman v. Arlington Mills*, 137 Mass. 277.

<sup>4</sup> *Pretty v. Bickmore*, L. R. 8 C. P. 401; affirmed (in case of coal shoot) L. R. 10 C. P. 658. And see *Gandy v. Jubber*, 5 B. & S. 78, 485. In *Preston v. Norfolk Ry. Co.*, 2 H. & N. 735, the Norfolk Railway Company owned a canal and lock, for navigation, and transferred to the Eastern Counties Railway Company the exclusive possession, use, enjoyment, and receipt of all property, rights, rates, etc., therein, and the latter company agreed to repair and keep up the works at all times. The gates and lock were out of repair at the time of the transfer, and after the Eastern

Counties Company took possession, large quantities of water escaped and were diverted from the stream to the injury of the plaintiff. *Pollock, C. B.*, held that the Norfolk Company was not liable, and that the Eastern Counties Company was, on the ground that the latter company had possession at the time of the diversion. The covenant to repair was not alluded to. The decision may be supported on the ground that the canal and lock had not become a nuisance at the time of the transfer, for there is no law against letting a tumble-down house, or property out of repair. *Robbins v. Jones*, 15 C. B. N. S. 221, 240. And the covenant to repair would have the effect of discharging the transferrer. Where a contractor erected piles in a river, and, after completing his work, sold the piles which his vendees cut off and removed, leaving stumps which became a nuisance, the contractor was held not liable. *Bartlett v. Barker*, 3 H. & C. 153. Where the lease contemplates or authorizes a nuisance, the landlord is liable. *Harris v. James*, 45 L. J. Q. B. N. S. 661.

<sup>5</sup> *Braine v. Summers*, 7 Vict. L. R. (L.) 420. In *Beswick v. Combdon*,



continuance must be with knowledge of the nuisance. Such knowledge will not be presumed, and an action cannot be maintained against him until he has been notified of the existence of the nuisance, and requested to abate it.<sup>1</sup> He may rightfully suppose that the property has been lawfully used in the past, and may use it as it was used when purchased until objection is made.<sup>2</sup>

§ 393. **Same — Form of notice.**— The form of the notice is immaterial, provided its character is clear and unmistakable.<sup>3</sup> In *Woodman v. Tufts*,<sup>4</sup> a letter of remonstrance was held sufficient. In *Carleton v. Redington*,<sup>5</sup> the court say: "It may be written or verbal, or by acts clearly giving the party notice of the claim for a removal of the nuisance."

*F. Moore*, 353; *Cro. Eliz.* 402, a feoffee was held liable for maintaining a bank in a stream, which caused an overflow of another's land. At a later hearing of this case it was held no offence for the feoffee to maintain the bank as he found it. *Cro. Eliz.* 520. But this is no longer law. In a case where the defendant's husband in his lifetime diverted a water-course from the plaintiff's house, and after her husband's death the defendant continued the diversion, she was held liable in case. *Moore v. Dame Browne*, *Dyer*, 819*b*. An agent maintaining a dam for his principal, and not himself having possession or control, is not chargeable for injuries caused by such continuance of the dam. *Brown Paper Co. v. Dean*, 123 *Mass.* 267. But on an indictment for maintaining a nuisance, such agency is no defence. *State v. Bell*, 5 *Porter*, 365.

<sup>1</sup> *Penruddock's Case*, 5 *Rep.* 101 *a*; *Brent v. Haddon*, *Cro. Jac.* 555; *Winsmore v. Greenbank*, *Willes*, at 588; *Jones v. Williams*, 11 *M. & W.* 176; *Ahern v. Steele*, 115 *N. Y.* 203, 210; *Plumer v. Harper*, 3 *N. H.* 88; *Curtrice v. Thompson*, 19 *N. H.* 471; *Eastman v. Amoskeag Manuf. Co.*, 44

*N. H.* 143; *Johnson v. Lewis*, 13 *Conn.* 303; *Branch v. Doane*, 17 *Conn.* 402; *Noyes v. Stillman*, 24 *Conn.* 15; *Jones v. Westerhausen*, 131 *Penn. St.* 62; *Pierson v. Glean*, 2 *Green (N. J.)*, 36; *Beavers v. Trimmer*, 25 *N. J. L.* 97; *Pillsbury v. Moore*, 44 *Maine*, 154; *Hogan v. Barry*, 143 *Mass.* 538; *Fenter v. Toledo R. Co.*, 29 *Ill. App.* 250; *Dodge v. Stacy*, 39 *Vt.* 558, at 577; *Howe Scale Co. v. Terry*, 47 *Vt.* 109, 124; *Morris Canal Co. v. Ryerson*, 27 *N. J. L.* 457; *Belyea v. Hamm*, 2 *Hannay (N. B.)*, 27. See 2 *Saund. Pl. & Ev.* 464; 1 *Chit. Pl.* 95; 88 *L. T.* 149. In *Hughes v. Mung*, 3 *Har. & McH. (Md.)* 441, it was held that the alienee would be liable for doing any act tending to continue the diversion. A plea of "not guilty" puts in issue the wrongful erection of a dam by another as well as its continuance by the defendant. *Nigh v. Sowerwine*, 12 *Q. B. (Can.)* 67.

<sup>2</sup> *Johnson v. Lewis*, 13 *Conn.* 303, 307; *Sappington v. Little Rock R. Co.*, 37 *Ark.* 23.

<sup>3</sup> *McDonough v. Gilman*, 3 *Allen*, 264.

<sup>4</sup> 9 *N. H.* 92.

<sup>5</sup> 21 *N. H.* 311.

Such a notice to a municipal corporation, as a grantee continuing a nuisance, must be served upon the proper officer, and in *Nichols v. Boston*,<sup>1</sup> it was held that the mayor was the proper officer, and that a notice given to the clerk was insufficient. In *Tomlin v. Fuller*,<sup>2</sup> it was held that the lack of notice was cured by a verdict, where the objection was not taken until after verdict obtained. In *Salmon v. Bensley*,<sup>3</sup> it was held that a notice left at the premises was evidence of knowledge, as against a subsequent occupier; but in *Nichols v. Boston*, it was held that a judgment against the grantor for a nuisance, existing a year previous, was no evidence of knowledge of its continuance.

§ 394. *Same — Same.*—In New York the rule has varied somewhat. The later decisions hold that a purchaser of property, upon which there is a nuisance, must be shown to have notice or knowledge of its existence before he will be liable for damages caused by its continuance, but that it is not necessary to prove a request to abate it.<sup>4</sup> The rule formerly was that a purchaser who continued a nuisance was responsible for the damages caused by it, although he had not been notified to remove it, nor, it would seem, shown to have knowledge of it.<sup>5</sup> In *Brown v. Cayuga Railroad Co.*,<sup>6</sup> the defendants had

<sup>1</sup> 98 Mass. 39.

<sup>2</sup> 1 Mod. 27.

<sup>3</sup> Ry. & Mo. 189; 21 E. C. L. 730.

<sup>4</sup> *Conhocton Stone Road v. Buffalo R. Co.*, 51 N. Y. 573; reversing s. c. 52 Barb. 390; *Miller v. Church*, 2 T. & C. 259; s. c. 5 Hun, 342.

<sup>5</sup> *Brown v. Cayuga R. Co.*, 12 N. Y. 486; followed in *Irvin v. Wood*, 4 Rob. 188; 51 N. Y. 224; *Conhocton Stone Road v. Buffalo R. Co.*, 52 Barb. 390. And see *Bellinger v. New York Central R. Co.*, 23 N. Y. 52; *Wasmer v. Delaware R. Co.*, 80 N. Y. 212.

<sup>6</sup> 12 N. Y. 486. Of this it may be said that the opinion of Denio, J., himself is an *obiter dictum*. He said: "If we should be of opinion that an action on the case could not be maintained against one who has continued a nuisance erected by another, with-

out notice to remove it having been first given, the defendants could not claim the benefit of that principle in this case, for the reason that they failed to make any such objection at the trial;" and that the case of *Rolf v. Rolf*, cited in *Penruddock's* case as agreeing with it, was one of an action on the case for the nuisance of drip. See *Beswick v. Combdon*, F. Moore, 353. The case of *Jones v. Williams*, 11 M. & W. 176, is subject to the same limitation which he puts upon *Tomlin v. Fuller*, 1 Mod. 27, and the facts in *Salmon v. Bensley* are not given. But this doctrine of Denio J.'s opinion was opposed by the opinion of Strong, P. J., a year and a half later (1857), in *Hubbard v. Russell*, 24 Barb. 404. He followed the English cases, and gave the usual rule. Judge Denio's

bought a railway and land, which included a cut in the bank of a stream. The action was for damages from the overflowing of the plaintiff's land through this cut. Denio, J., laid down the rule as above. He confined the rule in *Penraddock's* case to the writ of *quod permittat*; distinguished *Tomlin v. Fuller* as a case of denying a right of way through the defendants' land, and therefore not applying to all nuisances; relied on *Salmon v. Bensley* as showing that the notice need not be personal; and held that the rule in *Johnson v. Lewis* was not sustained by these cases, and was incorrect in principle. He made no reference to *Brent v. Haddon* or to *Jones v. Williams*.

**§ 395. Same — New nuisance — Grantee liable.**— If the grantee erects a new nuisance upon his premises, he is an original wrong-doer and not entitled to notice.<sup>1</sup> Such new nuisance may be created by a new use of existing structures, as by increasing the height of a dam,<sup>2</sup> or by using flash-boards, which were formerly used in a proper manner, in such a way as to raise the water to a greater height than he had a lawful right to raise it;<sup>3</sup> or by keeping closed the gates in a dam,

opinion was not referred to, and apparently was not brought to Judge Strong's attention, and the decision was based on the ground that a request was sufficiently proved. The question was again brought before the court of appeals in the case of *Conhocton Stone Road v. Buffalo R. Co.*, 51 N. Y. 578, reversing s. c. 52 Barb. 390. The cases were reviewed at length by Lott, Ch. C., the decision below reversed, *Brown v. Cayuga R. Co.* was overruled, and the rule settled as stated at the beginning of this section. It differs from the ordinary doctrine in holding that no request to abate the nuisance is necessary. This decision is noticed in *Morse v. Fair Haven East*, 48 Conn. 220, where, after referring to *Johnson v. Lewis*, 13 Conn. 303, and the New York cases above cited, Park, C. J., said: "It is not necessary for us to

consider whether such a request is necessary, as the want of knowledge is decisive of the present case." The New York doctrine is followed in *Pinney v. Berry*, 62 Mo. 359; *Dickson v. Central Pacific R. Co.*, 71 Mo. 575; *Wayland v. St. Louis Ry. Co.*, 75 Mo. 548. In the last case the court also had occasion to decide that a purchaser is not liable for either the erection or continuance of a nuisance created by his vendor upon adjoining land.

<sup>1</sup> *Curtice v. Thompson*, 19 N. H. 471; *Carleton v. Redington*, 21 N. H. 291; *Snow v. Cowles*, 22 N. H. 296; *Branch v. Doane*, 17 Conn. 402; *Noyes v. Stillman*, 24 Conn. 15; *Lawson v. Price*, 45 Md. 123, 137; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457.

<sup>2</sup> *Carleton v. Redington*, 21 N. H. 291.

<sup>3</sup> *Noyes v. Stillman*, 24 Conn. 15.

which have been habitually kept open, whereby water is diverted from the plaintiff;<sup>1</sup> or by rebuilding and maintaining a dam originally built by another.<sup>2</sup>

**§ 396. Same — Joint and several liability.**— It is a general rule that one, any, or all of several joint wrong-doers may be sued.<sup>3</sup> In other words, the liability for torts is both joint and several, and every person who joins in committing a tort is separately liable therefor, and cannot escape his liability, or compel the joinder of other persons by showing that such others are liable also.<sup>4</sup> But this rule is modified where the cause of action is against persons in respect of their common interest in land. Where the injury arises from the state of their land, apart from any act, the liability is simply joint, and all must be made defendants.<sup>5</sup> But if the injury arises from the acts of co-tenants upon their land, the general rule applies, and any or all of the wrong-doers may be sued. Applying these rules to injuries affecting waters, it follows that for any nuisance caused by a misfeasance by co-tenants, as by wrongfully maintaining a dam or polluting a stream, the plaintiff might sue one or all of the co-tenants; but where the injury proceeds from a mere omission of the land-owners to perform their duties in respect to their land, the tort is simply joint, and all must be sued; and so the courts have held.<sup>6</sup>

<sup>1</sup> *Snow v. Cowles*, 22 N. H. 296.

<sup>2</sup> *New Salem v. Eagle Mill Co.*, 138 Mass. 8.

<sup>3</sup> *Dicey on Parties*, 480.

<sup>4</sup> *Dicey on Parties*, 480; 1 *Chitty Pl.* 97, 98; *Freeman on Co-tenancy*, § 366; *ante*, § 222.

<sup>5</sup> 1 *Chitty Pl.* 98; 1 *Wms. Saund.* 291 *fg.* (notes to *Cabell v. Vaughn*); 1 *Lindley on Partnership* (4th ed.), 485.

<sup>6</sup> *Abbe de Stratforde's Case*, Y. B. 7 Hen. 4, p. 8, case 10; *Sutton v. Clarke*, 6 Taunt. 29; *Low v. Mumford*, 14 Johns. 426; *Simpson v. Seavey*, 8 Greenl. 138; *Southard v. Hill*, 44 Maine, 92; *Sumner v. Tileston*, 4 Pick. 308. And see *Converse v.*

*Symmes*, 10 Mass. 377. In the *Abbe de Stratforde's case* (7 Hen. 4, p. 8, case 10), an action of trespass on the case was brought against him, and the plaintiff averred that the defendant held certain land, by reason whereof he ought to repair a wall on the bank of the Thames; that the plaintiff had lands adjoining, and that for default of repairing the wall his meadows were drowned. To which Skrene said: "It may be that the abbot had nothing in the land by cause whereof he should be charged, but jointly with another," "in which case the one cannot answer without the other." In *Sutton v. Clarke*, 6 Taunt. 29, the suit was against the

§ 397. **Same — Same.**— If one of two tenants in common of a mill use it to the nuisance of a stranger, the other owner not actually participating in the wrong is not liable.<sup>1</sup> A joint tort must arise out of a single and joint act, and immediate juxtaposition of different acts will not make a tort joint. Where a land-owner had covered a stream flowing through his land, and the city had used the stream as a sewer, and increased the volume of water in the stream, it was held that they could not be made jointly liable; and that the fact that the effects of their several wrongful acts were produced at the same time and place did not affect the question of liability, but only of damages.<sup>1</sup> So a cause of action against two who have erected a dam cannot be joined with a cause of action against one of them who continued the dam after receiving a conveyance from the other.<sup>2</sup>

chairman of a board of trustees of a turnpike, who had caused a trench to be cut in the road, whereby the plaintiff's land was overflowed. It was held that the other members of the board need not be joined. In *Low v. Mumford*, 14 Johns. 426, Platte, J., in speaking of the *Abbe de Stratforde's* case, said: "The gist of the action, therefore, was that the defendant was such proprietor, and had neglected a duty incident to his title. The title to the land on which the nuisance existed was, therefore, directly in question; for, if the abbot was not the owner of the land, he was not chargeable with neglect nor liable for the nuisance. But in this case the action is for a nuisance arising from an act of misfeasance, 'the keeping up' a mill-dam on a stream below the plaintiff's land." "Unless the title comes in question, there is no difference in this respect, in cases arising *ex delicto*, between actions merely personal and those which concern the realty." *Sumner v. Tileston*, 4 Pick. 308, was an action against three defendants for erecting a dam,

by means whereof the plaintiff's mills were obstructed. Two of the defendants pleaded in abatement the death of the third, pending the suit; but the pleas were held ill, as the action was simply *ex delicto*, and it did not appear that the defendants were charged by reason of their holding real estate as co-tenants. In *Converse v. Symmes*, 10 Mass. 377, which was also for maintaining a dam and flooding land, the non-joinder of a tenant in common was pleaded in bar, and it was held matter only for abatement.

<sup>1</sup> *Simpson v. Seavey*, 8 Greenl. 138. In this case four persons owned a saw-mill, and three of them erected a lath-mill inside the saw-mill, for their separate use, the rubbish thrown from which obstructed the mills below. It was held, in an action on the case against all the owners of the saw-mill for this injury, that the fourth owner, having no interest in the lath-mill or occupancy thereof, was not liable.

<sup>1</sup> *Sellick v. Hall*, 47 Conn. 260.

<sup>2</sup> *Hines v. Jarrett*, 26 S. C. 480.

§ 398. **Same—Same.**—Where the injury complained of results from the separate acts of many persons, any one contributing to produce the injury is separately liable for the injury which he causes.<sup>1</sup> Where the flow of a stream was obstructed by several distinct causes, and water was thrown back upon the plaintiff's premises, the court said: "If the injury is produced by the joint action of several parties, and especially if it is the result of the independent action of several parties contributing thereto, though not in combination or by concert, it is no defense that all are not made defendants;" but that fact "can be considered only upon the question of damages."<sup>2</sup> But a mortgagee of land through which a stream flows, who lends the money secured by his mortgage for the purpose of building a mill-dam in the stream, is not liable for an injury caused by the dam, if erected by the mortgagor in possession.<sup>3</sup>

§ 399. **Same—When creator of nuisance is not in possession.**—It is not necessary that one should be the owner or even occupier of the freehold in order to become liable for erecting a nuisance, and on the other hand the owner is not liable for nuisances erected on his land without his consent. In *Dorman v. Ames*,<sup>4</sup> the court said: "It is not necessary in an action of this nature that a person charged with erecting the nuisance should be the owner of the freehold, or any part of it upon which the dam is erected; it is sufficient if he is a party to the erection of the obstruction claimed to be a nuisance." In *Saxby v. Manchester Railway Co.*,<sup>5</sup> the defendants were owners of the soil of a stream which supplied water to two print works, both of which had formerly been occupied by A., who had erected a weir across the stream and diverted water from one of the works to supply the other. The plaint-

<sup>1</sup> *Wheeler v. Worcester*, 10 Allen, 591; *Chipman v. Palmer*, 9 Hun, 517; 77 N. Y. 51; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Arimond v. Green Bay*, 85 Wis. 41; *Hill v. Smith*, 82 Cal. 166; *Keyes v. Little York Gold Washing & Water Co.*, 53 Cal. 724; *Little Schuylkill Nav. Co. v. Richards*, 53 Penn. St. 142; *Gladfelter*

*v. Walker*, 40 Md. 1; *Buccleuch v. Cowan*, 5 Macph. Sc. Sess. Cas. (3rd ser.) 214; 2 App. Cas. 344.

<sup>2</sup> *Wheeler v. Worcester*, 10 Allen, 591.

<sup>3</sup> *McNaughton v. Frazer*, 8 Allen (N. B.), 247.

<sup>4</sup> 12 Minn. 451, 456.

<sup>5</sup> L. R. 4 C. P. 198.



iff, becoming lessee of the former works and entitled to the water from the stream, removed the weir, which was shortly afterwards replaced by A., as it was supposed, but without the authority of the defendants. The court held that they were not responsible for the acts of A., or for the continuance of the nuisance. So one does not become a party to the wrong by deriving benefit from it. If a mill-owner increases the height of the stream, and in so doing wrongfully flows the lands above, another mill-owner who derives benefit from the increase, but who contributes to it in no way, is not liable for the flowage to those who are injured thereby. But if he pays anything for the benefit which he enjoys, he will be liable for the injury caused by the wrong done in producing that benefit.<sup>1</sup>

**§ 400. Survival of suits.**—At common law an action to recover damages sustained from diversion, obstruction, or flowage, caused by the defendant's wrongful acts, died with the defendant. But this has been changed by statute in several of the States.<sup>2</sup>

**§ 401. Nuisance not causing actual damage.**—It was at one time doubted whether case could be maintained for a nuisance which caused no actual damage to the plaintiff; but the rule is well settled both in England and America, that for any nuisance which infringes upon the rights of the plaintiff, or which would abridge his present or potential use of his property, the action will lie, although it causes no present actual damage.<sup>3</sup>

<sup>1</sup> *Tourtellot v. Phelps*, 4 Gray, 370, 376.

<sup>2</sup> *Ten Eyck v. Runk*, 31 N. J. L. 428.

<sup>3</sup> *Ante*, § 214. A statement in Britton (written about 1800 A. D.) gives a rule apparently contrary to that above. In Bk. II., ch. 30, §§ 2, 154 (1 Nichols' ed. 398), Britton says: "Of nuisances, however, some are both tortious and hurtful, others hurtful, yet not tortious; therefore, it behooves every plaintiff in this case to show what damage is occasioned

to him by the nuisance." This is almost a copy from Bracton (Bk. 4, ch. 48); but the important clause in this connection is wanting. And Britton continues: "And if the nuisance be found to be both hurtful and tortious, then matters are to be entirely restored to their former condition. If not tortious, it must be tolerated, however hurtful it may be;" which seems to indicate that damage was used more in the sense of injury.

§ 402. Same.— The case usually treated as the leading case is *Duncombe v. Randall*,<sup>1</sup> where it is said: “If one had anciently ponds which are replenished by channels out of a river, he cannot change the channels if any prejudice accrue to another by that.” In *Westbury v. Pond*, cited in *Fineux v. Hovenden*,<sup>2</sup> it was held that one of a body of people entitled to a common watering-place, which the defendant obstructed, might bring an action on the case, although there was no actual and particular damage to the plaintiff. The principal English authorities by which the doctrine opposed to that given above is seemingly supported, are *Williams v. Morland*,<sup>3</sup> *Wright v. Howard*,<sup>4</sup> and *Miner v. Gilmour*.<sup>5</sup> In *Williams v. Morland* the case was for diverting a stream by a dam, and, it was alleged, causing injury to the plaintiff’s land. The jury found that the plaintiff was uninjured, but that the defendant had no right to stop the water. The judges all used language seemingly opposed to the rule. Holroyd, J., said: “The mere obstruction of the water which had been used to flow through his lands does not of itself give any right of action. In order to entitle himself to recover, he should show the loss of some benefit, or the deterioration of the value of the premises.” But the ground of the decision was that no such damage as that alleged was shown. In *Wright v. Howard*, Vice Chancellor Sir John Leach, in deciding upon a bill for specific performance of a contract to purchase land with water-rights, and to which there was a cross bill for cancellation, remarks *obiter*: “It appears to me that no action will lie for diverting or throwing back water except by a person who sustains an actual injury.” But the distinction between actual injury and actual damage must be observed. In *Miner v. Gilmour*,<sup>6</sup> the privy council were called upon to determine the rights of riparian owners. Lord Kingsdown, in delivering the opinion, said: “But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.” We shall hereafter notice the appli-

<sup>1</sup> Hetley, 84.

<sup>2</sup> Cro. Eliz. 664.

<sup>3</sup> 2 B. & C. 910; s. c. 4 Dow & Ry.  
588.

<sup>4</sup> 1 Sim. & Stu. 190, 203.

<sup>5</sup> 12 Moo. P. C. 131, 156.

<sup>6</sup> 12 Moo. P. C. 131, 156. But see  
article in 12 Jur. N. S. (1866) 859.

cation of the rule to the rights of adjacent riparian owners. In *Mason v. Hill*,<sup>1</sup> Denman, C. J., reviewed several of these cases, but declined to pass on the point. He said: "It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water without a special use or special damage shown." He referred to *Palmer v. Keblethwaite*,<sup>2</sup> and *Glynne v. Nichols*,<sup>3</sup> where the question was raised, but not decided. In the latter case it was adjudged for the plaintiff. But the report in *Comberbach* shows that this was a case of trespass, and therefore not in point.

§ 403. *Same.*—The later English cases place the rule beyond a doubt. In *Rochdale Canal Co. v. King*,<sup>4</sup> the defendants, who owned a mill adjacent to a canal, were authorized by Act of Parliament to draw water from the canal for the sole purpose of condensing steam used in their engines. It was found at the trial that they had been drawing the water for other purposes, but that they had not thereby obstructed the navigation. The court held that the action would lie. Coleridge, J., said: "The water then having been used by the defendants for illegal purposes, the general principle applies, that although no appreciable damage may be sustained in the particular instance by the wrongful act, yet as the repetition of such an act might be made the foundation of claiming a right to do the act hereafter, a damage in law has already been sustained, in respect to which an action is maintainable." In *Wood v. Waud*,<sup>5</sup> the defendants fouled a stream without rendering the water less available for useful purposes than before. Pollock, C. B., in delivering the opinion, said: "We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land in its natural state." This is a case, therefore, of an injury to a *right*. The defendants by continuing the practice for twenty years might establish the right to the easement of discharging into the stream the foul water from their works."

<sup>1</sup> 5 B. & Ad. 1, 27.

<sup>2</sup> 1 Show. 64; s. c. *Skinner*, 65.

<sup>3</sup> 2 Show. 507; *Comberbach*, 48.

<sup>4</sup> 14 Q. B. 122, 134.

<sup>5</sup> 3 Exch. 748, 772. See *McGlone v. Smith*, 22 L. R. Ir. 559.

§ 404. *Same.*—In *Embrey v. Owen*,<sup>1</sup> which was a suit by a lower riparian proprietor against an upper one for abstracting water, and to which we shall again refer, Parke, B., says: “Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable.” This was followed in *Northam v. Hurley*.<sup>2</sup> In *Harrop v. Hirst*,<sup>3</sup> the court held that an action for diverting water is maintainable without proof of any actual personable damage. Martin, B., said: “The test is whether the doing of the acts complained of would, if continued, bar another person’s legal right.” So the drawing of a seine in the several fishery of another, although no fish are taken, entitles the latter to damages, on the ground that a repetition of such act for the required time would divest the proprietor of his rights.<sup>4</sup>

§ 405. *Same.*—In America, the rule that the action on the case lies for any nuisance infringing the plaintiff’s right, although there is no actual damage, is sustained by an almost unbroken series of authorities.<sup>5</sup> In *Woodman v. Tufts*,<sup>6</sup> decided

<sup>1</sup> 6 Exch. 353, 368.

<sup>2</sup> 1 E. & B. 665.

<sup>3</sup> L. R. 4 Exch. 43, 45. The same doctrine is followed in *Rose v. Groves*, 5 M. & G. 613; *Bower v. Hill*, 1 Bing. N. C. 549; *Sampson v. Hoddinott*, 2 C. B. N. s. 590; *Medway v. Romney*, 9 C. B. N. s. 575; *Crossley v. Lightowler*, L. R. 3 Eq. 279; *Bickett v. Morris* (*per* Lord Westbury), L. R. 1 H. L. (Sc. & Div. Ap.) 47; 14 L. T. N. s. 835 (explained in *Ewing v. Colquhoun*, L. R. 2 App. Cas. 839); *Lyon v. Fishmongers’ Co.*, L. R. 10 Ch. 679; 1 App. Cas. 662; *Claxton v. Claxton*, Ir. Rep. 7 C. L. 23 (1873). To same effect see 1 Wms. Saund. 846b (note to *Mellor v. Spateman*); 2 Notes to Saund. 870; *Clowes v. Staffordshire Waterworks Co.*, L. R. 8 Ch. 125. And see *Pennington v. Brinsop Co.*, 5 Ch. D. 769, where Fry, J., distin-

guishes the term “injury” from “damage.”

<sup>4</sup> *Patrick v. Greenway*, 1 Wm. Saund. 846b; 1 Notes to Saund. 627. And see *Chapman v. Thames Manuf. Co.*, 13 Conn. 269, 274.

<sup>5</sup> *Whipple v. Cumberland Manuf. Co.*, 2 Story, 661; *Parker v. Griswold*, 17 Conn. 288; *Branch v. Doane*, 18 Conn. 233; *Newhall v. Ireson*, 8 Cush. 595; *Stowell v. Lincoln*, 11 Gray, 484; *Blanchard v. Baker*, 8 Maine, 253; *Bateman v. Hussey*, 12 Maine, 407; *Munroe v. Stickney*, 48 Maine, 462; *Cowles v. Kidder*, 24 N. H. 364, 379; *Bassett v. Salisbury Manuf. Co.*, 28 N. H. 438; *Gerrish v. New Market Manuf. Co.*, 30 N. H. 479, 484; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Chatfield v. Wilson*, 27 Vt. 670; *Tuthill v. Scott*, 43 Vt. 525; *Plumleigh v. Dawson*, 1 Gilman,

in 1837, before most of the English cases above cited, the defendants maintained a dam which caused the water to flow back upon the plaintiffs' land. It was insisted on the part of the defendants that the overflowing had occasioned no actual damage after the plaintiffs became the owners, but the court ruled that if the defendants without right maintained a dam so high as to overflow the land of the plaintiffs, the presumption of law was that the act was a damage, and no special damage need be shown in order to maintain the action, and this ruling was sustained above. In *Webb v. Portland Manuf. Co.*,<sup>1</sup> which was an equity case between riparian proprietors, Story, J., lays down the rule which is followed by Parke, B., in *Embrey v. Owen*, above cited. In *Tillotson v. Smith*,<sup>2</sup> the defendant increased the head of water in his pond by turning into it another stream, thereby increasing the volume of water flowing over the land of the plaintiff below. The court say: "It is a long established principle of the common law, that wherever any act injures another's right, and would be evidence in future in favor of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury." So where the owners of an ancient mill upon a lake, who had been accustomed for many years to obtain water for their mill through an artificial channel which they maintained in a sand-bar, thereby obtained a prescriptive right to overflow the adjoining lands to a certain height, and afterwards placed a conduit in the sand-bar which admitted more water and overflowed the adjoining lands to a greater height, it was held that the adjoining owner could maintain an action, although the gradual filling of the ancient channel would have raised the water to the same height.<sup>3</sup>

§ 406. Reasonable use.— The distinction between the proper use of the stream by a riparian owner, which infringes no

544; *Hulme v. Shreve*, 8 Green, Ch. 116; *Pastorious v. Fisher*, 1 Rawle, 27; *Ripka v. Sergeant*, 7 Watts & S. 11; *Miller v. Miller*, 9 Penn. St. 74; *Delaware Canal Co. v. Torrey*, 33 Penn. St. 143; *Graver v. Sholl*, 42 Penn. St. 58; *Stein v. Burden*, 42 Ala. 130; *Tootle v. Clifton*, 22 Ohio St. 274; *Mitchell v. Barry*, 26 Up. Can. Q. B. 416; *Hendrick v. Cook*, 4 Ga. 241; *Chapman v. Copeland*, 55 Miss. 476; *Essen v. McMaster*, 1 Kerr (N. B.), 501.  
<sup>1</sup> 8 Sumner, 189.  
<sup>2</sup> 32 N. H. 90, 96.  
<sup>3</sup> *Chapman v. Thames Manuf. Co.*, 18 Conn. 269.

right of the other proprietors, although it necessarily modifies the stream in some way, and a use which infringes their rights, although causing no damage, is important.<sup>1</sup> This topic involves the discussion of questions of substantive law which have already been considered,<sup>2</sup> but it is so intimately connected with the subject in hand that it must be referred to here. When does the riparian owner's use of the stream cease to be rightful and become a nuisance? What uses of the stream are *per se* infringements of the adjacent owner's rights? The answers to these questions doubtless explain the apparent conflict of authorities.

§ 407. *Same.*—The law of England on the point was settled by the opinion of Baron Parke in the case of *Embrey v. Owen*.<sup>3</sup> He states the right of the riparian owner to the flow of the stream in its natural state, without diminution or alteration, and then adds: This “is not an absolute and exclusive right to the flow of *all* the water in its natural state; if it were, the argument of the learned counsel that every abstraction of it would give a cause of action would be irrefragable; but it is a right only to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side, to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; for such an use it will; even as the case above cited from the American reports shows (*Webb v. Portland Manuf. Co.*), though there may be no actual damage to the plaintiff.” In the still earlier case of *Tyler v. Wilkinson*,<sup>4</sup> Story, J., uses similar language.

§ 408. *Same.*—The correct answers to the above questions are indicated by these opinions, and the true rule is clearly stated in the case of *Wheatley v. Chrisman*.<sup>5</sup> There a small stream of water flowed through the land of the parties, the defendant being the upper and the plaintiff the lower proprietor. The plaintiff complained that the defendant, who was working a lead-mine, had corrupted the water, and sensibly

<sup>1</sup> See *ante*, ch. 6.

<sup>2</sup> *Ante*, ch. 7.

<sup>3</sup> 6 Exch. 353.

<sup>4</sup> 4 Mason, 397, 401 (1827).

<sup>5</sup> 24 Penn. St. 298, 302.



diminished the volume of the stream. Black, J., in delivering the opinion of the court, said: "The wrong must cease, no matter how trifling it may seem. The right of the plaintiff is absolute to be restored to the full enjoyment of his own property, and is not dependent in any manner upon its value either to himself or his adversary." "The proposition of the defendant was that he had a legal right to use a reasonable quantity of the water for the purposes of his business. The court replied that his business might reasonably require more than he could take consistently with the rights of the plaintiff. We cannot see how or on what principle the correctness of this can be impugned. The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both. The true rule was given to the jury. The defendant had a right to such use as he could make of the water without materially diminishing it in quantity, or corrupting it in quality. If he needed more, he was bound to buy it."<sup>1</sup>

§ 409. *Same.*—In *Dumont v. Kellogg*,<sup>2</sup> the same question came up between upper and lower riparian owners. The upper proprietor, by filling a reservoir from a stream, had diminished its volume. Cooley, J., in delivering the opinion of the court, said: "As between two proprietors, neither of whom has acquired superior rights to the other, it cannot be said that one 'has no right to use the water to the prejudice of the proprietor below him,' or that he cannot lawfully 'diminish the quantity which would descend to the proprietor below.'" "Such a rule could not be the law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream." Mr. Phear<sup>3</sup> says: "Of course no action will lie either in trespass or nuisance, unless a right be infringed; but if the infringement be proved, nominal damages must be awarded, whether actual damage were a con-

<sup>1</sup> The language of this case is Ill. 280, 245; and *Garwood v. New York Central R. Co.*, 17 Hun, 856. adopted in Washburn on Easements, p. 266, and is followed in *Batavia Manuf. Co. v. Newton Manuf. Co.*, 91

<sup>2</sup> 29 Mich. 420, 422, 425.

<sup>3</sup> On Waters, 107.

sequence or not. In cases where the right alleged to be infringed is merely the right to be protected from actual damage, manifestly no action can succeed, unless actual damage be proved.”<sup>1</sup>

§ 410. *Same.*—In *Elliot v. Fitchburg R. Co.*,<sup>2</sup> a railroad company, owning land along a stream, had dammed it to obtain water for their locomotives. It was held that a lower riparian proprietor could not maintain case unless he had suffered actual and perceptible damage. The case is distinguished from the typical one by which the plaintiff resists an infringement, which may ripen into an adverse right, or abridge or bar the plaintiff's right. That this is not in conflict with the rule, that the action lies in the latter case, may be inferred from the opinion of the same learned judge in *Newhall v. Ireson*.<sup>3</sup> There the upper proprietor, having conveyed water by a pipe to his well upon another tract of land, wholly away from the stream, returned it into the salt water below the plaintiff's land, and Shaw, C. J., regarded it as “a case where an action can be maintained to vindicate the plaintiff's right, and to prevent a loss of it by adverse possession and lapse of time.”<sup>4</sup>

<sup>1</sup> This is somewhat inaccurate of trespass, since every trespass imports damage. 3 Bl. Com. 209. For further discussion of the doctrine stated in the text, see 1 Smith's Lead Cas., notes to *Ashby v. White*. The distinction is stated, but less clearly, in *Miner v. Gilmour*, 12 Moo. P. C. 181, upon which see an important article in 12 Jur. N. S. (1866) p. 359. And see *Snow v. Cowles*, 22 N. H. 86.

<sup>2</sup> 10 Cush. 191, 197. See Bigelow's *Leading Cases on Torts*, 509.

<sup>3</sup> 8 Cush. 595, 599.

<sup>4</sup> In the case of *Cummings v. Barrett*, 10 Cush. 186, 191, Shaw, C. J., also expresses his opinion in similar terms as to cases where rights are infringed. And this rule has been followed by the same court in *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241; *Hastings v. Livermore*,

7 Gray, 194; *Stowell v. Lincoln*, 11 Gray, 484; and *Lund v. New Bedford*, 121 Mass. 286. The doctrine of *Elliot v. Fitchburg R. Co.* is in accord with decisions in other States. In *McElroy v. Goble*, 6 Ohio St. 187, it was held that the use of streams of water for domestic, agricultural, or manufacturing purposes, being to some extent a public right, an action for a nuisance caused by any obstruction or diversion of a stream for *any such purpose*, will not lie unless the damage occasioned thereby is real, material, and substantial. For other authorities, that an insensible or minute diminution, or interference with a stream by a riparian owner in the course of a proper use of the stream, not causing damage, is no infringement of other riparian proprietors' rights, and is not action-

§ 411. **Damages.**— The question whether damages shall be computed only up to the beginning of the action, or shall include prospective damages, is one of considerable difficulty. The general rule, stated by Mayne, is that damages arising subsequent to action brought, or even to the date of the verdict, may be taken into consideration when they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action.<sup>1</sup> This general principle must be applied to single nuisances, to continuing and permanent nuisances, to acts which are wrongful only when causing damage, to single trespasses and continuing trespasses, and to cases where adverse rights are acquired by the party answering in damages. For the purpose of illustrating the leading distinctions made by the courts, we have distributed these cases into several classes.

§ 412. **Same — Damage as the gravamen of the suit.**— *First.* Nuisances and acts wrongful only when causing actual damage; *i. e.*, where damage is the gravamen of the action.<sup>2</sup> In these cases, only the damages actually accrued before action brought can be recovered; and any further damage must be recovered in a separate action when it actually accrues.<sup>3</sup> This

able, see *Wadsworth v. Tillotson*, 15 Conn. 866; *Martin v. Bigelow*, 2 Aik. (Vt.) 184; *Ford v. Whitlock*, 27 Vt. 265; *Canfield v. Andrew*, 54 Vt. 1; *ante*, §§ 204, 214.

<sup>1</sup> Mayne's *Law of Damages* (8d ed.), 84.

<sup>2</sup> See *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; *Lamb v. Walker*, 3 Q. B. Div. 389 (dissenting opinion of Cockburn, C. J.); *Delaware Canal Co. v. Wright*, 21 N. J. L. 469.

<sup>3</sup> *Ibid.*; *Waggoner v. Jermaine*, 3 Denio, 306; *Baldwin v. Calkins*, 5 Wend. 167, 179; *Phillips v. Terry*, 42 N. Y. 313; *Whitemore v. Bischoff*, 5 Hun, 176; *Duryea v. Mayor*, 26 Hun, 120; *Beckwith v. Griswold*, 29 Barb. 291; *Thayer v. Brooks*, 17 Ohio, 489; *Polly v. McCall*, 1 Ala. Sel. Cas. 246; 37 Ala. 20; *Stein v. Burden*, 24 Ala. 180; *Savannah Canal Co. v. Bourquin*, 51 Ga. 378; — *v. Deberry*, 1

*Hayw.* (N. C.), 248; *Carruthers v. Tillman*, *id.* 501; *Bradley v. Amis*, 2 *id.* 399; *Shaw v. Etheridge*, 3 Jones (N. C.), 300; *Burnett v. Nicholson*, 86 N. C. 99; *Duncan v. Markley*, 1 Harper (S. C.), 276; *Langford v. Owsley*, 2 Bibb (Ky.), 215; *Cobb v. Smith*, 38 Wis. 21; *Hazeltine v. Case*, 48 Wis. 391; *Dorman v. Ames*, 12 Minn. 451; *Clark v. Nevada Mining Co.*, 6 Nev. 203. See *Hodges v. Hodges*, 5 Met. 205; *McConnel v. Kibbe*, 29 Ill. 483. As to the statute of limitations, see *Sutton v. Clark*, 6 Taunt. 29; and *Deverry v. Grand Canal Co.*, Ir. Rep. 9 C. L. 194, where it is held that in actions for damages caused by continued obstruction, the statute runs from the time the special damage complained of occurred. To the same effect see *Van Orsdol v. B. C. R. & N. Co.*, 56 Iowa, 470.

class includes cases where the acts complained of are interrupted and repeated, as in the opening and closing of the gates of a dam;<sup>1</sup> cases where, from a single act, not wrongful in itself, new damages result from time to time, and constitute new causes of action; and, on principle, would include all cases of nuisances, single and continuing. In *Whitehouse v. Fellowes*,<sup>2</sup> the trustees of a turnpike had converted an open ditch at the side of their road into a covered drain. In heavy storms this drain was inadequate to the carrying off of the water, and in consequence the plaintiff's lands were overflowed. Williams, J., said: "The question is whether the plaintiff is bound to rest his complaint upon the original construction of the works, or whether he can maintain an action after the expiration of three months from that time" (the period of the special statute of limitation). "I am of opinion that the continuance by the defendants of that negligent and improper condition of the road under their charge, if accompanied by fresh damage to the plaintiff, constitutes a fresh cause of action."

§ 413. *Same.*—Most of these cases turn upon the principle that every continuance of a nuisance is a new nuisance.<sup>3</sup> In *Beckwith v. Griswold*,<sup>4</sup> the action was for damages caused by obstructing and changing the channel of a creek and diverting its waters and causing them to overflow the plaintiff's lands. The plaintiff had already had one recovery for damages caused by the same act. The court held that the former recovery was no bar to the present action. Balcom, J., said: "The plaintiff recovered damages in the first suit for erecting and continuing the obstructions in the channel of the creek, by the defendants, to the time he commenced that suit, and he has only recovered damages in this action for continuing such obstructions from the time the first suit was commenced to the time of the commencement of this one."<sup>5</sup>

<sup>1</sup> So in case of the occasional erection of flash-boards upon a dam, causing damages from time to time. *Noyes v. Stillman*, 24 Conn. 15.

<sup>2</sup> 10 C. B. N. s. 765, 781. See *Peden v. Chicago Ry. Co.*, 78 Iowa, 131; *Thornton v. Turner*, 11 Minn. 336.

See the dissenting opinion of Cockburn, C. J., in *Lamb v. Walker*, 8 Q. B. Div. 389.

<sup>3</sup> 8 Bl. Com. 220.

<sup>4</sup> 29 Barb. 291.

<sup>5</sup> This case is cited with approval in *Munson v. People*, 5 Parker, C. C.

§ 414. **Same.**— In *Duryea v. Mayor of New York*,<sup>1</sup> the action was for damages caused by the wrongful discharge of water and sewage upon the plaintiff's lands. Daniels, J., said: "As the discharges flowed from the sewer upon the plaintiff's property, they constituted a nuisance; and for that nuisance a distinct and separate action might have been brought by him for every discharge made by the sewer upon his property. Each discharge was in and of itself a substantive cause of loss, and for that reason constituting a separate right of action." *Thayer v. Brooks*<sup>2</sup> was an action on the case for nuisance in diverting water from the plaintiff's mill by means of a ditch. The court say: "The court instructed the jury that the owner of the mill might recover for the injury sustained by the diminution in value of the mill-site, consequent upon the diversion of the water. This was going too far. Supposing the party liable at all, he was only liable, under any form of declaration, for the damages actually sustained prior to the commencement of the suit."

§ 415. **Exemplary damages.**— If a person continues a nuisance after its wrongful character has been judicially determined, and damages have been recovered against him, the case becomes one for exemplary damages.<sup>3</sup> In a second action, the plaintiff should be awarded damages sufficient to compel the defendant to abate the nuisance.<sup>4</sup>

16. The same rule is laid down in *Bradley v. Amis*, 2 Hayw. (N. C.) 399.

<sup>1</sup> 26 Hun, 120, 122; 62 N. Y. 592; 96 N. Y. 477; *New York v. Law*, 125 N. Y. 380.

<sup>2</sup> 17 Ohio, 489. In *Hayden v. Albee*, 20 Minn. 159, this principle is departed from. The action there was for damages to plaintiff's land resulting from an overflow caused by defendant's dam. The jury were allowed to include in the damages the value of timber caused to die by the flowage, although the timber did not die until after the action was begun. In *Hazeltine v. Case*, 46 Wis. 391, a lower riparian owner had brought one action against an owner above,

for fouling the stream, and had obtained judgment from which the defendant appealed. While such appeal was pending, the plaintiff brought a second action before a justice of the peace for damages accruing since the date of the first action. It was held that the action would lie, and further that a judgment in the second action in no way affected the rights of the parties in the first action, pending in the circuit court.

<sup>3</sup> *Bradley v. Amis*, 2 Hayw. (N. C.) 390.

<sup>4</sup> *Ibid.* See — *v. Deberry*, 1 Hayw. 248; *Carruthers v. Tillman*, 1 Hayw. 501; *Clyde v. Clyde*, 1 Yeates,

§ 416. **Same — Permanent injury.**— But the rule as to the class of cases is subject to an important modification where the injury complained of is permanent. In such cases, the rule is altered for the sake of convenience, and but one action is allowed. The plaintiff is required to recover in one suit the entire damages, present and prospective, caused by the defendant's act.<sup>1</sup> Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as railroad embankments, culverts, and bridges, permanent dams and permanent pollutions of water, fall in this class. The leading case of this class is *Troy v. Cheshire Railroad Co.*<sup>2</sup> This was an action on the case by a town against a railroad company for damages caused by building a railroad bridge across the public highway, obstructing the highway, and demolishing a public bridge. The plaintiff recovered and was allowed to include in its damages the prospective increased cost of maintaining the highway. In delivering the opinion of the court, Bell, J., said: "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, there the damage is an original damage and

92; *Walker v. Butz*, 1 Yeates, 574; *Mayor v. Commissioners*, 7 Penn. St. 348, 366; *Wheatley v. Chrisman*, 24 Penn. St. 298. In *Battisbill v. Reed*, 18 C. B. 696, where the action was for the nuisance of overhanging eaves, Jervis, C. J., said: "Every day that the defendant continues the nuisance, he renders himself liable to another action. I think the jury did right to give, as they generally do, nominal damages only in the first action; and, if the defendant persists in continuing the nuisance, then they may give such damages as may compel him to abate it, but not, as was insisted here, the difference between the original value of the premises and their present diminished value." In Delaware, by statute, the owner of an upper mill is bound to give notice to the owner of a lower mill before discharging an unusual

quantity of water, and if he wilfully discharges water in an unusual quantity, he is liable for double damages. *McIlvane v. Marshall*, 3 Har. (Del.) 1; *Ross v. Horsey*, 3 Har. (Del.) 60.

<sup>1</sup> *Warner v. Bacon*, 8 Gray, 397; *Fowle v. New Haven & Northampton Co.*, 107 Mass. 352; 112 Mass. 354; *Mears v. Dole*, 135 Mass. 508, 512; *Rockland Water Co. v. Tillson*, 69 Maine, 255; *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423; *Powers v. Council Bluffs*, 45 Ia. 654; *Chicago & Alton R. Co. v. Maher*, 91 Ill. 312; *Van Schoick v. Delaware & Raritan Canal Co.*, 20 N. J. L. 249; *Seely v. Alden*, 61 Penn. St. 302; *Van Orsdol v. B. C. R. & N. R. Co.*, 56 Iowa, 470.

<sup>2</sup> 23 N. H. 83. For a suggestion of the convenience of one action instead of several, see *Duncan v. Sylvester*, 24 Maine, 482.



may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such act is not necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury to be compensated in a suit is only the damage that has happened." The court also cited *Woods v. Nashua Manuf. Co.*,<sup>1</sup> which was a case of taking lands for a canal.<sup>2</sup> It will be observed that the case itself was one for damages by building a railroad, and that the two cases cited in the opinion are cases for damages by building canals. They resemble the cases of eminent domain, of which we shall speak hereafter, but the reasoning is extended by the court to all permanent nuisances.

§ 417. *Same — Same.*—In *Fowle v. New Haven & Northampton Co.*,<sup>3</sup> where the action was for the washing away of the plaintiff's land by the diversion of a stream caused by building a railroad embankment, Gray, J., said: "The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as

<sup>1</sup> 5 N. H. 467.

<sup>2</sup> See also *Powers v. Council Bluffs*, 45 Iowa, 652. Here the city constructed a ditch so that it emptied into a main stream by a fall of several feet, instead of grading the bed of the ditch to the level of the stream. The action of the water washed out a cavity at the fall, which worked backward up the channel of the ditch, and at length washed out portions of the plaintiff's soil, for which injury he brought suit. The period of the statute of limitations had run after the stream began to wash out his premises, but there were recent damages within the period. It was held that the nuisance was a permanent one, the damages from which were calculable from the first; and that

the entire action was barred. So where a railroad company erected an embankment for its track, which closed the natural channel of a stream, and diverted water from land, it was held that the injury was a permanent one, for which damages might be at once fully recovered. *Stodghill v. C., B. & Q. R. Co.*, 53 Iowa, 341. Where a town is required by law to repair and maintain a road washed out by the overflow of a mill-pond, it may recover the cost of repairs and of building a wall protecting it against future injuries. *Andover v. Sutton*, 12 Met. 182. See, also, *Baldwin v. Oskaloosa Gas Light Co.*, 57 Iowa, 51; *Dickson v. Chicago, R. I. & P. R. Co.*, 71 Mo. 575.

<sup>3</sup> 107 Mass. 352; 112 Mass. 334.

gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ. And the judgment in one such action is a bar to another like action between the parties for subsequent injuries from the same cause." In the later report of the case, after further proceedings, Colt, J., said: The case at bar is "an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

§ 418. *Same — Same.*—In the case of *Chicago & Alton Railroad Co. v. Maher*,<sup>1</sup> the action was for damages caused by a railroad drawbridge which spanned the river upon which the lot fronted, immediately at the corner of the lot, and by its supports obstructed the access of vessels to the plaintiff's dock. The bridge in question was erected while the property was owned by the plaintiff's husband, and he conveyed it to her without bringing suit for the obstruction. She then brought the action for the injuries caused. The court held that the structure was permanent, and the damages entire, and that the total right of action therefor had vested in the grantor, and could not be transferred.<sup>2</sup>

§ 419. *Same — Same.*—To this class must be referred the cases of nuisance for which the measure of damages is the de-

<sup>1</sup> 91 Ill. 312, relying on *C. & P. R. Co. v. Stein*, 75 Ill. 41, which was a case of eminent domain, with facts like those in the *Maher Case*; and on *Ottawa Gas Light & Coke Co. v. Graham*, 28 Ill. 73. This was a case where a well was polluted by percolations from the defendant's gas works. The court held that the measure of damages was the depreciation in the value of the property caused thereby. In *Decatur Gas Light Co. v. Howell*,

92 Ill. 19, the action was for the continuance of a nuisance by the maintenance of gas works, polluting the water supply of the plaintiff. The plaintiff had formerly recovered for the depreciation in value of his premises from the same cause, and that recovery was held a bar to any further action for the same cause.

<sup>2</sup> For a similar ruling, see *Ortwine v. Baltimore*, 16 Md. 387.

preciation in the value of the property injured.<sup>1</sup> Such damages are for the permanent injury to the property, although the injury to the use of it is distinguished by some cases as an additional item not included;<sup>2</sup> and having been recovered once, no further action lies for that cause.<sup>3</sup> In *Seely v. Alden*<sup>4</sup> the action was for the pollution of a stream by throwing tan bark into it, and the plaintiff contended that he should be allowed the depreciation in the value of his premises, which was allowed by the court. Agnew, J., said: "Compensation for the diminished enjoyment or use of the property for a certain number of years is no compensation for the diminished value of the estate itself. The profit of the land must not be confounded with the land itself." "The argument of the defendant in error is that the injury is only temporary, the tan bark being light and removable by freshets. But this assumes the fact. The plaintiffs declared upon the deposit as an injury to their freehold, alleged it to be permanent in its character, and offered evidence to this effect. The fact was one to be decided by a jury; but in assuming that the injury was only to the use of the property for a certain period of time, the court withdrew the fact of permanency."<sup>5</sup>

§ 420. *Same — Same.*— The law will not presume a permanent injury. In order to recover such damages the plaintiff must aver and prove that the act complained of necessarily causes a permanent injury to the value of his property.<sup>6</sup> In

<sup>1</sup> *Chase v. New York Central R. Co.*, 24 Barb. 278; *Easterbrook v. Erie R'y Co.*, 51 Barb. 94; *Hanover Water Co. v. Ashland Iron Co.*, 84 Penn. St. 279; *Seely v. Alden*, 61 Penn. St. 302; *Minnequa Springs Imp. Co. v. Coon*, 10 W. N. C. 502; *Drake v. Chicago R. Co.*, 68 Iowa, 310; *Marsh v. Trullinger*, 6 Oregon, 356; *Finley v. Hershey*, 41 Iowa, 389. And see *Anon.*, 4 Dall. 147.

<sup>2</sup> *Illinois Central R. Co. v. Grabill*, 50 Ill. 241, 246. That all damages are included in depreciation of value, see *Chicago R. Co. v. Carey*, 90 Ill. 514.

<sup>3</sup> *Chicago & Alton R. Co. v. Maher*, 91 Ill. 312.

<sup>4</sup> 61 Penn. St. 302, 306.

<sup>5</sup> In *Hatch v. Dwight*, 17 Mass. 289, where a mortgagee was given as damages the interest on the value of a mill-site from the time the action accrued. See *James v. Worcester*, 141 Mass. 361.

<sup>6</sup> 1 Sutherland on Damages, 199; Sedgwick, Leading Cases on Damages, 662 (note); *Battishill v. Reed*, 18 C. B. 658; *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (see *ante*, § 412); *Bare v. Hoffman*, 79 Penn. St. 71; *Burnett v. Nicholson*, 86 N. C. 99; *Clark v. Nevada Land & Mining Co.*, 6 Nev. 203. And see *Hoagland v. Veghte*, 80 N. J. L. 516, and *Corning v. Troy Iron Factory*, 29 Barb. 311.

*Battishill v. Reed*,<sup>1</sup> which was for the nuisance of overhanging eaves, *Creswell, J.*, said: "The plaintiff had no right to assume that things would remain as they were." In *Bare v. Hoffman*,<sup>2</sup> which was an action for diminishing the volume of a stream, the court above said: "The whole damage of which the defendant in error complained was caused by Bare's placing a pipe in the stream on his own land. A severance of the pipe would cause the water to run in the accustomed channel, and remove the whole cause of complaint. It is not the case of an entry on the land of the defendant in error, and a severance of any part of his freehold, nor of depositing a permanent nuisance thereon."

§ 421. **Same — Single trespasses — Consequential damages.**—*Second.* In single trespasses the act complained of is a direct injury in itself, and the damages are merely consequential. Fresh damages from the trespass do not give a fresh cause of action, and the plaintiff must recover the entire damages from the trespass in a single action.<sup>3</sup> In *Oakley v. Kensington Canal Co.*,<sup>4</sup> a canal company entered upon the plaintiff's land, and dug it away for the purpose of sloping the banks of their canal, in consequence of which the land was overflowed at every high tide. It was held by Lord Denman, C. J., that the injury was complete when the trespass was committed, and that no new cause of action arose with every overflow. In *Clegg v. Dearden*,<sup>5</sup> the defendant trespassed upon the plaintiff's land by making an excavation into his mine, through which water flowed into the mine. It was held that the cause of action was complete when the excavation

<sup>1</sup> 18 C. B. 658.

<sup>2</sup> 79 Penn. St. 71.

<sup>3</sup> *Vedder v. Vedder*, 1 Denio, 257; *White v. Mosely*, 8 Pick. 657; *Dickinson v. Boyle*, 17 Pick. 78. To same effect see *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583. A former judgment in trespass for the same cause, as for flowage constituting a trespass, between the same parties, is conclusive in the absence of new circumstances. *Dick v. Webster*, 6 Wis. 481. An amendment introducing a

cause of action that accrued after suit brought, is improper. *Powell v. Allen*, 103 N. C. 46. An amendment claiming additional damages for injured crops, by reason of the overflow mentioned in the petition, does not set up a new cause of action. *International R. Co. v. Pape*, 73 Texas, 501.

<sup>4</sup> 5 B. & Ad. 138.

<sup>5</sup> 12 Q. B. 575. See, also, *Kansas Ry. Co. v. Muhlman*, 17 Kansas, 224; *Stock v. Boston*, 149 Mass. 410.

was made, and that the failure to fill up the excavation was not a new cause of action.

§ 422. *Same — Same.*— In *DeCosta v. Massachusetts Mining Co.*,<sup>1</sup> the defendant had dug a ditch on the plaintiff's land. It was held that the plaintiff could not recover as damages a sum sufficient to fill up the ditch, or any prospective damages. Cope, J., said: "The plaintiff could not recover beyond the injury sustained, and it was improper to award compensation for an expense which might never be incurred. It is possible that the cost of filling up the ditch may far exceed an injury resulting from it in its present condition, and in that case it is not probable that the amount recovered would ever be used for that purpose." *Vedder v. Vedder*<sup>2</sup> illustrates the distinction between the consequences of a single trespass and a continuing nuisance. The defendant trespassed on the plaintiff's land and polluted his stream by placing foul matter therein. The plaintiff afterwards gave him, for a valuable consideration, a discharge and satisfaction "of all demands to date." It was held that such discharge extinguished all right of action, not only for the original injury and the damages up to that time, but for all future damages occasioned by the nuisance.

§ 423. *Same — Continuing trespasses.*— *Third.* In the case of continuing trespasses, the rule is altered to conform to that for continuing nuisances. In such cases, only the damages which have happened before action brought are recoverable, and successive actions may be brought to recover any damages happening thereafter. "The continuing of a trespass from day to day," says Sergeant Williams,<sup>3</sup> "is considered in law a several trespass on each day, and must be directly and positively answered by the defendant, as well as the original trespass."<sup>4</sup> The leading case is *Holmes v. Wilson*.<sup>5</sup> There

<sup>1</sup> 17 Cal. 618.

<sup>2</sup> 1 Denio, 257. See *Grumley v. Webb*, 44 Mo. 444.

<sup>3</sup> 1 Wms. Saund. 20, note 1, to *Manchester v. Valer*; *Brakken v. Minneapolis Ry. Co.*, 32 Minn. 425.

<sup>4</sup> Citing *Monkton v. Pashley*, 2 Ld. Raym. 976.

<sup>5</sup> 10 A. & E. 508. See *Bowyer v. Cook*, 4 C. B. 236. An earlier case, not referred to in *Holmes v. Wilson*, is the case of *Farmers of Hampstead Water*, 12 Mod. 519. There, says the report, "upon executing a writ of enquiry of damages in trespass, for digging a hole in the plaintiff's soil,

the defendants, as trustees of a turnpike road, had built buttresses on the land of the plaintiff to support the road, and the plaintiff having recovered damages for the erection of the buttresses in a former suit, was held entitled to maintain this action of trespass against the defendants for the continued use of the buttresses for the support of the road, as a fresh trespass.

§ 424. Same — Same.— In *Battishill v. Reed*,<sup>1</sup> the nuisance consisted of overhanging eaves and gutters. Evidence of the diminution in the value of the property was rejected. The court above sustained the ruling, and held that the defendant was liable to a new action for every day of its continuance. The rule is stated in the same way in Maine. Continuing trespasses and continuing nuisances are placed in the same class as cases for successive actions, the damages in each being computed only until action brought. In *Cumberland Canal Co. v. Hitchings*,<sup>2</sup> the defendant, acting for the city of Portland,

whereby his land was overflowed, *continuando transgressionem*, for nine months, and it was insisted that they might give evidence of a consequential damage, after the nine months, as well as in a nuisance which continues for nine months, and the cause is removed, if the effect continues afterwards," damage may be recovered for it; but Holt, C. J., said "he was not satisfied that the parity would hold."

<sup>1</sup> 18 C. B. 696. That an injunction may be granted, see *Beach v. Gaylord*, 48 Minn. 476.

<sup>2</sup> *Cumberland Canal Co. v. Hitchings*, 65 Maine, 140. And see *Russell v. Brown*, 63 Maine, 203. The same proposition is stated as to continuing trespasses in *Savannah Canal Co. v. Bourquin*, 51 Ga. 378; but the case is one of overflowing plaintiff's lands by reason of the defendant's negligence. For successive single trespasses to the plaintiff's close and dam, successive actions lie. *White v. Moseley*, 8 Pick. 657. Mr. Mayne (on

Damages, 89) considers the whole law upon the subject of damages in the case of continuing nuisances or trespasses in a very unsatisfactory state. For continuing trespasses, such as building a house on another's land, he says: "The fair rule in such a case would be to give the plaintiff such damages as would compensate him for the loss sustained up to the time of the verdict, and would pay him for putting the land into its original state. If he chose to leave the trespass after this, it would clearly be because he thought it advantageous to himself; and if so, he ought not to be allowed to sue again." And he cites a case where such damages were allowed in an action on a covenant to repair. *Shortridge v. Lampleigh*, 2 Ld. Raym. 798-803. The reporter of *Holmes v. Wilson* (10 A. & E. 503) indicated this rule in a note at the end of the case. He says: "Quære whether the plaintiff, in the principal case, might not have recovered damages in respect



had filled up the bed of the canal with a solid embankment for a street. The court said: "When something has been unlawfully placed upon the land of another which can and ought to be removed, then, inasmuch as successive actions may be maintained, until the wrong-doer is compelled to remove it, the damages in each suit must be limited to the past and cannot embrace the future." They distinguish it from the cases of permanent injuries on the ground that the canal should have been bridged and not filled up.

§ 425. *Venue*.—The subjects of venue and territorial jurisdiction are so intimately related that we shall take them up together, considering, first, the venue of private actions and of indictments; secondly, the jurisdiction, as between the States, of suits at law and in equity for injuries affecting waters; and, thirdly, the jurisdiction over such injuries exercised by the Federal courts.

§ 426. *Same*.—Actions for nuisances and trespasses are local, and in them the venue must be laid and the trial held in the county where the injury was committed, or where the cause of action arose. For such injuries to or by means of waters as constitute trespasses, the action of trespass *quare clausum* must be brought in the county where the injured land lies.<sup>1</sup> The rule is the same for nuisances, except where the act causing the injury is done in another county, to which case we

of the expense of removing the buttresses herself; and the effect of such recovery." The point is directly considered in *Kansas Pacific Railway Co. v. Muhlman*, before referred to (17 Kansas, 232). The rule of allowing the cost of restoring the premises was rejected in *Easterbrook v. Erie Ry. Co.*, 51 Barb. 94, and *De Costa v. Massachusetts Mining Co.*, 17 Cal. 613, on the ground that such cost might exceed the value of the soil itself, or the injury suffered. That such cost should be considered, instead of permanent depreciation of value, see *Chicago Railroad v. Carey*, 90 Ill. 514.

<sup>1</sup> *Shelling v. Farmer*, 1 Strange, 646; *Berwick v. Ewart*, 2 Wm. Bl. 1070; *Doulson v. Matthews*, 4 T. R. 508, limiting *Mostyn v. Fabrigas*, Cowper, 161; s. c. 1 Smith's Ldg. Cas.; *Livingston v. Jefferson*, 1 Brock. 203; *Roach v. Damron*, 2 Humph. 425; *Champion v. Doughty*, 3 Har. (N. J.) 3; *Ham v. Rogers*, 6 Blackf. 559; *Chapman v. Morgan*, 2 G. Greene, 374; *Drinkhouse v. Spring Valley Water-works*, 80 Cal. 308; *Archibald v. Mississippi R. Co.*, 66 Miss. 424; *Missouri Pac. Ry. Co. v. Carter*, 85 Mo. 448; *Stamford Water Co. v. Stanley*, 39 Hun, 424; *Meranda v. Spurlin*, 100 Ind. 380.

shall presently refer.<sup>1</sup> In these actions it is held sufficient to lay the venue in the body of the county, and if the place be more particularly alleged, the allegation is surplusage, and variance of proof therefrom is immaterial.<sup>2</sup> Where an action on the case was brought for obstructing navigation in the Irwell River by a weir or dam at Preston, in the county of Lancaster, non-suit was moved for default of proving that the Irwell was at Preston; but it was held not necessary to give a local description to the nuisance, or to prove it to have happened at such a place, but it is sufficient if it be at any other place within the county.<sup>3</sup> In an early case for overflowing the plaintiff's land by a mill-pond, it was objected that "there was no place mentioned where *stagnum molendini* should be, and there the nuisance is done; and it may be in another vill. *Sed non allocatur*, for it shall be intended to be in the same vill where the mill is."<sup>4</sup> If, therefore, the venue was sufficiently laid in describing the mill, it was unnecessary to allege the location of the pond itself which covered the plaintiff's land.

§ 427. **Same.**—The nuisance must be proved to have been committed within the county where the venue is laid. An action on the case was brought for failure to repair a spout on the defendant's property in Middlesex, whereby the rain penetrated and injured the plaintiff's wall adjoining the defendant's premises. The lands were proved to be in Surrey. It was held that the action was local and the variance fatal; and that if no place is alleged where the nuisance was committed, the county in the margin would be intended.<sup>5</sup> Where

<sup>1</sup> That the action for nuisance is local, see *Warren v. Webb*, 1 Taunt. 379; 1 Chitty Pl. 281; Cooley on Torts, 471. Where part of the injured property lies in one county and part in another, provision is sometimes made by statute, allowing the action to be brought in either county. Thus in Pennsylvania, under St. 1836, June 13, §§ 79, 80, on actions real, where an action was brought for injuring a mill and dam, the mill and part of the dam being in one county,

and the remainder of the dam being in another county, it was held that the whole was a "single tenement," and that suit could be brought in another county. *Finney v. Somerville*, 80 Penn. St. 59.

<sup>2</sup> *Mersey Nav. Co. v. Douglas*, 2 East, 497; *Simmons v. Lillystone*, 8 Exch. 431.

<sup>3</sup> *Mersey Nav. Co. v. Douglas*, 2 East, 497.

<sup>4</sup> *Brent v. Haddon*, Cro. Jac. 555.

<sup>5</sup> *Warren v. Webb*, 1 Taunt. 379.

the defendant obstructed the waters of a navigable river by erecting a dam in Westmoreland County, whereby the plaintiff's boat was lost, the court held that he must sue in Westmoreland, and could not maintain the action in Fayette.<sup>1</sup> So where the parties owned adjoining mines in Columbia County, and one mine was flooded by the wrongful management of the other, for which the plaintiff brought suit in Philadelphia County describing the mines as situated in the county of Columbia, *to wit, at the county of Philadelphia*, it was held that the action was local, and that the venue could not be transferred by such a fictitious averment.<sup>2</sup>

§ 428. Same.—Where the nuisance is committed in one county, and the property injured lies in another, the action may be maintained in either county. The first form of remedy for such cases was the assize *in confinio comitatus*, by which a writ issued to the sheriff of each county to summon twelve men from the neighborhood, and a patent issued to the justices to try the assize between the counties.<sup>3</sup> In the Abbe de Stratforde's case<sup>4</sup> it was adjudged that for a failure to repair a wall in Essex, which he ought to repair, whereby my land is drowned, I may bring my action in Essex, for there is the default; and Lord Coke, citing the decision in Bulwer's case,<sup>5</sup> adds, "or I may bring it in Middlesex, for there I have the damage, as it is proved by 11 R. 2, Action sur le Case, 36."<sup>6</sup> In Bulwer's case the rule is laid down generally: "In all cases

In *Simmons v. Lillystone*, 8 Exch. 431, Parke, B., says that this case is difficult to understand. For a similar decision in an action for obstructing a footway, see *Richardson v. Locklin*, 6 B. & S. 777.

<sup>1</sup> *Oliphant v. Smith*, 3 Pen. & W. (Pa.) 180.

<sup>2</sup> *Provost v. Gorrell*, 2 W. N. C. (Penn. St.) 440; 3 id. 866.

<sup>3</sup> F. N. B. 183 K.; Co. Lit. 154a; *Leveridge v. Hoskins*, 11 Mod. 257.

<sup>4</sup> Y. B. 7 Hen. 4, 8, pl. 10; and see this case as cited in *Archeboll and Borrell's case*, 3 Leon. 141.

<sup>5</sup> 7 Co. 1a.

<sup>6</sup> The case of 11 R. 2 is stated in

*Bellewe's Les Ans du Roy Richard le Second*, p. 4. See reprint by Stevens & Haynes, 1869. This case related to the duty of fencing, and it was held that the *gravamen* of the declaration was the injury done to the plaintiff's land, and the action was properly brought in the county of Kent, that the jury of the county might *videre tenementum illud*. See *Worster v. Winnipiseogee Lake Co.*, 25 N. H. 525, 528. In 21 Vin. Abr. 86, pl. 6, the case is stated somewhat differently. The locations of the two pieces of land are changed, and the action is said to have been brought in Surrey, "where the land was.

where the action is founded upon two things done in several counties, and both are material or trasversable, and the one without the other doth not maintain the action, there the plaintiff may choose to bring his action in which of the counties he will;" and this act prevails in most jurisdictions to-day. Where the defendant in Dorset dug ditches, and diverted water from streams watering the plaintiff's farm in Devon, it was held that the action would lie in either county.<sup>1</sup> In *Sutton v. Clarke*,<sup>2</sup> it was held that if a trench cut in Northampton causes the plaintiff's lands to be overflowed in Warwick, the action may be brought and tried in Warwick.

§ 429. Same.—The first American case in point was one of injury to a mill by a dam. The action was brought in Plymouth County, where the mill was, and the dam was alleged under a *videlicet* to be in the same county. The evidence proved the dam to be in Bristol. Parker, C. J., held that the variance was immaterial, and that the place where the injury was done, to wit, at the mills, gave locality to the action, and not the source from which the mischief came.<sup>3</sup> But in the following year the same court, in a case for injuries, caused apparently by the same dam, held that where an injury to a fishery in Plymouth County was caused by the dam in Bristol County, Bulwer's case was decisive, and the owner of the fishery could bring his action in either county.<sup>4</sup> In the later case of *Pilgrim v. Mellor*,<sup>5</sup> the defendant had erected a dam in Stark County, which produced an injury to the adjoining land of the plaintiff, lying in Bureau County. The action was brought in the county where the dam was erected, and it was held in the appellate court that the action might be brought in either county.

And the writ awarded good, because nothing is to be recovered but damages." The land to be fenced, and the plaintiff's land which was injured, both lay in one county, and the land charged with the duty of fencing lay in another.

<sup>1</sup> *Leveridge v. Hoskins*, 11 Mod. 257. See *Wells v. Ody*, 1 M. & W. 452.

<sup>2</sup> 6 Taunt. 29.

<sup>3</sup> *Thompson v. Crocker*, 9 Pick. 59;

*Commonwealth v. Macloon*, 101 Mass. 1, 6.

<sup>4</sup> *Barden v. Crocker*, 10 Pick. 383. To the same effect see *Oliphant v. Smith*, 3 Pen. & W. 180.

<sup>5</sup> 1 Brad. (Ill.) 448; 17 Am. L. Reg. N. S. 729. To same effect see *Lower King's River Water Co. v. King's River Canal Co.*, 60 Cal. 408; *Powers v. Ames*, 9 Minn. 178 (*semble*).

§ 430. Same.— Opposed to these decisions is that in *Worster v. Winnipiseogee Lake Co.*,<sup>1</sup> which came up on facts precisely similar to those in the case last mentioned. The court held that the action should have been brought in the county where the plaintiff's land lay. Gilchrist, C. J., reviewed the authorities at length, and held that the rule in Bulwer's case sprang from the ancient remedy of assize *in confinio comitatus*, which having become obsolete, the rule must go with it. He says: "It does not appear to us that there is any reason for excepting such cases as the present out of the operation of the general rule, and it is very clear that the exception rejects the principle of the rule, and is not a mere modification of the application of it. The erection of the dam, of itself, gave the plaintiff no cause of action. It was not until his land was injured that an action accrued, and this happened in the county of Carroll (where the land lay). The general rule then applies, and it is there that the action should have been brought."<sup>2</sup>

<sup>1</sup> 25 N. H. 525; *Bancroft v. Conant*, 64 N. H. 151. For a reference to the first case *per* Ryan, C. J., *arguendo*, and apparent agreement with it, see *In re Eldred*, 46 Wis. 530. See, also, Wis. Rev. Stats. (1878) § 2619.

<sup>2</sup> He denied the doctrine in the *Abbot of Stratforde's* case, saying there was no reason for it, and relied principally on *Simmons v. Lillystone*, 8 Exch. 431; 22 L. J. Exch. 217; 20 E. L. & E. 445. In that case the plaintiff owned premises in the county of Kent, abutting on the Thames at a certain point of the river called the Blockhouse Dock, and the defendant obstructed the dock by placing piles, etc., thereon. The venue in the margin of the declaration was London. Parke, B., said: "Probably the objection might have been raised by special demurrer; but, after verdict, it certainly comes too late, because, then, any defect in the venue is cured by St. 16 & 17 Car. 2, ch. 8. It is enough, for the present purpose, to

say that there is nothing which makes it necessary to prove, on the part of the plaintiff, that the obstruction took place in the city of London." "It is unnecessary to decide whether this is a local action, though I am rather disposed to think it is, since it is an injury to the plaintiff's premises." The nuisance, and the land injured thereby, both lay in the same county, and that the objection was that the plaintiff had brought his suit outside of that county. There is nothing here contrary to the exception in Bulwer's case. Baron Parke's consenting that it was a local action is not contrary, because the gist of the exception is that where two counties are involved, the action has *two localities*, in either of which it will lie, not that it is transitory. The *New Hampshire* case makes no reference to *Leveridge v. Hoskins*, 11 Mod. 257. In that case (decided in 1710), Holt, C. J., said: "Here is a cause of action that arises

§ 431. **Same.**—The distinction between local and transitory actions has been modified or abrogated in many of the new systems of procedure; but in most of the States it retains its place as part of the law. In Ohio it has been abolished by judicial legislation;<sup>1</sup> and in England it has been abolished by the Judicature Acts, and the question of venue must there be considered as new.<sup>2</sup>

§ 432. **Same — Indictments.**—In the case of indictments for nuisances committed in one county and injuring the public in another, the rule of the common law was the same, and the

in both counties, and the action may be brought in either.” It followed the analogy of the assize *in confinio comitatus*, but that remedy had already gone into disuse. The court did not think that the need had disappeared with the old writ. In truth, that assize disappeared only in common with all the writs of right, and the special necessity in this case for a remedy, in either county, remained the same as ever. Courts generally have held that the rule of the common law was arbitrary and rested on historical grounds (see *Doulson v. Matthews*, 4 D. & E. 503, *per* Buller, J.), and the distinction is fast disappearing from the new systems of procedure. *Genin v. Greer*, 10 Ohio, 209; and see 22 Alb. L. J. 47. But the New Hampshire court held that a branch of the common-law rule allowing greater liberality in the venues within which an action can be brought, historically founded on a writ of right, and in its present form dating back to 1406 (Abbe de Stratforde’s case), and perhaps of equal date with the rule itself, was an unreasonable invasion of the common law, and that the general rule must be restored and applied with uniform rigor.

<sup>1</sup>*Genin v. Greer*, 10 Ohio, 209; N. Y. Code, 1860, §§ 982, 984. It was early determined in Massachusetts

that, by their statute, an action for injuries to realty where the damage did not exceed twenty dollars might be brought before a justice of the peace for the county where the wrong-doer lived, although the land lay in another county. *Sumner v. Finegan*, 15 Mass. 280. Under Mass. Gen. Sta. ch. 149, it was held that a complaint for flowing land by a dam might include tracts lying in different counties, but overflowed by means of the same dam, and would lie in a county where any portion of the land lies. *Bates v. Ray*, 102 Mass. 458; and see *Todd v. Austin*, 33 Conn. 87. In New Jersey it was held that in such actions the venue cannot be *changed* from the county where the land lies, under their statute. *Deacon v. Shreve*, 2 Zab. 204. In a similar case, under the Missouri statute (Wag. St. § 4), it was held that the venue could be changed, and accordingly we find the venue changed three times in that case. *Taylor v. Atlantic R. Co.*, 68 Mo. 397.

<sup>2</sup>38 & 39 Vict. ch. 77, Ord. xxxvi, R. 1 (L. R. 10 Gen. St. 813). In England, before the passage of these statutes, the venue of local actions might be changed after issue was joined, but not before, by order of the court or judge. *Bell v. Harrison*, 2 C. M. & R. 733; and see 3 & 4 Wm. 4, ch. 42, § 22.



offender was liable to indictment in either county.<sup>1</sup> But the weight of more recent decisions is opposed to this rule, and limits the venue for an indictment to the county where the act is committed. The remedy by indictment has by legislation in some States become a proceeding *in rem*, which accounts for the change.

§ 433. *Same — Same.*—The question was considered by the Supreme Court of Wisconsin in *Eldred's case*.<sup>2</sup> That was the case of an indictment of an unauthorized dam, situated in one county, and producing injurious effects in another. Ryan, C. J., in delivering the opinion, said: "The venue of local actions rests entirely, in the absence of statute, upon the authority of adjudged cases. But the venue of indictments rests upon fundamental law, as old as Magna Charta, entering into the provision of the constitution of the State." He held that the indictment alleging a public nuisance in one county was complete, and that the *per quod* containing the averment of injury in another county was surplusage.

§ 434. *Same — Same.*—In Pennsylvania, where works were erected on a stream in Center County, which corrupted its waters in an adjoining county, it was held that the indictment could be prosecuted in Center County.<sup>3</sup> In Maine, where a dam lying partly in the town of Eddington, and partly in Bangor, both in Penobscot County, was alleged to be a nuisance, the indictment charging that the offence was committed in Bangor, it was held that the place was laid as venue and not as a description of the offence, and that the variance was immaterial.<sup>4</sup>

<sup>1</sup> Staundford, *Pleas del Corone*, lib. 2, p. 91; citing *Ass. Edw. 8*; *Ann. 19*, pl. 6; *Hawkins, Pleas of the Crown*, Bk. 2, ch. 25, § 87; 1 *Chitty Criminal Law*, 193 (2 Eng. and 4 Am. ed.). And see 2 *Hale's Pleas of the Crown*, 164. But *Chitty* cites no cases since the earlier writers which support the rule. He refers to *Scott v. Brest*, 2 T. R. 241, and 2 B. & P. 381, which were private actions for usury.

<sup>2</sup> 46 Wis. 530.

<sup>3</sup> *Commonwealth v. Lyons*, 1 Clark (Penn. L. J.), 497.

<sup>4</sup> *State v. Godfrey*, 13 Maine, 361. The venue of an indictment for any offence committed in, or upon, a body of water, is laid in the adjoining county. Where an indictment charged that the offences (of assault and rescue) were committed "on the said Penobscot River, between the two towns of Enfield and Howland aforesaid, or within the limits afore-

§ 435. **Same — Same.**— In general, the rule holds good of indictments for nuisances that the venue need only be laid in the body of the county, but matters of description of the offence must be strictly proved as laid. So an indictment for obstructing a navigable stream must state the name of the stream, the place where the obstruction is situated, that the part obstructed is navigable, and that the passage of boats is obstructed at that point.<sup>1</sup> Where the indictment is a proceeding to abate, great accuracy of description and proof is required. An indictment of a mill-dam, creating a public nuisance by flowage, described the nuisance as “a certain mill-dam in, about, and across a certain stream of water in said county, called Elkhart River,” and this was held insufficient even after judgment for the State.<sup>2</sup> It is also to be observed that the creation and continuance of a nuisance are distinct offences and cannot be joined in the same count of an indictment.<sup>3</sup>

§ 436. **Same — Different sovereignties.**— Where different States or sovereignties are involved in actions of this kind, the question is different.<sup>4</sup> Actions will not be entertained for nuisances committed outside the State, and affecting lands in another State. Where the plaintiff owned a mill in New Jersey, from which the defendant diverted water by cutting a trench in New Jersey, and the plaintiff brought suit in New York, averring that the wrongful acts were done in New Jersey, to wit, at the city and county of New York, it was held that the action would not lie in New York.<sup>5</sup> Where the

said or either of them, and within said county of Penobscot,” it was held that the place was sufficiently alleged. *State v. Roberts*, 26 Maine, 263. So where an indictment (for murder) charged that the act was committed “at an island called ‘Smutty Nose,’ a place within the County of York,” it was held sufficient. *State v. Wagner*, 61 Maine, 178.

<sup>1</sup> *Cox v. State*, 8 Blackf. 193.

<sup>2</sup> *Wood v. State*, 5 Ind. 433. Where, in an indictment for maintaining a nuisance (in this case a soap factory), the nuisance was alleged to be main-

tained on a particular tract of ground, the State was held bound to prove the location as laid, or fail in the prosecution. *Wertz v. State*, 42 Ind. 161. Confer *Roscoe's Crim. Ev.* 85.

<sup>3</sup> *Burke v. People*, 23 Ill. App. 36; *Hoadley v. People*, id. 39.

<sup>4</sup> As trespass will not lie for injuries to lands in another county, *a fortiori* it will not lie for injuries to lands in another State.

<sup>5</sup> *Watts v. Kinney*, 23 Wend. 484; affirmed, 6 Hill, 82; *Atlantic Tel. Co. v. Baltimore R. Co.*, 14 Jones & S. 377.

nuisance is located in one State and the property injured is in another, the rule of the common law applies strictly that the action must be brought in the jurisdiction where the land which is injured is situated. And this is not inconsistent with the exception in *Bulwer's case*.<sup>1</sup> By the common law, where the offence was complete in the sovereign's dominions, he gave a remedy in either of two counties, for injuries caused in one county and accomplished in another. By the common law the sovereign gave his subjects redress for any injuries to lands in his dominion, though caused by acts outside, if jurisdiction over the offender could be obtained. But the sovereign acting through the common law never attempted to redress injuries to foreign real estate, springing from causes set in motion within his dominion, the reason being that the act is wrongful only by reason of consequences happening beyond his territory and jurisdiction.<sup>1</sup>

§ 437. *Same — Same.*—The first American case in which the question was involved was that of *Thayer v. Brooks*.<sup>2</sup> There the action was brought in Ohio for injuries to a mill and water-power in Ohio, by the diversion in Pennsylvania of water which was accustomed to flow to the mill. The supreme court of Ohio held that the action would lie. In their opinion the court say: "The act was done in Pennsylvania, the injury which was occasioned by that act was sustained in Ohio. In such a case it is believed the suit would well lie in either State. When an injury has been caused by an act done in one county, to land, etc., situated in another, the venue may be laid in either." This agrees with the law in general, but the *dictum*

<sup>1</sup> *Doulson v. Matthews*, 4 T. R. 503; *Livingston v. Jefferson*, 1 Brock. 203; *Mostyn v. Fabrigas*, Cowper, 161.

<sup>2</sup> 17 Ohio, 489; citing 1 Chitty Plead. 299. The court treated the action as a local one to be determined by the rules of the common law. In so doing, they overlooked their earlier decision in *Genin v. Greer*, 10 Ohio, 209, abolishing the distinction between local and transitory actions. If the court had said: "From the

rule of this court making all actions transitory, it would follow that the action could be brought 'in either State,' the dictum would have been sound. The short point involved, that the State could give a remedy for injuries to land within its borders, though caused by acts done outside, where jurisdiction of the wrong-doer could be had, was correctly determined.

that the action would lie in either State is unsound in principle, and contrary to the weight of the authorities.

§ 438. *Same — Same.*— In 1855 a similar question came up in Maine. It was held that an action on the case would lie in Maine for flowing lands in that State by a dam across a river forming the boundary line between Maine and New Hampshire, to feed a mill situated in the latter State.<sup>1</sup> The next case came up in Illinois. A dam which was erected in Will County, Illinois, for the purpose of feeding a canal, caused the flooding and injury of lands in Indiana. The owner of the land brought suit in Illinois. It was held that the action would not lie, and that only the courts of the State within whose limits the injured lands lay could take jurisdiction.<sup>2</sup>

§ 439. *Same — Same.*— In Texas, where the parties were both citizens of that State, and the plaintiff owned lands on the south bank of the Rio Grande, in Mexico, and the defendant placed obstructions in the bed of the river, on the Texas side, which threw the current of the river against the plaintiff's land, and caused serious injuries, the court followed the *dictum* in *Thayer v. Brooks*, held that the rule in *Bulwer's case* applied, and that the action could be maintained.<sup>3</sup> In the recent

<sup>1</sup> *Wooster v. Great Falls Manuf. Co.*, 39 Maine, 246; approved in *Salisbury Mills v. Forsaith*, 57 N. H. 124.

<sup>2</sup> *Eachus v. Trustees of Illinois Canal*, 17 Ill. 534. See, also, *Slack v. Walcott*, 3 Mason, 508, 517. In New York, in the recent case of *Ruckman v. Green*, 9 Hun, 225, it was held that an action could be maintained in New York for an injury to lands situated in New York, caused by a nuisance (a noxious trade) established and carried on in New Jersey.

<sup>3</sup> *Armendiaz v. Stillman*, 54 Texas, 623. The court also relied on the Federal case of *Rundle v. Delaware Canal*, 1 Wall. Jr. 275, which will be noticed hereafter. The Texas court said (p. 631): "In our opinion, however, these common-law rules, respecting local and transitory actions,

have no more to do in determining with us where suit can be brought and maintained, than the like rules in respect to the form and names of actions; but this is solely regulated by and dependent upon the proper construction of the constitution and statutes of the State. In the first it is emphatically declared in the bill of rights as a fundamental principle of government, that 'all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law.' Now a party may not have an action *in rem* for or concerning land in a foreign jurisdiction, because redress cannot be given or had by such proceeding in due course of law; but personal damages may be given and enforced

case of *Mannville Co. v. Worcester*,<sup>1</sup> in Massachusetts, the question was examined, and an action of tort was held maintainable in that State, for preventing, by a diversion there, the waters of a natural stream from coming to the plaintiff's mill in Rhode Island.

§ 440. *Same — Same.*— In a State which has abolished or does not recognize the distinction between local and transitory actions, an action *in personam* will lie for injuries to foreign real estate. An action was held to lie in Louisiana for damages to land and buildings in Illinois caused by a steamer which, in plying upon the Mississippi River during a high flood, struck against and injured the buildings.<sup>2</sup> An exception, taken below on the ground that the action would be local by the law of Illinois, was overruled. The Supreme Court said: "The present action is, under our laws, a personal action, and is not distinguished from any ordinary civil action as to the place or tribunal in which it may be brought."

§ 441. *Same — Same.*— The same question recently came up in England in the Admiralty Division, and again in the Court of Appeal, but was determined by an agreement of the parties.<sup>3</sup> The owner of a pier in Spain brought an action in the English court against the owner of an English ship for an injury caused by the ship knocking down a pier attached to the Spanish soil. James, L. J., said: "The question of jurisdiction has probably been successfully got over by what has been done in this case, inasmuch as the ship in question, the

by due process of law within the State." The statute, cited in the argument, provides (Tex. Rev. St. 1879, Art. 1198, pl. 13): "Suits for the recovery of lands or damage thereto; suits to remove encumbrances upon the title to land; suits to quiet the title to land, and suits to prevent or stay waste on lands, must be brought in the county in which the land or a part thereof may lie."

<sup>1</sup> 138 Mass. 89; *Banigan v. Worcester*, 80 Fed. Rep. 392. See *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394.

<sup>2</sup> *Holmes v. Barclay*, 4 La. Ann. 63. As it is the property injured, which, as between States, determines the character of the action, an injury to a steamer, caused by the wrongful obstruction of a stream by a bridge, is held ground for a transitory action. Where a steamer owned in Missouri was injured by a bridge over the Mississippi, on the Illinois side, it was held that the action was transitory and could be maintained in Missouri. *Mason v. Turner*, 31 Mo. 508.

<sup>3</sup> *The M. Moxham*, 1 P. D. 43, 107.

owner of which is sued, and which by a figure of speech may be called the delinquent ship, having been arrested in Spain, was released upon an agreement between the parties that all remedies against the ship and against the owners should be tried in this country. Such an agreement would give jurisdiction by contract, not only jurisdiction by consent." "Possibly this would get rid of the question, and the Court of Admiralty would have jurisdiction to enforce against the ship an equitable right arising from this contract, by virtue of which the ship was released from its liability under the jurisdiction in Spain." Mellish, L. J., was equally doubtful of the jurisdiction, apart from the contract.<sup>1</sup>

<sup>1</sup>See comments on this case in Foote's *Private International Jurisprudence*, pp. 135, 390. Mr. Foote considers the question as it was at common law, and as one of general jurisprudence. On p. 137, he says of Lord Mansfield's opinion in *Mostyn v. Fabrigas* (1 Sm. L. C. 658, 680): "An injury to land is in fact a personal injury to its owner, and is no more beyond the jurisdiction of an English court on general principles, than other personal injuries are." On page 390 of the same work, he says: "That difficulties would arise there can be no doubt, as the abolition of the rules of venue have cut away the main ground upon which the earlier decisions on the point were founded; but it is submitted that the result of the change has been to make the reasoning of Lord Mansfield in *Mostyn v. Fabrigas* applicable to its full extent, and to remove all reasons that existed previously from excluding actions for damages in respect of injuries done to foreign immovables from English courts." To same effect see Westlake, *Private International Law*, ed. 1880, p. 210, note, on actions for trespass to foreign soil. See, also, *The Uhla*, cited in note, L. R. 2 Adm. & Eccl. 29,

and *De Lovio v. Boit*, *per* Story, J., 2 Gallison, 398, 474, 475. The distinction is abolished by the New York code, and the question of venue opened anew. Actions for waste and nuisance must be brought in the county where the land lies, but no provision is made for actions for trespass. In 22 Alb. L. J., pp. 47-50, a contributor contends forcibly that the effect of the code is to give the courts of that State jurisdiction of actions for injuries to land situated in a foreign State or county. The code provides (§ 982): "But where all the real property to which the action relates is situated without the State, the action must be tried as prescribed in § 984 of this act." § 984 reads: "An action not specified in the last two sections must be tried in the county in which one of the parties resided at the commencement thereof. If neither of the parties then resided in the State, it may be tried in any county which the plaintiff designates for that purpose in the title of the complaint." But in *American Union Telegraph Co. v. Middleton*, 80 N. Y. 412, decided when the same provisions were in force, it was held that the action of trespass *quare clausum* was local in



§ 442. **Same — Same.**— In proceedings against the nuisance in abatement, and in all proceedings *in rem.*, jurisdiction necessarily depends on the presence of the property or *res*, and its subjection to the control of the court; and therefore such actions are maintainable only in the State and county where the property is situated.<sup>1</sup> This applies to indictments *in rem.* Although indictments for nuisances affecting two counties may have been entertainable in either county by the common law, the same rule does not apply between States. An indictment for a nuisance can properly be brought only in the State within which the nuisance was committed. This is true of the common-law indictments of offenders, as well as of statutory indictments *in rem.*<sup>2</sup>

§ 443. **Same — Indictments.**— Indictments lie only for breaches of the law punishable as crimes, and criminal laws have no extra-territorial force.<sup>3</sup> Acts done outside the sovereign's territory are not breaches of *his* law, although they may produce harmful consequences within it. Such consequences are not crimes in themselves. The first case involving the question arose in New Hampshire,<sup>4</sup> and is opposed to this reasoning. There an indictment was found against the defendant for erecting and maintaining a dam, thereby overflowing the highway and making it impassable. The indictment alleged that the dam was situated partly in New Hampshire and partly in Maine. The evidence showed that it was entirely in Maine. It was held by Parker, C. J., that the gravamen of the indictment was the damage to the highway, and that the variance as to the situation of the dam was immaterial. The correct rule was stated in New Jersey in the case of *State v. Babcock*.<sup>5</sup> There an obstruction was placed in the

its character, and would not lie in New York for injuries to lands in New Jersey.

<sup>1</sup> Story, *Conflict of Laws*, § 551. That this rule extends to counties, see *In re Eldred*, 46 Wis. 530.

<sup>2</sup> *Ibid.*; *Mississippi & Missouri R. Co. v. Ward*, 2 Black, 484.

<sup>3</sup> For an exception to this rule, showing that the sovereign may make laws authorizing certain acts

to be done out of the State, and prescribing their effect within it, and may make laws controlling his citizens when without the State, for the violation of which they may be punished within it, see *State v. Main*, 16 Wis. 398.

<sup>4</sup> *State v. Lord*, 16 N. H. 357.

<sup>5</sup> *State v. Babcock*, 30 N. J. L. 29, 32. Elmer, J., in delivering the opinion, said: "The case does not materially

Hudson River, on the soil of New Jersey, but within the exclusive jurisdiction of New York, by compact between the two States, and an injury was caused in New Jersey. The court held that the indictment could not be maintained in New Jersey.

§ 444. **Same — In equity.**—In equity the distinction between local and transitory actions is unknown, and as equity acts *in personam*, there is no obstacle of territorial jurisdiction to prevent the granting of equitable remedies for nuisances affecting land in another county or State. If the defendant is within the jurisdiction of the court, he can be controlled and prevented from injuring the property of another, wherever it is situated. This rule was applied by the court of New Hampshire to protect a mill dam. The complainants owned a dam in the river bounding the State, which extended across the river into the State of Maine. The defendant was a citizen of New Hampshire. It was held on a bill filed for that purpose that the court had jurisdiction to issue an injunction restraining the defendant from destroying the dam of the complainants in Maine.<sup>1</sup>

§ 445. **Same — In the Federal courts.**—In the Federal courts the question has been considered both with reference

differ from a line between two States on the land which happens to be the scene of a busy population, where a manufactory near to that line in one State may be a nuisance to the citizens of the other, whose redress will have to be obtained from the tribunals of the State in which the nuisance is situate." This case is approved by Ryan, C. J. (*In re Eldred*, 46 Wis. 530), and the case of *State v. Lord* criticised.

<sup>1</sup> *Great Falls Manuf. Co. v. Worster*, 23 N. H. 462; approved in *Vermont R. Co. v. Vermont C. R. Co.*, 46 Vt. 792; *Prince Manuf. Co. v. Prince's Metallic Paint Co.*, 51 Hun, 443; *Smith v. Larrabee*, 58 Maine, 361. In the similar case, *Stillman v. White Rock Manuf. Co.*, 3 Wood. & M. 538, 545,

some remarks are made contrary to this. The case of *Morris v. Remington*, 1 Pars. Sel. Cas. Eq. (Pa.), 387, decided in 1849, two years before the case of *Great Falls Manuf. Co. v. Worster*, is also opposed to the doctrine in the text. It is to be noticed that an injunction restraining a nuisance does not involve a transfer of possession, and therefore needs no writ of assistance; that the abatement in equity is accomplished by a decree *in personam*, directing the defendant to abate; that compensation in damages is not necessary to the granting of the other remedies, and, if granted, is also enforced by a decree *in personam*, and, if necessary, by confinement of the defendant for contempt, until it is performed.

to their own jurisdiction and that of the State courts. The decisions are not altogether harmonious. The judges speak of the courts in general terms, but such remarks must be taken to refer to the Federal courts, except where a different meaning is plainly indicated. Where parties, residing on opposite sides of a stream, the boundary between Rhode Island and Connecticut, owned a dam and water-power in common, and the respondents, by another dam on the Rhode Island side, diverted water from the common water-power, it was held that the complainants in Connecticut had an easement in the water beyond the centre of the stream, that the injury occurred in Rhode Island, and that the remedy must be sought in the courts of Rhode Island, or if pursued in the tribunal of the general government, it must be in the district of Rhode Island, and not in that of Connecticut.<sup>1</sup> It was held in the Circuit Court that the several districts within its limits are to be treated as counties, and that the rule in *Bulwer's* case applies to them. An action was brought in the Circuit Court for the New Jersey district for damages to lands in Pennsylvania, caused by the wrongful diversion of a stream in New Jersey, and the court held that it was maintainable.<sup>2</sup> From this it follows that the action is maintainable in the Circuit Court in either district. So where A. diverted, in Connecticut, a stream of water which had its rise in Connecticut, and flowed into Massachusetts, so that it ceased to flow to B.'s mill, situated on the same stream in Massachusetts, the Circuit Court for the district of Connecticut held that it had jurisdiction of an action by B. against A. for the damage caused by the diversion.<sup>3</sup> *Ingersoll, J.*, in the opinion, cited the remark of *Woodbury, J.*, given above, and added approvingly: "And the cases which he puts clearly show that he so considered the law to

<sup>1</sup> *Stillman v. White Rock Manuf. Co.*, 3 Wood. & M. 538.

<sup>2</sup> *Rundle v. Delaware & Raritan Canal*, 1 Wall. Jr. 275. In *Slack v. Walcott*, 3 Mason, 508, the suit was to establish a prior right to the waters of the Pawtucket River, and to prevent its diversion. *Story, J.*, said: "The wrong done by stopping the flow of the water by any obstruction

or drain in Rhode Island, is an injury done to the mill itself in Massachusetts. In a just sense, the wrong may be said to be done in both States, like the analogous case of an injury to land lying in one county by an act done in another county."

<sup>3</sup> *Foot v. Edwards*, 3 Blatch. 310.

be;" *i. e.*, that the rule in Bulwer's case applies to Federal districts.

§ 446. **Same — Same.**— But the Federal District Courts are subject to the same limitation which prevents the State courts from taking jurisdiction of proceedings *in rem* over foreign nuisances. Such proceedings are local in any case, and can be brought only in courts which have jurisdiction of the thing; that is, within the territorial limits of whose jurisdiction the nuisance is situated. Their power *in rem* extends to the boundaries of their districts and no further. So it is held in the Supreme Court of the United States that a suit to abate a nuisance is a local suit, and can be brought only in the district where the nuisance is situated.<sup>1</sup> The nuisance complained of was a bridge across the Mississippi between Illinois and Iowa, the boundary being the middle of the river. The channel used for navigation was on the Illinois side of the stream, and the alleged obstruction consisted of a pier for the drawbridge, which stood in this channel. The complainant filed his bill in the United States District Court for the district of Iowa, praying an abatement of the nuisance. Catron, J., in delivering the opinion in the Supreme Court, said: "It was at the long pier, and in the Illinois draw east of that pier that the complainant's boats sustained the injuries on which he founds his right to sue the Iowa corporation, and to proceed against the bridge *in rem* as a public nuisance. An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the courts of that State, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to the complainant's boats giving him the privilege to sue and abate the obstruction were as local as the public right to indict." In the Federal courts, therefore, a suit for damages will lie, either in the district where the nuisance is committed or the damage is sustained, but proceedings *in rem* are maintainable only where the thing complained of is situated.

§ 447. **Actions on covenants.**— Covenants which run with the land and relate to waters are enforceable by the action of

<sup>1</sup> *Mississippi R. Co. v. Ward*, 2 Black, 485.

covenant, by and against the assignees of the original parties.<sup>1</sup> Thus a covenant by a lessor to supply the premises demised with water;<sup>2</sup> or, by a purchaser of land with a well or spring on it, to supply water to all houses on the vendor's land;<sup>3</sup> by a licensee to supply his licensor with pure water;<sup>4</sup> by the grantor of a watercourse, for himself and heirs, to cleanse it;<sup>5</sup> by tenants in common of a dam and water-power to repair their respective portions of the dam;<sup>6</sup> by grantors of a mill to keep a dam in repair;<sup>7</sup> by riparian owners on opposite sides of a stream to rebuild a dam held in common, in case of its destruction;<sup>8</sup> to maintain in repair a dam or race;<sup>9</sup> or a bridge across the race;<sup>10</sup> to repair a canal which drains the covenantor's lands, or to pay a proportional share of the cost of such repairs;<sup>11</sup> to repair a sea-wall;<sup>12</sup> by a party to a conveyance, not

<sup>1</sup> *Ante*, § 801; *Horn v. Miller*, 136 Penn. St. 640; 9 L. R. A. 810. That a covenant for diversion of only surplus water from a mill-race runs with the land, see *Warren v. Munroe*, 15 Q. B. (Can.) 557.

<sup>2</sup> *Jourdain v. Wilson*, 4 B. & Ald. 266. For a discussion of such a covenant, see *Kinney v. Watts*, 14 Wend. 88.

<sup>3</sup> *Cooke v. Chilcott*, 3 Ch. D. 694. The covenant was enforced in this case by an injunction against leaving the covenant unperformed. It was held to run with the land, but further, if it did not, it was held that it would bind a purchaser with notice. See *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403; *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562. In *Kennedy v. Scovil*, 12 Conn. 817, a reservation of water for the use of a certain piece of property was held to save an assignable interest.

<sup>4</sup> *Sharp v. Waterhouse*, 7 E. & B. 816. Or by grantor of power. *Sterling Co. v. Williams*, 66 Ill. 393.

<sup>5</sup> *Holmes v. Buckley*, 1 Eq. Cas. Abr. 27, pl. 4.

<sup>6</sup> *Wilbur v. Brown*, 3 Den. 356.

<sup>7</sup> *Thompson v. Shattuck*, 2 Met. 615; *Batavia Manuf. Co. v. Newton Wagon Co.*, 91 Ill. 230; *Fitch v. Johnson*, 104 Ill. 111.

<sup>8</sup> *Linderman v. Lindsey*, 69 Penn. St. 93. In *Woodruff v. Trenton Water Power Co.*, 2 Stock. 489, the deed was held to be subject to a condition that the grantees erect and maintain a raceway and dam, a safe bridge and road, and the estate conveyed was held liable to forfeiture for non-performance; but the court said that if it were a covenant, it would be enforceable against assignees.

<sup>9</sup> *Carr v. Lowry*, 27 Penn. St. 257; *Shaber v. St. Paul Water Co.*, 30 Minn. 179.

<sup>10</sup> *Hord v. Montgomery*, 26 Ill. App. 41.

<sup>11</sup> *Norfleet v. Cromwell*, 64 N. C. 1. The covenant in this case expressly bound the parties and their heirs and assigns of land, and the action was brought to recover a proportional share of the cost of repairs against an assignee of one of the tracts of land. In a later action of covenant between the same parties, growing

<sup>12</sup> *Morland v. Clark*, L. R. 6 Eq. 252.

to use water-power for a particular purpose;<sup>1</sup> by a lessor to permit a lessee to make a drain;<sup>2</sup> by a grantor of lands, including part of a pond, with the grantee's purchaser, to draw off his pond on request for a certain time, and permit the covenantee to enter and remove mud;<sup>3</sup> by tenants in common, on dividing property, reserving a raceway in common, each covenanting not to use more than one-half the water, and not to use it for boats larger than a given size, not to use it for mills, except on the tract of land divided, nor to use it for any mill employed in the manufacture of gunpowder;<sup>4</sup> nor to diminish the volume of a stream,<sup>5</sup> have been held to run with the land, and to be enforceable by action of covenant.

§ 448. *Same.*—A conveyance of a privilege of drawing water from a pond is not a conveyance of land, and a covenant respecting the privilege is held not to run with the land, and is not enforceable in an action by an assignee of the grantee.<sup>6</sup> Covenants by owners of separate mills in severalty, but drawing water from the same dam, limiting their uses of the stream, have been held in Massachusetts not to run with the land, or to bind a stranger purchasing one of the mills.<sup>7</sup> The rule that where the grantor attempts to convey rights which he has not, the covenants are broken as soon as made and cannot be assigned, is illustrated by the conveyance of a privilege of drawing water, with a covenant to erect and main-

out of the same matter, it was shown that the canal did not in fact touch the lands in question. The court held that the covenant concerned land, within the second resolution in Spencer's case, and would bind an assignee with notice. *Norfleet v. Cromwell*, 70 N. C. 634.

<sup>1</sup> *Norman v. Wells*, 17 Wend. 136.

<sup>2</sup> *Target v. Lloyd*, 2 Vent. 277.

<sup>3</sup> *Morse v. Aldrich*, 19 Pick. 449.

<sup>4</sup> *Jamison v. McCredy*, 5 Watts & S. 129. The action here was on the case. In *Collins v. Plumb*, 16 Ves.

454, the question was raised whether a covenant not to sell or dispose of water from a well to the injury of the proprietors of certain water-

works, their heirs, representatives and assigns, ran with the land, but the case was on a bill in equity, and Lord Eldon, in sustaining the demurrer, remitted the parties to their rights at law. In *London v. Richmond*, 2 Vern. 421, the assignee of a covenant to pay rent for water furnished by a conduit was held chargeable in equity: for the assignee might not be liable at law, if it was an incorporeal hereditament, for they had no privity of estate. Affirmed, 1 Bro. P. C. Temp. ed. 316.

<sup>5</sup> *Shaber v. St. Paul Water Co.*, 20 Minn. 172.

<sup>6</sup> *Whetlock v. Thayer*, 16 Pick. 68.

<sup>7</sup> *Hard v. Curtis*, 19 Pick. 459.



tain a dam ten feet high, with a warranty, when the grantor in fact had only the right to maintain a dam six feet in height.<sup>1</sup>

§ 449. *Same.*—A license may be the subject of a grant and of a covenant running with the land. In an English case, A. and B. granted a license to C. for a term of years, to continue a channel open through the bank of a navigable watercourse, in order that waste water might pass to the mills of C., on payment of an annual sum. C. assigned to the defendant. B. died. A. brought suit for non-payment of the sum. It was held that, assuming A. and B. to be owners of the navigation, the deed would operate as a grant of interest in incorporeal hereditaments, within St. 32 Hen. VIII., ch. 34, so as to make the defendant liable on the covenant as the assignee of the grantee. But as it appeared by the deed that the grantors were seized of the real hereditament only jointly with others, and that the power of granting the privilege was vested in all the owners, it was held that the deed operated only as a license to use the water, subject to the right of the other shareholders, and that the defendant was not bound by the covenant.<sup>2</sup>

§ 450. *Same.*—Devisees of equitable interests are not assignees within the rules on covenants running with the land, and are not liable in actions on the covenants. A covenantor sold to a municipal corporation water for grinding corn, and covenanted, for himself and those under him, not to obstruct or divert any part of the water. He then mortgaged his estate to A., and devised his equity of redemption to B. and T., who diverted water. The corporation brought an action of covenant against them as assignees of all the estate of the covenantor. It was held that the defendants as devisees of an equitable estate could not be charged on the covenant as assignees.<sup>3</sup> A grantee of land with which a covenant runs may, upon conveying the premises, reserve, by agreement, the right

<sup>1</sup> *Wheelock v. Thayer*, 16 Pick. 68; *rule in England*. *Mitchell v. Warner*, 5 Conn. 497; *Rawle, Covenants for Title* (4th ed.), 89, 320, 333.  
<sup>2</sup> *Portmore v. Bunn*, 1 B. & C. 694.  
<sup>3</sup> *Carlisle v. Blamire*, 8 East, 487.

of action for breach of the covenant. A right of action on a covenant to repair a dam was so reserved in *Thompson v. Shattuck*,<sup>1</sup> in a conveyance after the dam had been carried away; the covenantee repaired the dam, and it was held that he might maintain an action in his own name upon the covenant.

§ 451. *Same.*—It has been said that covenants against incumbrances are broken by the existence of any easements or servitudes to which the land is subject.<sup>2</sup> And this was undoubtedly the rule at common law. So a right to take water from the premises conveyed;<sup>3</sup> a right to maintain an artificial watercourse;<sup>4</sup> a right to maintain a drain, and an easement of entering to repair it;<sup>5</sup> a right to obstruct and divert water by means of a dam;<sup>6</sup> an easement of conveying water from a spring in pipes,<sup>7</sup> and the right to maintain a dam, and overflow lands,<sup>8</sup> have each been held breaches of covenants against incumbrances.

§ 452. *Same.*—In Massachusetts it is held that where an owner of an entire tract, which he overflows by means of a dam, conveys a portion of such overflowed land, he retains the right to continue such flowage without express reservation.<sup>9</sup> This was followed in Vermont in the case of *Harwood v. Benton*.<sup>10</sup> There an owner of a mill and lands, including a dam and flowed land, sold a portion of the flowed land with a covenant against incumbrances. It was held that he did not

<sup>1</sup> 2 Met. 615.

<sup>2</sup> *Prescott v. Trueman*, 4 Mass. 627; *Mitchell v. Warner*, 5 Conn. 497, 508.

<sup>3</sup> *Mitchell v. Warner*, 5 Conn. 497; *Harlow v. Thomas*, 15 Pick. 66; *Morgan v. Smith*, 11 Ill. 194.

<sup>4</sup> *Prescott v. Williams*, 5 Met. 433. See *Prescott v. White*, 21 Pick. 341; *Johnson v. Knapp*, 146 Mass. 70; *Viterbo v. Friedlander*, 22 Fed. Rep. 422. But the right to the continued flow of a natural watercourse is not a breach, nor are the rights incidental thereto, such as the right to enter and remove obstructions. See *ante*, § 303.

<sup>5</sup> *Smith v. Sprague*, 40 Vt. 43.

<sup>6</sup> *Morgan v. Smith*, 11 Ill. 194.

<sup>7</sup> *McMullen v. Wooley*, 2 Lans. (N. Y.) 394.

<sup>8</sup> *Lamb v. Danforth*, 59 Maine, 322; *Patterson v. Sweet*, 3 Brad. (Ill.) 550.

<sup>9</sup> *Cary v. Daniels*, 8 Met. 466. This case was decided expressly on the ground that one who makes a prior appropriation of a stream thereby gains a priority of right as against adjacent owners. But this is not everywhere the law. *Ante*, ch. 9.

<sup>10</sup> 32 Vt. 724.

part with the right to flow such land, and that the subsequent exercise of such right by himself and his grantees of the mill was not a breach of the covenant. Barrett, J., said: "Such covenant has relation to rights existing in, or in relation to, the property conveyed, appertaining to parties *other than* the grantor, and which may be claimed and exercised and enforced upon and against said property, as against such grantor and his assigns." Applying this narrow distinction it would follow that although the grantor might continue to exercise such right of flowage himself, yet if he had granted the right to another person to flow the land, and then had sold the land itself, the outstanding right to flow would be a breach of the covenant against incumbrances; and this would follow although the right to flow was openly and notoriously exercised before and at the time of the grant; but he might afterwards convey whatever right he had himself retained.

§ 453. *Same.*—The Supreme Court of New Hampshire have established a similar rule. In *Dunklee v. Wilton Railroad Co.*,<sup>1</sup> the court says: "Property conveyed passes in its existing state, subject to all existing easements and burdens of a similar nature *in favor of other lands of the grantor*, which are apparent, and which result naturally from the relative situation of the land, and from the nature, construction, and intended use of the buildings, mills, etc., upon it, and their situation and connection with other property, as they were usually enjoyed at the time of the conveyance." In this case no mention is made of that of *Kidder v. George*,<sup>2</sup> decided five years

<sup>1</sup> 24 N. H. 489. In this case the respective owners of the upper and lower land constructed by agreement an artificial raceway, shortening the course of a brook flowing through their lands, and the lower owner afterwards conveyed his land to the upper owner (the plaintiff), who, being then the owner of both the parcels, conveyed part of the lower land to a third party. The grantee conveyed a portion of the land to the defendant, who erected an embankment across the watercourse, to the

plaintiff's damage, and the court held that the plaintiff, by conveying away the land, had not lost the easement; that the raceway was not a breach of his covenant, or a nuisance which the owners of the land could remove; and that the plaintiff could maintain case for the injury. Confer Rawle, *Covenants for Title* (4th ed.), 109; *Blanchard v. Ames*, 60 N. H. 404; *Griffin v. Bartlett*, 55 N. H. 119; *Butler v. Huse*, 63 Maine, 447.

<sup>2</sup> 18 N. H. 511.

before in the same court, where it was held in an action of covenant that it is no breach of the covenant against incumbrances that the land, at the time of the conveyance, had been flowed by the grantor for twenty years by a dam below, and after the conveyance, was flowed as before.

§ 454. *Same.*—In Wisconsin the Supreme Court has gone further, and laid down the unqualified rule that purchasers of property, obviously and notoriously subjected at the time to some right of easement or servitude affecting its physical condition, take it subject to such right, without any express exceptions in the conveyance, and that such easements are not breaches of covenants against incumbrances or other covenants for title.<sup>1</sup> So, where the defendant conveyed land to the plaintiff by a deed containing the usual covenants of seisin and against incumbrances, without any exceptions, and at the time of the purchase between thirty and forty acres of the land were flowed by a mill-pond created by a dam on land not belonging to the defendant, which dam had been maintained long enough to create a prescriptive right in the owner of it to flow the land in question, and the grantee brought an action for breach of the covenants, by reason of the right of flowage, it was held that the action could not be maintained.<sup>2</sup>

§ 455. *Same.*—The decisions in Massachusetts, New Hampshire and Wisconsin are influenced by the policy of those States in favoring mills and the development of water-powers;<sup>3</sup> but it is submitted that in so far as these cases hold that any such easements or servitudes upon land abridge the covenantee's right to the entire beneficial use of the property purchased, they are departures from the common law. They are, in short, a limitation upon the covenant, by reference to the subject-matter. The doctrine of notice is an insufficient ground for the departure, for the purchaser has notice of recorded incumbrances, such as mortgages and judgment liens, and buys with reference to them; but if he takes a covenant against in-

<sup>1</sup> *Kutz v. McCune*, 22 Wis. 627 (approved in the cases of *Pomeroy v. Chicago R. Co.*, 25 Wis. 641; *Sabine v. Johnson*, 35 Wis. 185; *Smith v. Hughes*, 50 Wis. 620).

<sup>2</sup> *Kutz v. McCune*, *supra*. Confer *Janes v. Jenkins*, 34 Md. 1, accord.

<sup>3</sup> See Rawle, *Covenants for Title* (4th ed.), 108, 118.

cumbrances, he is entitled to damages for all such charges on the land, regardless of notice.<sup>1</sup>

§ 456. **Same — Eminent domain.**—Covenants in private grants do not include protection against or compensation for future acts of sovereignty; and, accordingly, if lands conveyed are injured by an exercise of the power of eminent domain, such injury is not a breach of any of the covenants for title, and affords the covenantee no cause of action;<sup>2</sup> and in States where the flowage of lands under the Mill Acts is held an exercise of the power of eminent domain, such flowage would not constitute a breach of the covenants.<sup>3</sup> So an entry and occupancy in exercise of the power of eminent domain, for the purpose of building a canal, is not a breach of covenants of warranty, nor is a release of damages for such entry, executed before the conveyance is made.<sup>4</sup> If the title to land, part of which is below tidal high-water mark, is, for the purposes of division, assumed to be perfect, and there is an agreement for indemnity against any outstanding title or claim, the existing sovereign title of the State below high-water mark is within the meaning of the agreement, although liable to be extinguished by the riparian owner's right of reclamation by occupancy.<sup>5</sup>

<sup>1</sup> See *Bean v. Mayo*, 5 Greenl. 94, where a covenant in a deed that the land was free from incumbrances was held broken by the existence of a mortgage previously given by the grantor to the grantee.

<sup>2</sup> *Ellis v. Welch*, 6 Mass. 246. See *Snarr v. Baldwin*, 11 C. P. (Can.) 353; *Doty v. Lawson*, 14 Fed. Rep. 892.

<sup>3</sup> In *Fitch v. Seymour*, 9 Met. 462, the action was upon a covenant against incumbrances, and the alleged breach consisted of flowage of the lands by a third person under a license from the grantor, which had been held binding as against him. It was held that such license gave no such right as against the grantee, and that, therefore, there was no breach.

<sup>4</sup> *Dobbins v. Brown*, 12 Penn. St. 75. But where a lease of a mill and water-power was made after the water had been taken for the temporary use of a canal company, and the lease contained covenants of warranty and against incumbrances, such abridgment of the full use of the property, under a *prior* exercise of the power of eminent domain, was held a breach of the covenant. *Peters v. Grubb*, 21 Penn. St. 455. This is plainly contrary to the New Hampshire and Wisconsin doctrine as to notorious easements.

<sup>5</sup> *United Companies v. Long Dock Co.*, 38 N. J. Eq. 142; *Cooper v. Bloodgood*, 32 id. 209; *ante*, § 171.

§ 457. *Same.*—In Maine, where a corporation was authorized to erect dams, locks, etc., in a stream, and to take lands therefor, making compensation to the owner, and the company leased land, and erected a portion of their works thereon, no damages being claimed by the owner, or assessed, and the owner afterwards conveyed the land with covenants, it was held that the company had erected its works under its charter power, and had the right to maintain them permanently, and that they were a breach of the covenant against incumbrances.<sup>1</sup> If this case is law, it follows that an easement erected in the past, under the exercise of the power of eminent domain, is an incumbrance within the meaning of the covenant, which is a strict application of the original rule as to easements.

§ 458. *Same.*—The covenant of seisin is held to be broken by the existence of a prior grant to another of the right to divert a natural spring.<sup>2</sup> So where the deed included a grant of the right “to raise a dam sufficient to raise the water seven feet high,” with a covenant of seisin, it was held that the *habendum* and covenant of seisin extended to the right to maintain the dam, and were broken by lack of that right in the grantor.<sup>3</sup> A similar question arose in Vermont on a covenant of warranty. The defendant had conveyed a lot, including a mill-site and dam, simply as “lot No. 19;” *habendum*, etc., “with the appurtenances thereof,” with a covenant to

<sup>1</sup> *Ginn v. Hancock*, 31 Maine, 42, 47. See *Peters v. Grubb*, 21 Penn. St. 455, *supra*.

<sup>2</sup> *Clark v. Conroe*, 38 Vt. 469. The obligation of a contract imposed by the grant of a city of the exclusive right to supply the city with water from a certain creek is not impaired by its later grant to others of a similar right from other sources. *Stein v. Bienville Water-Supply Co.*, 34 Fed. Rep. 145. See *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1.

<sup>3</sup> *Walker v. Wilson*, 18 Wis. 522; *Hall v. Gale*, 14 Wis. 54; 20 Wis. 292; *Traster v. Snelson*, 29 Ind. 96. In

*Stetson v. Veazie*, 11 Maine, 408, it is held that an easement (in this case of landing boats on the shore of a stream) was not a disseisin of the owner of the land to which the easement is annexed (upon which it is exercised). So in *McMullen v. Wooley*, 2 Lans. (N. Y.) 394, a grant of prior right to conduct water by means of pipes laid beneath the surface of land, from a spring thereon, was held an easement, and not a breach of covenants of warranty and for quiet enjoyment, but a breach of the covenant against incumbrances. See *McCarthy v. Nicrosi*, 72 Ala. 332.



warrant and defend "the above granted and bargained premises." The plaintiff maintained the dam at its former height, and thereby overflowed lands above him, for which a recovery of damages was had against him. He then brought suit on the covenant against the grantor, alleging for breach the recovery against him. It not appearing that the dam had ever caused such flowage prior to the date of the defendant's deed, or that the defendant had ever exercised or claimed the right so to flow the land, it was held that no breach of the covenant was shown.<sup>1</sup>

§ 459. *Same.*—In a recent case in New York a different result was reached. The defendant and another conveyed to the plaintiff and another certain premises upon which were a mill, a dam and pond, which furnished water-power for the mill, and were essential to its complete enjoyment and operation, by a deed containing covenants of warranty and quiet enjoyment, but with no express covenant in regard to the water-power. The grantees entered into possession, and while working the mill with the dam at the same height as when the conveyance was made, were sued for overflowing the lands of an upper riparian proprietor by means of the dam. They gave their grantors notice to defend the actions, and judgments for damages were obtained against the grantees. They then brought an action upon their covenants, and it was held that the deed conveyed the dam as it then stood, at its existing and apparent height, and the water-power it thus indicated, which was an essential element in the value of the property, and that the judgment constituted an eviction and breach of the covenants.<sup>2</sup>

§ 460. *Same.*—The paramount right to divert water from a spring was also held a breach of the covenant of warranty in the above case from Vermont.<sup>3</sup> But in *Mitchell v. Warner*<sup>4</sup>

<sup>1</sup> *Swasey v. Brooks*, 30 Vt. 692.

<sup>2</sup> *Adams v. Conover*, 87 N. Y. 422; 22 Hun, 424; *Brugger v. Butler*, 6 Oregon, 459. For a decision distinguishing the case of a sewer over adjoining land from this, and holding that the covenants of warranty and

for quiet enjoyment of the premises and appurtenances do not extend to the right to discharge water through such a sewer, see *Green v. Collins*, 86 N. Y. 246.

<sup>3</sup> *Clark v. Conroe*, 38 Vt. 469.

<sup>4</sup> 5 Conn. 497. The case of *Thayer*

it was held that a pre-existing right to divert water from water works, thereby rendering them useless, was not a breach of the covenant of warranty. This case is placed upon the ground that the water is not part of the freehold; but the common law was not so, and the decision has been criticised in Pennsylvania as ill-considered.<sup>1</sup> In the last mentioned State, it was held that a covenant for quiet enjoyment in the lease of a grist-mill, operated by water-power, was broken by the diversion of the water of the stream under a prior right, acquired by a canal company under a delegation of the power of eminent domain.<sup>2</sup>

§ 461. *Same.*—In *Blatchford v. Plymouth*,<sup>3</sup> certain allegations as to the use of water were held to show no breach of a covenant for quiet enjoyment. The defendants demised a mill and stream of water flowing in their trench, except so much of the water as should be sufficient for the supply of persons whom the lessor should already have contracted with, or should thereafter contract to supply, provided that such a quantity should be left as would be sufficient to supply the mill for twelve hours a day, with a covenant for quiet enjoyment. The breach assigned was that the defendants, at divers times between the execution of the lease and the bringing of the suit, had caused and procured to be drawn off large quantities of water. The evidence showed that nothing had been done since the execution of the lease; but it was shown that persons having rights under prior grants had diminished the quantity of water that might otherwise have flowed to the plaintiff's mill. It was held that the lease was not a demise of water for twelve hours a day, that the proviso for such

*v. Wheelock*, 16 Pick. 68, before referred to, held similarly that the benefit of a covenant of warranty in a grant of the right of drawing water from a pond would not enure to a subsequent purchaser of the land.

<sup>1</sup>See *Wilson v. Cochran*, 46 Penn. St. 229; Rawle, *Covenants for Title* (4th ed.), 182 (note 2); *Spencer's Case*; 1 *Smith's Lead. Cas.* 7th Am. ed.), 201, note. In *Griswold v. Allen*, 22 Conn. 89, it was held that a grant

of the right to maintain a raceway would not include a grant of the right to use as much water as would flow through it; and that a prior right of another riparian owner, preventing the grantee from using so much water, was not a breach of the covenant.

<sup>2</sup>*Peters v. Grubb*, 21 Penn. St. 455.

<sup>3</sup>1 Bing. N. C. 691. *Cf. Parker v. Fairbanks*, 1 Russell & Ch. (N. S.) 215; *Scriver v. Smith*, 100 N. Y. 471.

quantity of water was a limitation merely on future grants, and that the diversions complained of were no breach of the covenant. In an action by a tenant on the covenants of his lease, for damages caused by the bursting of a water-pipe in the house, where the jury found that the pipe was reasonably fit and proper for the purpose for which it had been placed in the house, it was held that the bursting of the pipe was no breach of the covenant for quiet enjoyment.<sup>1</sup>

**§ 462. Same — Particular covenants.**— A covenant in a conveyance of land intersected by water-races, that the courses should not be diverted, but should flow uninterruptedly in their present channels, and that the grantee should have access to their sources, to increase or improve the streams, and that the grantor would keep the races in repair over his other land, was held to impose the duty on the grantor of maintaining the races in such repair that water should continue to flow in them as freely as at the time of the grant, and to be enforceable in an action of covenant.<sup>2</sup> A covenant to convey land, together with the right to erect a dam and to overflow the land of the vendor, is not complied with by tender of a deed for the land, omitting all reference to the easement; and on a failure to tender a deed containing grants of such rights, the covenantee may maintain an action of covenant.<sup>3</sup>

**§ 463. Same — Same.**— By an instrument made under seal between the owner of a mill-dam and the owner of land flowed thereby, the owner of the dam stipulated that he would reduce his dam to a specified height, and covenanted for himself, his heirs and representatives, to keep the dam so reduced forever. The land-owner granted to the mill-owner, his heirs and assigns forever, the right to flow so much land as would be flowed by the dam at such height, but reserved the right to annul the grant whenever the dam should be raised above such height. The mill-owner lowered his dam, as agreed, but afterwards raised it again, and thereby flowed more land, to the

<sup>1</sup> *Anderson v. Oppenheimer*, 5 Q. B. D. 602. See *Sanderson v. Berwick-upon-Tweed*, 13 Q. B. D. 547. broken by permitting it to remain out of repair after notice. *Leonard v. Young*, 4 Allen (N. B.), 111.

<sup>2</sup> *Carroll v. Cockey*, 3 H. & J. 282. <sup>3</sup> *Wilson v. McNeal*, 10 Watts, 422. A covenant to keep up a mill-dam is

injury of the other party, and for this injury suit was brought. The defendant contended that the covenants were dependent, and that he had a prescriptive right prior to the covenant. It was held that the covenants were independent, the mill-owner promising for the future, the land-owner granting *in presenti*; that the reservation of the right to annul the grant gave no election to the owner of the dam to raise it after having once reduced it to the height agreed, and furnished no defence to the action; and that whatever prescriptive right he might have had before the agreement was immaterial in an action for the breach of his covenant.<sup>1</sup> In *Tomlinson v. Ousatic Water Co.*,<sup>2</sup> a covenant by the defendant to repair injuries which might be caused by flowage, recited simply in the condition of a bond for the performance of such covenant, was held a sufficient and valid covenant.

§ 464. Same — Same.— *Underhill v. Saratoga Railroad Co.*<sup>3</sup> was an action to recover possession of land, and also for damages for the breach of certain covenants. A grant was made to a railroad company upon the condition that the grantees should build and maintain a water-tight embankment or dam over a certain brook crossing the land conveyed for part of their line of road, and that the said embankment or dam with the flood-gates and sluice-ways therein might be used for hydraulic purposes by the grantors, their heirs, and assigns; and it was covenanted that the grantees should not be liable for any damages which the grantors should sustain in case of a break in the dam or an overflow thereof, unless the same should happen through the gross negligence or wilful misfeasance of the grantees, but that the grantees should forthwith repair all damages which the dam or embankment should at any time maintain. The grantees took possession and built their road, but omitted to build the dam. The grantors assigned all their rights to a third person, who brought the suit. It was held that the condition was subsequent, that the effect of the deed was to vest the fee-simple of the estate in the grantees, subject to be defeated by a neglect or refusal to perform the condition; that a right of re-entry remained in the

<sup>1</sup> *Stinson v. Gardiner*, 83 Maine, 94.

<sup>2</sup> 44 Conn. 99.

<sup>3</sup> 20 Barb. 455. See 2 Wash. Real Prop. (4th ed.) 17.

grantors and their heirs; but that no action could be maintained by the assignee for the possession of the land. It was further held that there was no express covenant in the grant except the one to repair; that the condition as to the erection and maintenance of the dam did not raise an implied covenant so to do; and that by the assignment the condition was discharged forever, and an indefeasible estate was vested in the grantees.<sup>1</sup>

§ 465. *Same — Same.*— Where property was conveyed together with the right of taking water by a race from the grantor's pond, with a warranty of the title to the land and right of taking water, and suit was brought on the covenant, the breach charged being that during a specified period of time the defendant deprived the plaintiff of the water necessary for his mill, by diverting it therefrom, and suffering it to be diverted by others, it was held that the plaintiff was not limited to proving acts committed during the period alleged, but might prove previous acts, in consequence of which the injury was sustained during the time.<sup>2</sup>

§ 466. *Same — Same.*— In *Fish v. Folley*,<sup>3</sup> the action was on a covenant that the plaintiff should have a continued supply of water for his mills from the defendant's dam. The defendant after a time wholly failed to perform his covenant. It was held that the breach was entire, and that one recovery was a bar to any further action. But in *Crain v. Beach*,<sup>4</sup>

<sup>1</sup> It is to be noticed that the condition was to maintain as well as to construct a dam. The court (*per Allen, J.*) say (p. 460): "There was no limit to the time of its performance, and consequently the defendants would be allowed a reasonable time to construct and complete the work." *A fortiori* there was no limit within which the condition for *maintaining* the dam was to be performed. The right of re-entry, therefore, was annexed to a continuing condition without limit in time. That such an interest is not void for remoteness within the rule against perpetuities, see *Brattle Square Church v. Grant*,

3 Gray, 142, 148; *Crocker v. Old South Society*, 106 Mass. 479. A suggestion *contra* is made by Mr. Lewis (*Perpetuities*, 619).

<sup>2</sup> *Hollinsworth v. Dunbar*, 5 Munf. (Va.) 199.

<sup>3</sup> 6 Hill, 54.

<sup>4</sup> 2 Barb. 120. This case is limited in *Shaffer v. Lee*, 8 Barb. 412; and *Fish v. Folley* is cited generally in New York as an authority for the rule that a right of action cannot be divided. It must be considered with reference to the explanation given in *Crain v. Beach*. See *O'Dougherty v. Remington Paper Co.*, 81 N. Y. 496.

which was an action on a covenant for maintaining a gate, a contrary rule is laid down; and *Fish v. Folley* is explained as decided with reference to the fact that a new water-power had been obtained, and the one in question abandoned several years before the suit.

§ 467. *Same — Same.*— It is a general rule that in actions upon covenants, where there can be but one breach there can be but one recovery, and such recovery must include entire damages for the permanent injury done. This rule was applied in *Jacobs v. Davis*<sup>1</sup> to the case of the breach of covenants as to the construction and use of a trench. Where, on a breach of covenants for title, the breach is but partial, as of the waters of a stream supplying the land conveyed, the damages will be apportioned to the measure of value between the property lost and that preserved.<sup>2</sup>

§ 468. *Same — Same.*— A covenant in a lease of water-power, to use due diligence in furnishing water-power, is a

<sup>1</sup> *Jacobs v. Davis*, 34 Md. 204.

<sup>2</sup> *Dalton v. Helm*, 8 Nev. 190. In *Jacobs v. Davis*, just cited, A., B. and C. owned, in severalty by separate titles, certain tracts of swamp lands adjacent to one another. By a sealed instrument signed by them all, A. and B. agreed to let C. cut a ditch through their respective lands, and C., in consideration of this permission, covenanted that he would not allow D., an adjacent owner, or anyone who might thereafter own the adjacent land of D., to cut ditches in C.'s land so as to drain through the ditches by the agreement granted; C. further agreed to cut the ditch by a particular line, and not to open it and let water flow through it until provision was made for carrying it away below. On breach of the covenants by C., A. brought suit without joining B. as co-plaintiff. C. demurred on the grounds that the covenant was joint, the breach was insufficiently assigned, and that the covenant not to allow the ditches to

be used for the land of D. was against public policy. It was held that the agreement was valid, and that the covenants were several. The court also held (relying on 1 Wms. Saund. 154, note 1, to *Eccleston v. Clipsham*) that though the parties covenanted jointly, yet as the interest and cause of action were several, the covenant should be taken so, and separate actions allowed. The allegation of breach, that C. did cut the said ditch so as to throw the water down before it could be taken off by the ditch below, was held a sufficient assignment of breach in that respect. And an averment that C. allowed the owner of the said lands of D. to cut a ditch into the lands of said C., so as to drain through the said ditches, was held sufficient without naming the owner. It was held, also, that if C. entered on the land of A. under the agreement, and began cutting the ditch, he must cut it as agreed, and could not defend on the ground that he had no deed,



proper matter for set-off in an action on a promissory note and account for rent; and it has been held that a deduction from the rent for an obstruction of the power, under a clause in the lease providing for a rebate of rent for a stoppage of water, was no bar to an action on such covenant.<sup>1</sup> But where a lease of water-power provides in a plain way for an abatement at specified rates for every failure of water, the tenant is confined to the remedy so specified; a covenant that the lessor will repair will not be implied, and the tenant cannot counterclaim for the cost of repairs made by himself.<sup>2</sup> So the grantor of a ditch to be dug and maintained across a portion of his farm, in order to supply the grantee with water from a spring there, is not bound to keep the ditch in repair or prevent it from becoming filled up by the tramping of cattle pastured on his farm.<sup>3</sup>

§ 469. *Assumpsit*.—Where a contract under seal has been modified, and a simple contract substituted, upon a valid consideration, the remedy for a breach of contract after such modification is by *assumpsit*, and not in covenant.<sup>4</sup> Where the rights of parties in respect of water are the subject of a simple contract, express or implied, *assumpsit* is the legal remedy for the breach of such contract.<sup>5</sup> So where, after a wrongful diversion and recovery therefor, a lease of the use

but should have tendered a deed for execution if he thought it necessary.

<sup>1</sup> *Moline Water Power Co. v. Waters*, 10 Brad. (Ill.) App. 159. Where the land beneath the pool and inlet furnishing the power had been ceded by the lessor to the United States government, which had agreed to maintain the power out of appropriations that might be made by Congress for that purpose, and which had entire control over the power, it was held that the covenant "to use due diligence in providing water" did not require it to remove accumulations of sediment in the pool, impairing the power, but only to use due diligence in attempting to pro-

cure such removal by the United States. *Ibid*.

<sup>2</sup> *Sheets v. Selden*, 7 Wall. 416. See *Openshaw v. Evans*, 50 L. J. N. S. 156. As to a lessee's right to water after the expiration of his lease, see *Chamber Colliery Co. v. Hopwood*, 32 Ch. D. 549; *Washburn & Moen Manuf. Co. v. Salisbury*, 152 Mass. 346. As to agreements for repairs, see *Indianapolis Water Co. v. Nulte* (Ind.), 26 N. E. 72.

<sup>3</sup> *Joslin v. Sones*, 80 Iowa, 534.

<sup>4</sup> *Mill Dam Foundry v. Hovey*, 21 Pick. 417.

<sup>5</sup> *Davis v. Morgan*, 4 B. & C. 8; s. c. 6 Dowl. & Ry. 42; *Turner v. Strange*, 56 Texas, 141. See *Mullett v. Bemis*, 100 Mass. 92.

of the water was given and accepted, and rent paid, and parties claiming under the lessee held over after its expiration, it was held that the assignee of the reversion could maintain assumpsit against them for the use and occupation.<sup>1</sup>

§ 470. **Same.**— Where a co-tenant uses more than his share of a mill or water-right, it is presumed *prima facie* to be done with the consent of his co-tenants, and the law implies a promise to pay for such excess. But if such presumption is rebutted, and there is no promise, and nothing to show the relation of landlord and tenant, the other co-tenants cannot maintain assumpsit against him for the use and occupation.<sup>2</sup> Where the joint owners of a mill, excepting P., who refused to unite with them for that purpose, rebuilt a mill, and retained P.'s share to reimburse themselves for expenses incurred for him in rebuilding it, refusing to give him his share until reimbursed, it was held that P. could not maintain assumpsit against them, as the holding was adverse.<sup>3</sup> Assumpsit is not an appropriate remedy for settling a disputed title.<sup>4</sup> A grant by one tenant in common of the right to use water when the grantor is not using it is not void as creating a several interest in common property or impairing the rights of co-tenants.<sup>5</sup>

§ 471. **Same — Ejectment.**— It was early settled that ejectment would not lie for a watercourse.<sup>6</sup> But it of course lies for land which is occupied as an approach to and landing for a bridge,<sup>7</sup> or for land covered with water, and the recovery will include all incidents of the land, and the action may be used to try the title to a water-right.<sup>8</sup> Where the rights of the State in public waters begin with low-water mark, and owners of lands bordering thereon have a statutory right to build into the water, they cannot maintain ejectment for land artificially

<sup>1</sup> Davis v. Morgan, 4 B. & C. 8; s. c. 6 Dowl. & Ry. 42.

<sup>2</sup> See Lamson v. Worcester, 58 Vt. 381.

<sup>3</sup> Porter v. Hooper, 11 Maine, 170. As to ouster of the co-tenants by one tenant in common, see Ingalls v. Newhall, 139 Mass. 268.

<sup>4</sup> North Haverhill W. Co. v. Metcalf, 63 N. H. 427.

<sup>5</sup> Adams v. Manning, 51 Conn. 5.

<sup>6</sup> Challenor v. Thomas, Yelv. 143; s. c. Brownl. & Golds. 142; Swift v. Goodrich, 70 Cal. 103.

<sup>7</sup> Lawe v. Kaukauna, 70 Wis. 306.

<sup>8</sup> Beidelman v. Foulke, 5 Watts, 308.

made in front of their own land.<sup>1</sup> Ejectment is not an appropriate remedy for one whose mining operations are impeded by a lower proprietor who has dammed the stream.<sup>2</sup>

§ 472. *Mandamus*.—In a proper case, an injury done to or by means of waters may be remedied by the extraordinary writ of *mandamus*. It has seldom been employed in cases of such injuries, and an extended discussion of its nature and uses may therefore be omitted. It may, however, be briefly stated that the essentials of a proper case for its exercise are, first, a specific legal duty due to the relator from a specific person or body;<sup>3</sup> and secondly, the absence of any other remedy by due course of law.<sup>4</sup> By “due course of law” is here meant the

<sup>1</sup> *Austin v. Rutland R. Co.*, 45 Vt. 215. In Iowa, it is held that owners of land bounding on a navigable river own the fee only to high-water mark. Under this doctrine it is held that an act of Congress subsequently declaring that a river formerly held navigable is not navigable, will not have the effect to extend the ownership of such persons to the center of the stream, so as to enable them to maintain ejectment against parties claiming land that forms part of the bed of the river. *Wood v. Chicago Ry. Co.*, 15 N. W. Rep. 284. But the State may maintain ejectment for land which was below high-water mark in navigable waters and arms of the sea, which have been filled up and made hard land. *People v. Mauran*, 5 Denio, 389. The right of the riparian proprietor to land below high-water mark is a right to a tangible corporeal hereditament which may be vindicated against a disseisor by this action. *Nichols v. Lewis*, 15 Conn. 137. But the action will not lie for a mere privilege of a landing place held in common with other citizens of a town. *Black v. Hepburn*, 2 Yeates, 331. If a grantor reserves to himself, his heirs, and assigns forever “the right and privi-

lege” of erecting a mill-dam at a certain place described, and “to occupy and possess the aforesaid premises, without any let, hindrance or molestation” from the grantee or his heirs, he has such an interest in the land reserved as will enable him to maintain ejectment. *Jackson v. Buel*, 9 Johns. 298. The action may be maintained for a fishery. *Rex v. Old Alresford*, 1. T. R. 358, *per* Ashurst, J.: “There is no doubt but that a fishery is a tenement. Trespass will lie for an injury to it; and it may be recovered in ejectment.” Denying the doctrine of *Molineaux v. Molineaux*, Cro. Jac. 144; *Herbert v. Laughlun*, Cro. Car. 492; *Waddy v. Newton*, 8 Mod. 275, 277. See *ante*. § 185. Ejectment will lie for a well of salt water, or for a right to a certain quantity of the water to be taken from a certain well. *Smith v. Barret*, 1 Lev. 114; Cro. Jac. 150; *Runnington on Ejectment*, 131.

<sup>2</sup> *Ezzard v. Findley G. M. Co.*, 74 Ga. 520.

<sup>3</sup> *Haines v. People*, 19 Ill. App. 354.

<sup>4</sup> High, Extr. Legal Rem. § 10; *State v. New Orleans R. Co.*, 42 La. Ann. 11; *People v. Green Island Water Co.*, 56 Hun, 76; *State v. Hanna*, 97 Ind. 469; *Will County Supervisors v. People*,

entire system of remedies administered by courts, including remedies in equity.<sup>1</sup>

§ 473. *Same.*— An obligation arising merely upon a contract and not involving any trust,<sup>2</sup> or an obligation to pay damages for a tort,<sup>3</sup> will not be ground for a mandamus; nor will the existence of a nuisance for which a complete remedy may be had by indictment and judicial abatement.<sup>4</sup> The rights given by the Colorado statute regulating the use of water for irrigation may be enforced by mandamus.<sup>5</sup>

§ 474. *Same.*— The exercise of official discretion, as by municipal bodies, boards of health, or commissioners of highways, will not be controlled by the writ.<sup>6</sup> But an official trust to perform a specific duty, or a public trust imposed on a private corporation, may be enforced by mandamus.<sup>7</sup> In California,

110 Ill. 511; *Brownell v. Gratiot Supervisors*, 49 Mich. 414; *Reg. v. Com's of Sewers*, 1 Hannay (N. B.), 8; *Merrick v. Baltimore*, 48 Md. 219.

<sup>1</sup> In *Commonwealth v. Supervisors*, 29 Penn. St. 121, it was held that mandamus would not lie where the relator had a full and adequate remedy by injunction. But in *Commonwealth v. Commissioners of Allegheny*, 32 Penn. St. 218, 223, it is said that the existence of an equitable remedy is not ground for refusing mandamus.

<sup>2</sup> *State v. Republican River Bridge Co.*, 20 Kansas, 404. So where the State received a grant of land from the United States, for bridge purposes, and gave a guaranty to erect and maintain a bridge at a certain place, and then procured the erection of a bridge at that place by a company, accepted the bridge and took from it a guaranty to protect the State against loss upon its guaranty to the United States, it was held that the obligation of the company to repair the bridge was merely contractual, and could not be enforced by mandamus. To

the same effect, see *State v. Zanesville Turnpike Co.*, 16 Ohio St. 808.

<sup>3</sup> So one who has a claim for compensation against a local board of health, for injuries not specially authorized, has a remedy by action, and cannot have a mandamus. *Regina v. Darlington Board*, 6 B. & S. 562.

<sup>4</sup> *Reading v. Commonwealth*, 11 Penn. St. 126; *Commonwealth v. McLaughlin*, 120 Penn. St. 518.

<sup>5</sup> *Golden Canal Co. v. Bright*, 8 Col. 144; *Wheeler v. Northern Colorado Ir. Co.*, 10 Col. 582.

<sup>6</sup> *High on Extraordinary Remedies*, § 42; *Dillon, Municipal Corporations*, § 836. So of a discretionary power to erect and repair bridges or highways. *State v. Freeholders of Essex*, 3 Zab. (N. J.) 214; *State v. Ousatonic Water Co.*, 51 Conn. 137. A discretion as to erecting a bridge is not determined by levying and collecting a tax for that purpose; and the commissioners will not be compelled by mandamus to complete the bridge. *State v. Commissioners*, 31 Ohio St. 211.

<sup>7</sup> Mandamus will not lie against a

canal companies organized under a general statute relating to such companies are held to be charged with a public trust, so long as they have water, to supply with water all those included in the classes for whose alleged benefit the companies were created; and this duty is enforceable by mandamus.<sup>1</sup> So where a company was authorized by Act of Parliament to divert rivers and watercourses, and under this authority the company raised the level of a brook, causing the flooding of a mine, it was held that the persons injured might have a writ of mandamus to compel the payment of compensation under the Act; and that if the injuries were caused partly by acts done under the powers of the statute, and partly not, the remedy was by mandamus, and not by action at law.<sup>2</sup> But it is always open to the company to show full compliance with the act, in answer to the writ; as in case where a company was required to make ponds and watering-places for cattle, where, by means of the railway, the cattle of persons occupying lands adjacent thereto were deprived of access to former watering-places.<sup>3</sup>

§ 475. **Pleading — The declaration or complaint.**— As the rights infringed by injuries done by and affecting waters are property rights, it is necessary for the plaintiff to allege an interest in the property injured, and an injury to such interest, in order to show a cause of action.<sup>4</sup> The nature and extent of his interest need appear only so far as to show that it is injured by the wrong charged. Where the law gives a common right, as of navigation or fishing in public waters, it is unnecessary to state such right specially; but if the plaintiff claims more than he is entitled to of common right, he must allege his title to the right which he claims.<sup>5</sup> Rights infringed by private nuisances fall within the latter class.

public board of fish commissioners at suit of one of its employees for redress for a breach of contract, but he may have a claim for damages. *Portman v. Fish Commissioners*, 50 Mich. 258.

<sup>1</sup> *Price v. Riverside Co.*, 56 Cal. 481.

<sup>2</sup> *Queen v. North Midland R'y Co.*, 2 Rail. Cas. 1.

<sup>3</sup> *Queen v. York & North Midland R'y Co.*, 3 Rail. Cas. 764.

<sup>4</sup> *Leeds v. Shakerley*, Cro. Eliz. 751; 1 Com. Dig. 308, Action for Nuisance, E.

<sup>5</sup> 1 Chitty Pl. 393; *Gale on Easements* (5th ed.), 668. So where a plaintiff declared that he was possessed of a house and was thereby entitled to an easement to take water from a cistern, but that the defendant wrongfully closed and fastened up a doorway, and thereby prevented the

§ 476. **Same — Same.**—If the injury is to the possession, a general averment of the plaintiff's possession is sufficient, without any special statement of his title;<sup>1</sup> for, as we have seen, possession is a sufficient interest to maintain an action against a wrong-doer.<sup>2</sup> If, for example, the injury is by diverting or polluting a stream, the plaintiff should aver that he was possessed of the property injured, and that by reason thereof he was entitled to the flow of a stream to his land, or to the flow of a stream of good quality in its natural purity.<sup>3</sup> Seisin in law is a sufficient interest to maintain the action. So, if one avers the seisin and death of his father, and a descent to the plaintiff, whereby he is seized, it suffices without alleging an entry;<sup>4</sup> and so if one alleges that he is "seized in his demesne as of fee," possession will be implied.<sup>5</sup>

plaintiff from having access to the cistern and taking water, it was held that, if the declaration had alleged generally a right to use the cistern, and had complained that that right was interrupted, it might have been good; yet as it had stated the particular mode of obstruction by fastening the door, the plaintiff was bound to allege a right to pass through the door, for the lack of which the declaration was bad. *Tebbutt v. Selby*, 6 A. & E. 786. See Gale on Easements (5th ed.), 669. And where a count for polluting the waters of a canal which supplied boilers on the plaintiffs' land, alleged that the plaintiffs enjoyed the benefit of the water for that purpose, and that the water used and ought to run and flow without being fouled and polluted, it was held bad on the ground that it did not show that the plaintiffs were entitled to the flow or enjoyment of the benefit of the water. *Laing v. Whaley*, 3 H. & N. 675, 901; reversing 2 H. & N. 476.

<sup>1</sup>*Sly v. Mordant*, 1 Leon. 247; *Jackson v. Savage*, Skinner, 316; *Sand v. Trefuses*, Cro. Car. 575; *Glyn v. Nichols*, Comb. 43; *Rutland v.*

*Bowler*, Palm. 290; *Heblethwaite v. Palmer*, Carthew, 85; 3 Mod. 48; 3 Lev. 133; *Fentiman v. Smith*, 4 East, 107; *Bealey v. Shaw*, 6 East, 208; *Northam v. Hurley*, 1 El. & Bk. 665; *Hoare v. Dickinson*, 2 Ld. Raym. 1568; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420, 432. See 2 Wm. Saund. 115, note 1 (to *Coryton v. Lithebye*). In an anonymous case, Cro. Car. 499, which was an action for diverting an ancient watercourse, it was held unnecessary to show title by prescription or otherwise.

<sup>2</sup>See *ante*, § 377.

<sup>3</sup>For precedents of forms of declaration for injuries affecting waters and watercourses, see 2 Chitty Pl. (16th Am. ed.), 624-631; 2 Chitty's Precedents, 600-610.

<sup>4</sup>*Russell v. Handford*, 1 Leon. 273.

<sup>5</sup>*Hart v. Evans*, 8 Penn. St. 13. Coulter, J., here said: "The possession of the plaintiff below is sufficiently set out. The averment is that the plaintiffs were at the time of the torts committed 'seized in their demesne as of fee.' Seisin includes possession. It is true there is also seisin in law, and that would be sufficient to maintain this action; and



§ 477. *Same—Same.*—The plaintiff's possession must be alleged to be at the time of the wrong done; but possession at the time of action brought is unnecessary, and the averment "*still is possessed*" may be rejected as surplusage.<sup>1</sup> While the plaintiff is at liberty to declare generally upon his possession, yet if he undertakes to set out a title, and does it insufficiently, the declaration is bad.<sup>2</sup> But an allegation that the plaintiff is entitled to the use of water in a convenient and customary manner is held not an allegation of a prescriptive right to be proved; and in a complaint for the unreasonable detention of water, the averment that the plaintiff is entitled to use the stream without hindrance or interruption is held not a declaration upon an exclusive right, but only the right incident to the ownership of land through which the stream passes.<sup>3</sup>

actual and corporal seisin. But when an individual avers that he was seized, we may take it for granted that he was in possession, as the words will import that state of facts. But I am not to be understood as intimating that it was necessary to state an actual *pedis possessio*, or to prove it, in order to enable the plaintiffs to maintain this action. It was an injury to the freehold as well as to the actual possession." This case seems to hold (1) that the averment of seisin will be taken to imply possession; (2) that seisin in law is sufficient to maintain the action *for injuries to the freehold*; and is apparently pregnant with the proposition that seisin in law is not sufficient to maintain the action for injuries *not affecting the freehold*. The injury in the preceding case was diversion from a mill, necessarily affecting the freehold. But where the plaintiff attempted to charge the defendant with the duty of cleansing a drain, it was held that the words "owner and proprietor" did not import that the defendant was the occupant of the

premises. *Russell v. Shenton*, 3 Q. B. 449.

<sup>1</sup> *Vowles v. Miller*, 3 Taunt. 137. So where the plaintiff alleged that his watercourse ran through his land prior to the injury, without alleging a continuance of the flow, it was held that the continued flow would be presumed. *Stone v. Bromwich*, Yelv. 161.

<sup>2</sup> *Dorne v. Cashford*, 1 Salk. 363; *Crowther v. Oldfield*, 1 Salk. 365; 2 Ld. Raym. 1225, 1230. And see 1 Wms. Saund. 346a (note to *Mellor v. Spateman*); Notes to Saund. 625; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420, 432.

<sup>3</sup> *Twiss v. Baldwin*, 9 Conn. 291. See *Avon Manuf. Co. v. Andrews*, 30 Conn. 476. At common law a verdict would cure a title imperfectly stated, but would not cure a defective title, or the omission to state any title. 1 Wms. Saund., notes to *Stennel v. Hogg*; 2 Wms. Saund., notes to *Barber v. Fox*. Allegations of diversion and of digging the soil are not improperly joined when the digging is only the means used for diverting

§ 478. **Same—Same.**—The plaintiff must state his title sufficiently, if at all, but is not bound to prove the same title as he alleges; “for the disturbance is the gist of the action, and the title is only inducement, and cannot be traversed.”<sup>1</sup> But he is required to prove the right which he alleges is infringed, as laid. Where the plaintiff declared that he was possessed of a mill, whereby he was entitled to enjoy a watercourse which had been accustomed to flow to his mill, and the evidence showed that he owned land along an ancient stream, but that his mill was a new mill, as to which the jury found no right, it was held that the declaration would not support a recovery. The right declared on was that of an ancient appropriation; the right proved was that of an ordinary riparian proprietor, which in no way supported the declaration.<sup>2</sup> Where the plaintiff in case for diversion alleged, as a reversioner, a right to the flow of water to three ponds, and the evidence showed that he had an immemorial right to the flow of water to an ancient pond, but had turned the water into three new ponds, and that his right in respect to these was barred by an outstanding life estate, it was held that he might recover under the declaration in respect to his right to the flow of water to the ancient pond.<sup>3</sup> In averments describing his right great accuracy was required of the plaintiff, and any substantial variance was held fatal to recovery. A general description of the course of a stream was sufficient, but if he attempted to describe it by metes and bounds, he must do it accurately.<sup>4</sup> Where he declared that he was entitled to all the water above a certain mark, whereas he was only entitled to the surplus of such water, after a prior use, the variance was fatal;<sup>5</sup> and the same rule was applied where the plaintiff described a dam as located below his land, and it was proved to be adjoining and

the water. *Grand Rapids W. P. Co. v. Bensley*, 75 Wis. 399. As to misjoinder of causes of action, see *Hodges v. Wilmington R. Co.*, 105 N. C. 170; *Bellant v. Brown*, 78 Mich. 294.

<sup>1</sup> Buller, N. P. 76, 7th ed.; *Ferrer v. Johnson*, Cro. Eliz. 336. “He must prove the same right, but he need not

prove the same title.” *Gale on Easements* (5th ed.), 672.

<sup>2</sup> *Frankum v. Falmouth*, 2 A. & E. 452; 4 Nev. & Man. 330.

<sup>3</sup> *Hale v. Oldroyd*, 14 M. & W. 789.

<sup>4</sup> *Hall v. Swift*, 6 Scott, 167. See *Idaho Imp. Co. v. Bradbury*, 132 U. S. 509.

<sup>5</sup> *Wilbur v. Brown*, 8 Den. 356; *Beckwith v. Griswold*, 29 Barb. 294.

partly on his land.<sup>1</sup> So an averment that the plaintiff was possessed of land, by reason of which he had a right to the use of water running in a tunnel to his mill, is not supported by proof that the tunnel was on the defendant's land, and that the plaintiff was using the water under a parol license and contract to convey.<sup>2</sup> But where the plaintiff alleged a greater right than he possessed, but of the same kind, the variance was not fatal. So where the plaintiff alleged that he was entitled to the free course of the stream, and that the defendant unlawfully increased the height of his dam, and inundated the plaintiff's mill, and the evidence showed that the parties' rights were subject to an agreement that during a scarcity of water the defendant was entitled to all the water during three days out of four, and the plaintiff to all the water on the fourth day, it was held that the injury to the plaintiff on the days when he was entitled might be proved under the declaration.<sup>3</sup> In most of the States as well as in England, the statute of amendments is so liberal that the distinctions as to variance have become unimportant.<sup>4</sup>

§ 479. *Same — Same.*— It is settled in both countries that the reversioner must state the nature of his interest, and allege an injury of such a character as to be necessarily injurious to the freehold, or else must aver in terms and prove that the

<sup>1</sup> *Brown v. Woodworth*, 5 Barb. 650.

<sup>2</sup> *Fentiman v. Smith*, 4 East, 207. See *Hewlins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783. So an allegation that, by reason of a dam, substances brought down the stream were collected and corrupted the water, was held sustained by proof that the injury resulted from the alternate rise and fall of the stream, and from the action of the sun upon the water. (Bronson, J., dissenting.) *People v. Townsend*, 3 Hill (N. Y.), 479. Where a petition alleged a contract in writing respecting lands on the southwest bank of the Sabine River, and the contract when produced was found to describe the land as on the Sabine River only, it was held that there was

no variance, as the petition did not purport to recite the words of the contract and the descriptions did not vary as to the locality of the action. *Sublett v. Kerr*, 12 Texas, 366. An averment that the plaintiff's mill, alleged to be obstructed, is "on" the watercourse does not amount to an allegation that he is a riparian owner, which would be at variance with the extent of his real ownership. *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236.

<sup>3</sup> *Burdick v. Glasko*, 18 Conn. 494. See *Brickner Woolen Mills Co. v. Henry*, 73 Wis. 229.

<sup>4</sup> For the English statute, see L. R. 10 Gen. Sts. 102 (*Judicature Act of 1875*; 38 and 39 Vict. ch. 77, Order xxvii).

act complained of injures his reversion.<sup>1</sup> Where the plaintiff declared as a reversioner of lands and buildings, which were injured by the defendant who had the lands adjoining, by erecting overhanging walls, it was held that the plaintiff must allege specifically that it was to the damage of the reversioner, or must state an injury of such a permanent nature as to be necessarily injurious to the reversion; and the allegations in that case (merely charging the injury by overhanging eaves, and not using the term reversion) were held insufficient.<sup>2</sup> In Massachusetts, in an action on the case for obstructing the plaintiff's use of his mills, the declaration alleged that the mills were leased, and that in consequence of the obstruction the tenants had threatened to quit, and the plaintiff had therefore been compelled to make a reduction in his rents. It was held that the declaration was sufficient, but that the last averment was necessary to show an injury to the reversion.<sup>3</sup> So, in case of diversion of water from a mill, the lessor cannot claim damages during the continuance of the lease without alleging diminution of rents.<sup>4</sup>

§ 480. Same — Same.— Where the plaintiff has different interests in possession and in reversion, he may recover in one action for an injury affecting both; but where the common-law system of pleading is retained, he must insert separate

<sup>1</sup> *Jackson v. Pesked*, 1 M. & S. 234; *Hale v. Oldroyd*, 14 M. & W. 789. And see *Alston v. Scales*, 9 Bing. 3; *Baxter v. Taylor*, 4 B. & Ad. 72; *Metropolitan Association v. Petch*, 5 C. B. N. S. 504; *Baker v. Sanderson*, 8 Pick. 348; *Noyes v. Stillman*, 24 Conn. 15. See *Sumner v. Tileston*, 7 Pick. 198; and *Tinsman v. Belvidere R. Co.*, 25 N. J. L. 255. The rule in *Jackson v. Pesked* is stated and followed in *Davis v. Jewett*, 13 N. H. 88, and *Potts v. Clarke*, Spencer (N. J.), 536.

<sup>2</sup> *Jackson v. Pesked*, 1 M. & S. 234.

<sup>3</sup> *Baker v. Sanderson*, 8 Pick. 348. Where the plaintiff had by descent a share in the reversion of his father's

lands, and had purchased the shares of the other heirs, and the widow held for life, he brought an action on the case for an injury to the land caused by stopping a watercourse flowing through it. He declared as "seized and possessed," and there was evidence that he held as tenant at will. *Shaw, C. J.*, held that he could maintain case for the injury and that he had sufficiently set forth his interest to recover for the damages to the reversion. *Ashley v. Ashley*, 4 Gray, 197. In *Sumner v. Tileston*, 7 Pick. 198, the declaration was in the same form, and the plaintiff recovered for present injury.

<sup>4</sup> *Moody v. King*, 74 Maine, 497.

counts.<sup>1</sup> Where the plaintiff declared in case for obstructing a stream and injuring his ferry franchise, and the declaration contained two counts, one by the plaintiff, as in possession, and the other as a reversioner for the injury to his reversionary estate, both counts were held good on general demurrer.<sup>2</sup>

§ 481. **Same — Allegation and proof of breach.**— In an action on the case for a nuisance, the injury may be alleged generally without describing the manner in which it was done.<sup>3</sup> Thus, in an action for diverting water and impeding navigation, Lord Ellenborough said: "It is sufficient to describe the substance of the injury in order to give the other party notice of what he is to defend; and it is sufficient in the form of pleading to allege the gravamen at any place within the body of the county."<sup>4</sup> Allegations of nuisance must be such allegations of fact as to show the nature of the nuisance on the face of the declaration, or it will be open to demurrer.<sup>5</sup>

§ 482. **Same — Same.**— At common law the plaintiff was bound by his own averments, and if he particularly described the alleged tort, he must prove it as described, and any substan-

<sup>1</sup> *Baker v. Sanderson*, 2 Pick. 848; *Davis v. Jewett*, 13 N. H. 88. In *Ashley v. Ashley*, *supra*, n. 3, and in *Woodbury v. Willis*, 50 Maine, 403, the recovery seems to have included damages to the present enjoyment and to the reversion, but no mention is made of more than one count.

<sup>2</sup> *Patrick v. Ruffners*, 2 Rob. (Va.) 309.

<sup>3</sup> 1 Chitty Pl. 406; Com. Dig. Action on the Case for Disturbance, B (1); *Anon.*, 8 Leon. 13; *Prickman v. Tripp*, Skin. 389. In an anonymous case, in 1 Ld. Raym. 452, it was held that such a general averment of obstruction was good after verdict, but it was questioned whether it would be good on demurrer.

<sup>4</sup> *Mersey Nav. Co. v. Douglas*, 4 East, 497. In *Tebbutt v. Selby*, 6 A. & E. 786, 793, Patteson, J., said: "If the charge were simply that the use

was obstructed, I think that would not be enough; such an allegation might mean an imprisonment, or any other way of impeding." But the common law is undoubtedly as stated by Lord Ellenborough. See *Stein v. Ashby*, 24 Ala. 521.

<sup>5</sup> 2 Saund. Pl. & Ev. (5th Am. ed.) 471; *Anon.*, Ld. Raym. 452. So in an action against an upper riparian owner for diverting a stream, the plaintiff must allege diminution and injury to himself. *Burden v. Mobile*, 21 Ala. 309. A complaint alleging the wrongful cutting of a ditch and the consequent flowage of the plaintiff's premises was held good on demurrer. It described the injury with sufficient certainty, and there was nothing to show that the flowage was by surface-water (which would not be a cause of action). It was not necessary for the plaintiff to

tial variance was ground for non-suit.<sup>1</sup> So at the present day, the plaintiff cannot allege one kind of nuisance and prove another.<sup>2</sup> Where the owner of a paper-mill declared that earth, sand, and other substances were washed into his mill-dam, and so filled and choked the pond as to make it in a great degree useless to him in the working of his mill, it was held that under this count he could not prove that the acts complained of made the water useless for washing rags.<sup>3</sup> So in the description of the injury, an allegation that the defendant placed obstructions in a ditch has been held not proved by evidence that materials were placed near the ditch, which were afterwards trodden and fell into the ditch.<sup>4</sup> And a count for diverting water has been held not sustained by proof of penning it back and causing it to overflow the plaintiff's meadow.<sup>5</sup> But a count for diverting water and preventing it from running along its usual course has been held sustained by proof that the water was prevented from being regularly supplied to the plaintiff's mill, although there was no diversion from the mill.<sup>6</sup>

§ 483. *Same—Same.*—If there is a defective statement of a valid claim, but the statement renders it necessary to establish facts, which if established would support the claim in the

deny that the flowage was by surface-water. *Ramsdale v. Foote*, 55 Wis. 557. It is a variance to declare for the destruction of a natural watercourse, and to prove at the trial damages by the flow of surface-water. *Munkers v. Kansas R. Co.*, 10 Mo. 384. See *Illinois R. Co. v. Fehringer*, 82 Ill. 129.

<sup>1</sup> 1 Chitty Pl. 407.

<sup>2</sup> *O'Brien v. St. Paul*, 18 Minn. 176; *Taylor v. Keeler*, 50 Conn. 346; 51 Conn. 397.

<sup>3</sup> *Ellicott v. Lamborne*, 2 Md. 131. See *ante*, § 346.

<sup>4</sup> *Fitzsimmons v. Inglis*, 5 Taunt. 534. In an early case, it was held that a count for breaking the bank of a stream was not sustained by proof of breaking a dam. *Biccot v. Ward*, Hob. 193.

<sup>5</sup> *Griffiths v. Marson*, 6 Price, 1.

<sup>6</sup> *Shears v. Wood*, 7 Moore, 345. But where the plaintiff declared that he was possessed of an adjoining close used as a private road, and that the defendant constructed a sewer in his close, and thereby diverted water from the plaintiff's pond, *Tindal, C. J.*, held that the averment that the defendant's close was used as a road was immaterial and need not be proved. *Dukes v. Gostling*, 1 Bing. N. C. 588. The Common Law Procedure Act of 1852 (15 and 16 Vict. ch. 76, Schedule B. R. 80) prescribed the following form for alleging the right and the breach: "That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant, by cutting



writ, the defect, though it might be fatal on demurrer, is cured by the verdict.<sup>1</sup> Where the complaint was for wrongful diversion by the defendant, and the evidence showed a diversion, but that he provided means for returning the water to the stream above the plaintiff's lands, and that the return was prevented by the act of another person, it was held that the allegations were sufficient, and that there was no material variance.<sup>2</sup> But under a declaration for obstructing the natural flow of a stream, "which had theretofore run and flowed," "and of right ought to run and flow freely," no recovery can be had for injuries caused by the improper construction of an authorized dam.<sup>3</sup>

§ 484. *Same — Same.*— The plaintiff is not bound to prove as great an injury as that alleged, but only to prove an injury of the kind charged, sufficient to constitute a cause of action.<sup>4</sup> In an action for flowing the plaintiff's land, where it was alleged that the defendant unlawfully erected and kept up a certain dam, and the proof offered was that he kept the gates or sluices in the dam shut when he should have kept them open, and thereby caused the injury complained of, it was held that there was no variance. Redfield, J., in delivering the opinion, said: "He must prove the very injury of which he complains, but not to the full extent. If he alleges the dam to be ten feet high, or unlawfully erected, or wholly unlawful, he may recover upon showing it five feet high, or unlawfully continued or repaired, and made tighter or higher, so that in

the bank of the said stream, diverted the water thereof away from the said mill."

<sup>1</sup> 1 Saund. 220, note (1) to *Stennel v. Hogg*; Notes to Saund. 260. So on an application for a *mandamus* the prosecutor complained that the defendants, as trustees of navigation, had charge of a lock, weir, and clows in a stream near his land, that the water was increased by rains, and the clows were not sufficiently raised to let off the water, whereby he suffered damage, but did not allege that the effect of the works was to raise the water higher than it would have been

if they had not existed. The issue on the return and pleadings was whether the damage was caused by the navigation and works. It was held that, although the allegations might have been insufficient on demurrer, the defect was cured by the verdict. *Delamere v. The Queen*, L. R. 2 H. L. 419.

<sup>2</sup> *Stein v. Burden*, 29 Ala. 127.

<sup>3</sup> *Wood v. Rice*, 24 Mich. 523; *Jones v. Loomis*, 19 Mo. App. 234.

<sup>4</sup> In *Luttrell's Case*, 4 Co. Rep. 89 a, it was held that the amount of diversion was immaterial.

fact it is but partly unlawful. If any portion of the dam is unlawfully erected or kept up, and it cause an injury to the plaintiff of the kind he complains of, he may recover."<sup>1</sup> But, as we have already seen, a variance is now easily corrected under the statutes of amendments.<sup>2</sup>

§ 485. *Same — Same.*—The rule that a tort cannot be proved upon an allegation in an action *ex contractu* applies to actions for injuries to rights in waters. Under a complaint against the alienee of the grantor of an easement of taking water from a pond, the plaintiff cannot recover for the defendant's tortious interference with his rights in such water. In New York, this rule has not been changed by the adoption of the code.<sup>3</sup>

§ 486. *Same — Same.*—It is a general principle that damages should always be alleged in personal actions. But an action will lie for any infringement of the plaintiff's rights although no special damage be caused.<sup>4</sup> It follows that in such cases no special damage need be alleged.<sup>5</sup> And it is equally well settled that general damages such as the law implies from the tort complained of need not be alleged.<sup>6</sup> But if the plaintiff claims any special damages, it is necessary to allege them with sufficient definiteness to inform the defendant of the nature of his claim.<sup>7</sup> The loss of rents occasioned by a nuisance is a special damage, and cannot be proved unless specially alleged.<sup>8</sup>

<sup>1</sup>Hutchinson v. Granger, 13 Vt. 386. So under a count for diverting and preventing water from coming to a mill, leakage and wastage may be shown. Wier v. Covell, 29 Conn. 197.

<sup>2</sup>See *ante*, § 478. In Morris v. McNamee, 17 Penn. St. 173, the plaintiff was allowed to amend a declaration for obstruction and diversion by the addition of a clause alleging that the defendant, during the same time, unlawfully discharged the water of the stream, so that it came upon the premises of the plaintiff at unreasonable times and in unreasonable quantities; and this amendment was held

proper to be made at the trial after a reference to arbitration, award for the defendants and appeal by the plaintiff.

<sup>3</sup>Beard v. Yates, 2 Hun, 466.

<sup>4</sup>*Ante*, § 401.

<sup>5</sup>1 Chitty Pl. 411. See Pastorius v. Fisher, 1 Rawle, 27.

<sup>6</sup>Richards v. Hill, 1 Ld. Raym. 102; Hutchinson v. Granger, 13 Vt. 386.

<sup>7</sup>1 Chitty Pl. 411; Solms v. Lias, 16 Abb. Pr. 311; Moline Water Power Co. v. Waters, 10 Brad. (Ill.) 159.

<sup>8</sup>Parker v. Lowell, 11 Gray, 358; Plimpton v. Gardiner, 64 Maine, 360; Potter v. Froment, 47 Cal. 165.

§ 487. **Same — Same.**— At common law the plaintiff might set forth his cause of action in several counts, with substantial variations, so that if he failed on one, he might succeed on another. The right to declare in several counts has been modified and limited in almost all jurisdictions where the common law prevailed, and in many abolished. The law upon this subject is stated at length in the books on procedure; but a discussion of it here would be foreign to our purpose.<sup>1</sup>

§ 488. **Same — Defences and pleas.**— In actions on the case for nuisances, as in other actions on the case, the general issue of “not guilty” was at common law a simple denial that the plaintiff was entitled to judgment, and under it anything might be given in evidence which tended to defeat the plaintiff’s claim.<sup>2</sup> This was an extension of the scope of the plea which on principle should have been confined to a traverse or denial of the *facts* alleged in the declaration.<sup>3</sup> But under this rule the plaintiff was at liberty to introduce evidence denying the plaintiff’s title, or of a license, or accord and satisfaction, or a former recovery, or any defensive matter. And in jurisdictions retaining the common-law rules in their completeness,

<sup>1</sup>See 1 Chitty Pl. (16th ed.) 424. Woolrych (p. 898) says: “Other counts varying the matters charged against the defendant are commonly introduced. For example, there may be one alleging a general diversion of the water without showing the means; another for widening cuts from the stream, etc.; and a count for not keeping the banks of the river in repair is said to be proper in order to avoid a risk, namely, of not being able to show that the defendant made the cuts or channels stated in the first count. The above may suffice as an example of the declarations on this subject, but there are many others in which the causes of complaint and the resulting injuries may be infinitely diversified.” Under the N. Y. Code of Civil Procedure it was held on demurrer, in an action

against a railroad company, improper to unite two causes of action, one for damages for an erection by the defendant on its land, being an injury to real property, the other for breach of duty in refusing to erect and maintain a farm crossing, this being “upon contract.” *Thomas v. Utica R. Co.*, 97 N. Y. 245.

<sup>2</sup>1 Chitty Pl. (2d Am. ed.) 486; (12th Am. ed.) 491; 1 Tidd Pr. (3d Am. ed.) 651; 3 Dane Abr. 56.

<sup>3</sup>Stephen, Pl. 177. And see Metcalf’s note, Yelv. 147b, n. 1. Lord Mansfield assigns as a reason for this extension, that the action on the case is “in the nature of a bill in equity,” “because the plaintiff must recover upon the justice and conscience of his case.” *Bird v. Randall*, 8 Bur. 1858. And this is repeated in the books.

this is still the law.<sup>1</sup> So where the defendant pleaded to a declaration for diversion, that the stream sprung from his ground, and that he had a prescriptive right to fill certain pits therefrom, which becoming filled up, he had dug others instead, which he had filled from the stream, and denied diverting any water, except in this way, the plea was held bad, as amounting to the general issue.<sup>2</sup>

<sup>1</sup> *Plowman v. Foster*, 6 Coldw. 52; *Puterbaugh's Practice* (Ill.), 1880, 489.

<sup>2</sup> *Brown v. Best*, 1 Wils. 174. In England the new rules of pleading provided: "In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact, alleged in the declaration. *E. g.*, in an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way." Hilary Term. 4 Will. 4, 1834; 5 B. & Ad. i. In the rules of Hilary Term, 1853, rule 16, on the same point, was substantially the same as this. See 17 Jur. Part II., pp. 168, 170. Where the plaintiff alleged that he was possessed of a water-mill, and by reason thereof ought to have had a stream of water running to his mill, yet that the defendant wrongfully diverted "the said stream," it was held that, under these rules, the word

*wrongfully* did not put the title in issue. *Frankum v. Falmouth*, 2 A. & E. 452. To same effect see *Blood v. Keller*, 11 Ir. C. L. (1860) 182. In *Dukes v. Gostling*, 1 Bing. N. C. 588; 1 Scott, 570; 3 Dowl. 619, in an action for diverting water from the plaintiff's pond, it was held that the plea of not guilty put in issue the fact of diversion only, and admitted the matters alleged by way of inducement. But under these rules "not guilty" put in issue both the act complained of and its consequences. So, in an action for erecting a cesspool near a well, and thereby contaminating the water of the well, the plea of not guilty was held to put in issue both the fact of the erection of the cesspool, and that the water was thereby contaminated. *Norton v. Scholefield*, *per Parke*, B. 9 M. & W. 665; s. c. 1 Dowl. N. S. 638. Where a local company was authorized to enter on lands and sink wells to obtain a supply of water for a town, not depriving the occupiers of the lands of water for their own necessary uses, and such company complained against an occupier for diversion, the court (*per Parke*, B.) held that under the plea of not guilty, and a plea denying the plaintiffs' right, the defendant might make the defence that within twenty years after the discovery of the spring by the plaintiffs, he had sunk a well, and used the water in a manner and for purposes not prohibited by the act. *South Shields Water Works Co. v. Cookson*, 15 L. J. Ex. 315.

§ 489. *Same — Same.*— In New York it is held that a general denial, pleaded in an action for the wrongful diversion of water, does not draw in question the title to the premises.<sup>1</sup> But in an action of trespass, on appeal from a justice's court, for removing gates from a raceway, it was held that the defendant might show under a general denial, that the raceway ran through his land, which could be rebutted only by proof of an easement, and that this would involve title, which would oust the justice's jurisdiction.<sup>2</sup> Where trespass is brought for flowage, if the defendant relies on a license, it must be pleaded specially, and cannot be proved under the general issue; but it is sufficiently pleaded, if the facts constituting the license are averred.<sup>3</sup> A plea of license to divert does not draw in question the title to the premises.<sup>4</sup>

§ 490. *Same — Same.*— In trespass a prescriptive right to a watercourse, or in respect of any use of waters, must be pleaded specially;<sup>5</sup> and at common law it was necessary to show who was seized in fee of the land in respect of which it was claimed, and then to aver that immemorially all the ancestors of the party so seized were entitled to, and from time to time actually exercised the right; and the title was required to be pleaded with exactness.<sup>6</sup>

§ 491. *Same — Same.*— A prescription cannot be pleaded against a prescription without a traverse of the plaintiff's right. This was decided in an action for the diversion of a watercourse in which the plaintiff claimed a prescriptive right

<sup>1</sup> Rathbone v. McConnell, 21 N. Y. 466.

<sup>2</sup> O'Donnell v. Brown, 3 Lana. 474. In another case, appealed from a justice's court, it was held that the question where a stream ought to run (in trespass for entry to abate a nuisance and restore a diverted stream to its channel) did not involve title. Bowyer v. Schofield, 1 Abbott, N. Y. Ct. of Ap. 177; s. c. 2 Keyes, 638. But the question whether one party has a prescriptive right to use a well on the premises of another involves title. Gage v. Hill, 48 Barb. 43.

<sup>3</sup> Lockhart v. Geir, 54 Wis. 133.

<sup>4</sup> Rathbone v. McConnell, 21 N. Y. 466.

<sup>5</sup> 1 Chitty Pl. (16th ed.) 541.

<sup>6</sup> Ibid. And see Gale on Easements (5th ed.), 677; 1 Wms. Saund. 346n; 1 Notes to Saund. 624. By the Prescription Act, 2 & 3 Wm. 4, ch. 71, it was provided that it shall be sufficient to allege the enjoyment of such rights as of right, by the occupiers of the tenement in respect of which it is claimed, for the required periods, without setting out the title of the fee.

to the flow of the water, and the defendant set up a prescription to maintain a ditch on his land.<sup>1</sup> A plea of prescriptive right in respect of a mill, to use the water of a canal for generating steam and supplying a cistern, was held divisible where the evidence supported the right for the former purpose, but not for the latter.<sup>2</sup> Where the defendant in one plea claimed the right to have water flow from a mill-stream to a ditch at all times, and in another plea claimed the right only at times when the stream was increased by certain water called "flash water," and the jury found the right in his favor at all times, the finding was held to include the right claimed by the other plea, and the jury was discharged as to it.<sup>3</sup> Where the defendant relies on an easement, the plaintiff may defeat it by showing that the defendant held the estates by unity of possession without a special replication to that effect.<sup>4</sup>

<sup>1</sup> *Murgatroyd v. Law*, Carthew, 116. The Hilary Rules (4 Will 4, 1834) provided that in all actions in which a right of way or other similar right is so pleaded, if the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively. This was held to apply to the case of a claim of right to pass and repass for the purpose of carrying water and goods, where the jury affirmed the right so far as it related to the carrying of water, but negatived it as to the rest. *Knight v. Moore*, 8 Scott, 326; 8 Bing. N. C. 3.

<sup>2</sup> *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287.

<sup>3</sup> *Drewett v. Sheard*, 7 C. & P. 465.

<sup>4</sup> *Clay v. Thackrah*, 9 C. & P. 47, where easement of way was claimed; *Only v. Gardiner*, 4 M. & W. 496. For a form of pleas denying the plaintiff's right to the water, see *Thomas v. Thomas*, 2 Cr. M. & R. 37. For form of plea of immemorial right at common law to discharge water from a tan-yard into a stream, see *Moore v. Webb*, 1 C. B. N. S. 673. Of a prescriptive right to throw refuse and

cinders into a stream, *Murgatroyd v. Robinson*, 7 El. & B. 391; *Carlyon v. Lovering*, 1 H. & N. 784; s. c. 26 L. J. Ex. 251. Under the Prescription Act (2 & 3 Will 4, ch. 71) of prescriptive right to lower a weir for the purpose of irrigation, *Ward v. Robins*, 15 M. & W. 237. Of a prescriptive right to discharge noxious water into a stream, *Wright v. Williams*, 1 M. & W. 77. Of a prescriptive right to scour and amend the channel of a watercourse, *Peter v. Daniel*, 5 D. & L. 501. In justification of a trespass, because the defendants had, as occupiers of a mill, an easement of going upon the close to repair the banks of a stream which flowed to the mill, *Clay v. Thackrah*, 9 C. & P. 47. In justification of the obstruction of a watercourse, because the plaintiff thereby wrongfully discharged water upon the defendant's land, *Roberts v. Rose*, L. R. 1 Ex. 82. For other forms of pleas, see 2 Chitty Pl. (16th ed.) 733. By the Supreme Court of Judicature Act of 1873, 36 & 37 Vict. ch. 66, Schedule "Rules of Procedure," R. 1 (L. R. 8 Gen. Sta. 350), one form of action is substituted for the dif-



§ 492. **Evidence.**—In order to recover, the plaintiff must prove his right and the injury caused by the defendant. His right may be in possession or reversion, or it may be an incorporeal right; but he must prove the right which he has alleged, and in respect of which he has brought suit. The subject of variance has been already considered under the subject of pleading.<sup>1</sup> As the defendant may defeat the action by proving a right in himself, the same rules will apply to evidence of right in either party.

§ 493. **Same.**—Evidence of a similar injury to other persons or tracts of land is within the rule excluding *res inter alios acta*, unless it is shown that all the conditions of the two events are the same. Where the injury was caused by removing stones from a river, in consequence of which the river washed away the plaintiff's land, evidence that the removal of stones at another place on the river had produced the same effect was excluded.<sup>2</sup> So evidence showing the effect of re-

ferent forms employed at common law. In the Judicature Act of 1875, 38 & 39 Vict. ch. 77, First Schedule, Order XIX., r. 20 (L. R. 10 Gen. Sts. 797), it is provided: "It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth."

<sup>1</sup> See *ante*, § 478. The plaintiff has a right to support his cause by proof of the facts stated in his declaration, whether they are sufficient in law to entitle him to recover or not; and this can only be prevented by a demurrer. So the plaintiffs should be allowed to prove a corruption of a stream as alleged, although it may be shown by the defendants to be no ground for making them liable, if the issue has not been framed so as to

render such proof unnecessary. *Howell v. McCoy*, 3 Rawle, 256.

<sup>2</sup> *Hawks v. Charlmont*, 110 Mass. 110. For applications of the rule to payments for the flowage of other lands, see *Tyler v. Mather*, 9 Gray, 177; *Ellis v. Harris*, 32 Gratt. 684. Where the plaintiff claimed the whole of the bed of a river running between his land and that of the defendant, the plaintiff was allowed to give evidence of acts of ownership by him lower down the stream, where the river flowed between his land and that of a third person which adjoined the defendant's land; and of repairs done to a fence along the river bank, dividing the third person's land from the river, which was in continuation of a fence dividing the defendant's land from the river. *Jones v. Williams*, 2 M. & W. 326. Injuries to the plaintiff by his own dam cannot be shown in bar or mitigation. The doctrine of contributory negligence does not apply.

moving other dams on other rivers is inadmissible upon the issue whether land was injured by maintaining a certain dam.<sup>1</sup>

§ 494. *Same.*—Damage need not be shown where the injury is to a private right,<sup>2</sup> but must be for injuries to an individual by a public nuisance;<sup>3</sup> and we have considered the time to which damages should be computed.<sup>4</sup> Evidence of special damage is admissible only when such damage is alleged.<sup>5</sup> Damages must be connected with the injury complained of. In an action for damages by the erection of an embankment cutting off the plaintiff's land from the river, it was held that the plaintiff might show the prevention of deposit of enriching sediment by the entire embankment, and not simply by that portion in front of his land.<sup>6</sup>

§ 495. *Same.*—The rule excluding evidence of opinion is applied to matters of damage. Expert testimony involving special knowledge is usually competent to show the effect of erecting a dam upon the channel of the stream and in causing backwater.<sup>7</sup> But opinions of witnesses as to the amount of damages caused by the deprivation or withdrawal of water from a tavern,<sup>8</sup> or in an action for flowage, as to the amount of damage sustained, have been held inadmissible.<sup>9</sup> Matters which do not require scientific attainments or unusual skill, such as the capacity of a ditch to carry water, may be estab-

Clarke v. French, 123 Mass. 419;  
Brown v. Dean, 123 Mass. 254. So  
the plaintiff is entitled to free navigation though he himself obstructs the stream. Such obstruction cannot be shown in bar. Olsen v. Merrill, 43 Wis. 203.

<sup>1</sup> Lynn v. Thomson, 17 S. C. 129. So of another judgment between another plaintiff and the same defendant for a similar injury at about the same time. Burdick v. Norwich, 49 Conn. 225. So also as to the value of other seaside property. Huntington v. Attrill, 118 N. Y. 365. See Omaha R. Co. v. Brown, 16 Neb. 161.

<sup>2</sup> *Ante*, § 401.

<sup>3</sup> *Ante*, § 122.

<sup>4</sup> *Ante*, § 411.

<sup>5</sup> Ellicott v. Lamborne, 2 Md. 181; McTavish v. Carroll, 13 Md. 429; Solms v. Lias, 16 Abb. Pr. 311.

<sup>6</sup> Concord R. Co. v. Greely, 23 N. H. 287. So where the defendant has cut away the portion of the plaintiff's land abutting upon a lake, and made it liable to be washed away, the plaintiff may recover the cost of a retaining wall. Thompson v. Milwaukee Ry. Co., 27 Wis. 93; Price v. Milwaukee Ry. Co., 27 Wis. 98.

<sup>7</sup> Ball v. Hardesty, 38 Kansas, 540; Butterfield v. Gilchrist, 63 Mich. 155.

<sup>8</sup> Harger v. Edmonds, 4 Barb. 256; Winter v. Fulstone, 20 Nev. 260.

<sup>9</sup> Sinclair v. Roush, 14 Ind. 450.

lished by competent testimony and opinions other than those of persons who are strictly experts.<sup>1</sup> And in Ohio, it was held that a person who was present during the trial of a cause, and heard witnesses describe the manner in which a ford was injured by the erection of a dam across the stream below the ford, could not be allowed to give his opinion of the damages sustained by the plaintiff.<sup>2</sup> If the finding of damages by the jury is excessive, it is ground for allowing a new trial.<sup>3</sup> But if the jury merely compute the damages for too long a time, and the excess is ascertainable, the plaintiff may have judgment by remitting the excess.<sup>4</sup> A verdict will not be set aside as against the weight of evidence, where the witnesses on one side satisfactorily prove that a dam has not been raised, and those on the other prove that the water in it is higher, when the raising of the water, as found by the verdict, can be accounted for by other alterations in the dam.<sup>5</sup>

§ 496. *Same.*—The evidence for the defendant may of course be either in rebuttal of the plaintiff's case, or in support of his own. If he relies on a license, it may be proved by parol.<sup>6</sup> A parol license to erect a mill-dam, by which the lands above will be covered with water when executed, has been held binding on all subsequent purchasers of the lands affected.<sup>7</sup>

<sup>1</sup> *Frey v. Lowden*, 70 Cal. 550. See, also, *Stead v. Worcester*, 150 Mass. 241; *Smith v. Sabine*, 76 Texas, 63; *Van Wicklyn v. Brooklyn*, 118 N. Y. 424; 41 Hun, 418; *Weidekind v. Tuolumne County W. Co.*, 83 Cal. 198; *Yost v. Conroy*, 92 Ind. 464; *Gulf Ry. Co. v. Locker* (Texas), 14 S. W. 611; *Moore v. Chicago Ry. Co.* (Wis.), 47 N. W. 273; *Chicago Ry. Co. v. Donelson* (Kans.), 25 Pac. 584; *Byre v. Minneapolis Ry. Co.*, 29 Minn. 200; *Couch v. Charlotte R. Co.*, 22 S. C. 557; *Spear v. Drainage Com'rs*, 113 Ill. 632; *Wight F. P. Co. v. Poczekai*, 130 Ill. 139; *Brown v. Doubleday*, 61 Vt. 523; *Thompson v. Penn. R. Co.*, 51 N. J. L. 42; *Burwell v. Sneed*, 104 N. C. 118.

<sup>2</sup> *Shepherd v. Willis*, 19 Ohio, 142.

<sup>3</sup> A finding of £3,000 for the diversion of a stream was held excessive by the court of King's Bench on certain facts, and a new trial ordered. *Pleydell v. Dorchester*, 7 T. R. 529.

<sup>4</sup> So ruled in a flowage case. *Hodges v. Hodges*, 5 Met. 205.

<sup>5</sup> *Morris Canal and Banking Co. v. Seward*, 3 Zab. 219.

<sup>6</sup> *Addison v. Hack*, 2 Gill, 221.

<sup>7</sup> *McKellip v. McIlhenny*, 4 Watts, 817. In *Liggins v. Inge*, 7 Bing. 682, where the plaintiff's father, by oral license, permitted the defendants to lower the bank of a river and make a weir above the plaintiff's mill, whereby less water flowed to the plaintiff's mill than before, which

§ 497. **Same.**— Under a denial of the injurious consequences of the act complained of, the defendant may show that the volume of the stream has not been diminished or its quality changed.<sup>1</sup> So where water was diverted to a reservoir and mixed with other water obtained from the earth, and the whole after being used for a steam-engine was returned to the river, Baron Alderson said: “I left it to the jury to say whether the same quantity of water continued to run in the river, as if none of its water had entered the premises of the defendant; telling them, that if they were of that opinion, they should find a verdict for the defendant.”<sup>2</sup> But the de-

proving injurious, the father had, after a lapse of five years, requested them to restore the banks to the former level, it was held that no action could be maintained against the defendants for continuing the weir. Tindal, C. J., said: “It is a license to do something that, in its own nature, seems intended to be permanent and continuing. And it was the fault of the party himself, if he meant to reserve the power of revoking such a license after it was carried into effect, that he did not expressly reserve that right when he granted the license, or limit it as to duration. Indeed, the person who authorizes the weir to be erected becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect.” In *Fitch v. Seymour*, 9 Met. 462, the action was by a purchaser whose land was flowed under an oral agreement and license from the plaintiff's grantor. It was brought for a breach of a covenant against incumbrances by such flowage. The court held that the agreement could not bind the estate as to future damages, not being in writing, and that the flowage was therefore no breach of the covenant, and the party flowing the land was liable for such dam-

ages to the present owner. The Mill Act there gave annual damages for flowage, recoverable by successive actions.

<sup>1</sup> *Embrey v. Owen*, 6 Exch. 353.

<sup>2</sup> *Dakin v. Cornish*, stated by Alderson, B., in *Embrey v. Owen*, 6 Exch. 360. So in *Elliot v. Fitchburg R. Co.*, 10 Cush. 191 (a case for diversion), the defendants offered evidence tending to prove that one Clark, under whom they claimed, had cut ditches through his meadow, which was wet and spongy, to the brook, thereby increasing the flow of water to the brook; and it was further proved that there was no outlet for the water of the meadow, except into the brook below the dam complained of. Metcalf, J., instructed the jury that if, by these ditches, the flow of water was increased equal to the quantity taken out by the defendants, then the defendants were not liable on appeal. Shaw, C. J., said: “The question was not if the defendants had caused a damage to the plaintiff, amounting in law to a disturbance of his right, for which an action would lie, whether it would be barred by an advantage of equal value, conferred in nature of a set-off; but whether by the improvements of Clark upon his meadow, taken together as a whole, including the dam and ditches as

fendant cannot show in mitigation of damages that the act complained of, amounting to an invasion of the plaintiff's right, was a benefit to the plaintiff, and not an injury; for the plaintiff is not bound to accept a benefit given against his will. He is entitled to any benefits which the defendant's proper use of the stream may incidentally confer upon him,<sup>1</sup> and is not bound to exchange one right for another.<sup>2</sup> Where prospective damages are allowed, the defendant may show in mitigation that structures erected, or causes set in operation since the suit began, will prevent future injury. So it may be shown that a causeway erected since the suit began will prevent the continuance of flowage.<sup>3</sup>

§ 498. *Same.*—Admissions by a party or declarations by a person interested on either side, must, in order to be admissible as declarations against interest, have been made since his interest accrued.<sup>4</sup> The enlargement, after the plaintiff received injury, of a passage-way for water, alleged to have been too small, is admissible in evidence as an admission.<sup>5</sup> But such evidence is to be received guardedly, for if the injury is caused by a storm of unprecedented violence, this fact is not relevant as an admission, if the repairs were made out of abundant caution.<sup>6</sup>

§ 499. *Same.*—Evidence as to the nature of the injury must, as we have seen, correspond with the allegation. In proving an injury by the flowage of land, where the defendant claimed the right to flow the land to a certain height, the plaintiff was permitted to introduce the declaration of a former owner that a certain stone marked the height of the defendant's right to flow.<sup>7</sup> In order to charge the defendant

parts of one and the same improvement, any damage was done to the plaintiff; and this, we think, was correctly so left."

<sup>1</sup> *Tourtellot v. Phelps*, 4 Gray, 370, 374.

<sup>2</sup> *Webb v. Portland Manuf. Co.*, 3 Sumner, 189, 202; *Gerrish v. New Market Manuf. Co.*, 30 N. H. 478, 484, 5; *Tillotson v. Smith*, 32 N. H. 90, 96. But see *Addison v. Hack*, 2

*Gill*, 221, where it is said that the defendant may show a diversion to be a benefit.

<sup>3</sup> *Tyler v. Mather*, 9 Gray, 177.

<sup>4</sup> *Tyler v. Mather*, 9 Gray, 177.

<sup>5</sup> *St. Louis Ry. Co. v. Weaver*, 35 Kansas, 412.

<sup>6</sup> *Ely v. St. Louis Ry. Co.*, 77 Mo. 34.

<sup>7</sup> *Tyler v. Mather*, 9 Gray, 177. See on amendments, *ante*, § 478.

for an injury done, it is sufficient to show that it was done by his authority, or that he continues it.<sup>1</sup> In an action by a canal company for a nuisance in digging clay pits, by which the banks of the canal were injured, it was held incumbent on the plaintiffs to show that the banks were at the time of the damage in such a state as the Act of Parliament required.<sup>2</sup> In trespass for entering a close covered with water, and taking fish therefrom, it is held that the ownership of the soil is *prima facie* evidence of ownership of the fish.<sup>3</sup>

§ 500. *Same.*—Where a prescriptive right is alleged, it must be proved by evidence of the exercise of such a right for the statutory period, which in the United States is usually twenty years.<sup>4</sup> Evidence is admissible of a user for more than the required time,<sup>5</sup> and also of a user for less than such time, and even of an interrupted use.<sup>6</sup>

§ 501. *Same.*—The claim of a prescriptive right may be defeated by showing it to be under a grant from a temporary occupant, as from the vicar of a parish, who has no power to bind his successor;<sup>7</sup> or the user may be shown to be permissive, and evidence may be given of what a former tenant said as to asking permission to have the water, which may be a verbal act, and may be proof or disproof of an exercise of right by one, and an acquiescence in it by the other.<sup>8</sup>

§ 502. *Same.*—When a prescriptive right is made out, and the opposing party seeks to show a limitation of the right, he

<sup>1</sup> Penruddock's case, 5 Co. 100. And see Greenl. Evid., § 472.

<sup>2</sup> Stafford Canal Co. v. Hallen, 6 B. & C. 317. But see Rex v. Trafford, 1 B. & Ad. 874; 3 Starkie Evid. (7th Am. ed.), 1252.

<sup>3</sup> Waters v. Lilley, 4 Pick. 145.

<sup>4</sup> *Ante*, § 329. For the Prescription Act in England, see 2 & 3 Will. 4, ch. 71.

<sup>5</sup> Lawson v. Langley, 4 A. & E. 890 (a case of way).

<sup>6</sup> Bealey v. Shaw, 6 East, 208, 215; Gilman v. Tilton, 5 N. H. 231. Lord Ellenborough, C. J., said: "I take it

that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament. But less than twenty years' enjoyment may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right."

<sup>7</sup> Wall v. Nixon, 3 Smith, 316.

<sup>8</sup> Wakeman v. West, 8 C. & P. 105; *ante*, ch. 11.



has the burden of proof,<sup>1</sup> but may establish the limitation by the same kind of evidence, as of user, as that by which the right itself may be proved.<sup>2</sup> But where a proprietor on one shore appropriates so much of the passing water as he is enabled to control, even the whole of it, by means of structures on his own estate, he can thereby gain no prescriptive right to appropriate more than one-half the same, so long as the opposite proprietor neither uses nor seeks to use any part of the stream to which he is entitled.<sup>3</sup>

§ 503. *Same.*—To avoid the effect of a grant, the party claiming the prescriptive right may give evidence tending to refer the grant to a different right, subject of course to the rules of evidence on explanation of documents.<sup>4</sup> An alleged easement may be defeated by showing that the party claiming it held both the dominant and servient estates by a unity of possession. So where an easement was claimed by the holder of a mill, of entering upon lands in order to repair the banks of a stream, letters which the claimant had written, while lessee of the mill, were held admissible to show the nature of his possession.<sup>5</sup>

§ 504. *Former judgment.*—A former judgment on the question of right involved will, if pleaded, be conclusive of the rights of the parties or those claiming through or under them.<sup>6</sup> This was the rule originally, and it was held with great strictness that if the party claiming the benefit of the judgment did not plead it, but simply offered it in evidence, he thereby, in the language of Abbot, C. J., “consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence, and they are to give their verdict upon the whole evidence submitted to them.”<sup>7</sup> So it was held that a judgment in an action on the case, disaffirming an exclusive right to a river, is strong evidence in another action

<sup>1</sup> *Bliss v. Rice*, 17 Pick. 23, 33, 34.

<sup>2</sup> *Burnham v. Kempton*, 44 N. H. 78.

<sup>3</sup> *Pratt v. Lamson*, 2 Allen, 275, 288.

<sup>4</sup> *Tyler v. Mather*, 9 Gray, 177.

<sup>5</sup> *Clay v. Thackrah*, 9 C. & P. 47.

<sup>6</sup> *Vooght v. Winch*, 2 B. & Ald. 662; *Evelyn v. Haynes*, *per* Ld. Mansfield,

C. J., cited *per* Lord Ellenborough, in *Outram v. Morewood*, 3 East, 365.

<sup>7</sup> *Vooght v. Winch*, 2 B. & Ald. 662, criticising Lord Mansfield's opinion in *Bird v. Randall*, 3 Burr. 1353, that in an action on the case a judgment given in evidence is conclusive.

trying the same right, but not conclusive.<sup>1</sup> Where the party is not allowed or required to plead specially, the judgment is allowed its full force in estoppel, when given in evidence;<sup>2</sup> and it is now held by several authorities that it will be equally conclusive in all cases, whether pleaded or given in evidence.<sup>3</sup>

<sup>1</sup> *Miles v. Rose*, 5 Taunt. 705. In case for diversion, it was held that where a question of right has been tried in an action on the case, the record of that trial is evidence in a second action against the same defendant, though there are other defendants, if they all claim under him. *Strutt v. Bovingdon*, 5 Esp. 56. To the same effect, see *Blakemore v. Glamorganshire Canal Co.*, 1 Gale, 78; 3 *Younge & J.* 60.

<sup>2</sup> *Kilheffer v. Herr*, 17 S. & R. 319. See *Clink v. Thurston*, 47 Cal. 21; *Gans v. St. Paul Ins. Co.*, 43 Wis. 108.

<sup>3</sup> In 1 Greenl. Evid. § 531, it is said: "Notwithstanding there are many respectable opposing decisions, the weight of authority, at least in the United States, is believed to be in favor of the position that where a former recovery is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by the way of estoppel." And in the notes, *Marsh v. Pier*, 4 Watts, 288, is relied on, and *Kilheffer v. Herr* (opinion of Huston, J.) is cited in support. For a further discussion of the question supporting the wider rule, see Bigelow on Estoppel (3d ed.), 583. And for a discussion of *Vooght v. Winch*, 2 B. & Ald. 662, upholding it, as deciding that the conclusiveness of the estoppel is waived by not pleading it, see 2 Sm. Lead. Cas., notes to *Doe v. Oliver*, and *Duchess of Kingston's Case* (7th ed. 628-9). The reason for the rule in *Vooght v. Winch* is that the form of the pleadings opens the case for evidence on the merits, and if the

case is before the jury on the merits, the question of estoppel is out of the case. The distinction that where, from the nature of the pleadings, recovery *cannot* be specially pleaded, it shall still be an estoppel, is a clear exception to the general rule. That the law in New York is as stated in the text, see *Wood v. Jackson*, 8 Wend. 9; *Krekeler v. Ritter*, 62 N. Y. 372. And that the law was the same in Massachusetts until altered by statute, see *Howard v. Mitchell*, 14 Mass. 241; *Adams v. Barnes*, 17 Mass. 365; *Bartholomew v. Candee*, 14 Pick. 167; *Sprague v. Waite*, 19 Pick. 455. In Pennsylvania, the common-law rule seems to be in force where there is an opportunity to plead the judgment. In an action on the case for the continuance of a nuisance by maintaining a dam, the defendant pleaded not guilty, license, and the statute of limitations, and offered in evidence the record of a former trial between the same parties on the same pleas, and the court held that the judgment would not be conclusive unless pleaded. *Kilheffer v. Herr*, 17 S. & R. 319. This seems to be the decision in that case. It is so stated in the head-note, and so treated in subsequent cases. *Marsh v. Pier*, 4 Rawle, 278; *Kerr v. Chess*, 7 Watts, 367; *Man v. Drexel*, 2 Penn. St. 202. It is cited as an authority for the rule that the judgment is equally conclusive, though not pleaded, in *Walton v. Dickerson*, 7 Penn. St. 376. But the court said (*per Rogers, J.*): "These principles apply only where

§ 505. *Same.*— If the plaintiff recovers judgment for the erection of a nuisance, and brings a second action for its continuance, he should recite the judgment in his declaration, and state that the action is for a continuance of the same, or the rule applies to both parties that the judgment is only evidence unless averred in pleading. In an action in Pennsylvania for the continuance of a dam overflowing the plaintiff's land, where the plaintiff so averred the former recovery, the court said: "In an issue on a declaration or plea founded on a former judgment, the only proper subject to be submitted to the jury is whether or not the matter in dispute in the present action is the same that was litigated in the former one. With this fact found the court must decide upon the effect of the former judgment."<sup>1</sup> In an action for the continuance of a nuisance, by maintaining a dam which overflowed the plaintiff's

special pleading is required, for I grant that where the parties are not bound to plead or reply specially, the record of a former recovery is conclusive evidence, binding the plaintiff, the court, and the jury, as in actions of *assumpsit* and debt." (Relying on the *Duchess of Kingston's Case*, 20 How. St. Tr. 537.) But, as we have seen, at common law the greatest latitude was extended to defences in the action on the case, offered under the plea of not guilty; and it would seem that if there were to be any exceptions to the rule, the action on the case would be one; and so it was held in Pennsylvania in *Gilchrist v. Bale*, 8 Watts, 355, 358. So that the authority of *Kilheffer v. Herr*, for the point in the text, is by no means unquestioned. In *Long v. Long*, 5 Watts, 102, the action was on the case for obstructing a stream, and a former judgment was specially pleaded. Rogers, J. (who gave the opinion in *Kilheffer v. Herr*), in his opinion followed the doctrine stated in the text, and cited the former case as in accord. In *Smith v. Elliot*, 9 Penn. St. 845, the action was on the

case for diverting water from the plaintiff's mill. The defendant pleaded the general issue, and insisted that a former judgment, offered in evidence, was conclusive. Rogers, J., again delivered the opinion. He followed *Vooght v. Winch* (2 B. & Ald. 662, see *supra*), and held that the judgment, while admissible, was not conclusive, and again construed *Kilheffer v. Herr* as in accord.

<sup>1</sup> *Rockwell v. Langley*, 19 Penn. St. 502. In *Heller v. Pine*, 8 Blackf. 175, the Supreme Court of Indiana held the same way. The action was case for obstructing a watercourse to the injury of the plaintiff's mill. The defendant pleaded the general issue. The plaintiff offered in evidence the record of a former cause for an injury to the same mill, by the same obstruction, and asked the court to instruct the jury that it was conclusive as to all matters put in issue at the former trial. But it was held that the record, though strong evidence for the plaintiff, could not act as an estoppel. See *Morgan v. Burr*, 58 N. H. 470.

iff's mill and spring, where the defendants relied on a former recovery, it was held that the plaintiff might give evidence that at the former trial he gave no evidence of the damage done during a part of the time laid in the declaration, and that the defendant might contradict it by other evidence.<sup>1</sup> A former recovery by one tenant in common for a nuisance to the joint possession is admissible in evidence in a subsequent action brought by both for a continuance of the nuisance.<sup>2</sup>

<sup>1</sup> *Haak v. Breidenbach*, 6 Binney, *res adjudicata* was not considered in 12; 8 S. & R. 204. The doctrine of this case.

<sup>2</sup> *Fell v. Bennett*, 110 Penn. St. 181.

## CHAPTER XIII.

### EQUITABLE REMEDIES.

#### SECTION.

- 506, 507. By injunction — Without first establishing the right at law.
- 508-511. Ibid.— Irreparable injury.
- 512-517. Ibid.— Present and prospective injury.
- 518-520. Ibid.— Claim of adverse right by defendant.
- 521-523. Ibid.— Allegations in the bill.
- 524-527. Preliminary injunction — When granted.
- 528, 529. Perpetual injunction — When granted.
- 530-533. Ibid.— Acquiescence and equitable estoppel.
- 534-537. Injunctions against obstruction or diversion of waters.
- 538, 539. Ibid.— Where the rights are fixed by contract or otherwise.
- 540. Regulation of common rights in equity.
- 541. Injunctions in cases of nuisances from stagnant water.
- 542. Ibid.— Not granted to protect subterranean percolations.
- 543. Ibid.— To protect prior appropriations in mining districts.
- 544-546. Ibid.— To restrain pollutions.
- 547. Ibid.— Impediments to navigation and rights of access.
- 548, 549. Ibid.— In other instances of injuries affecting waters.
- 550, 551. Practice as to granting injunctions.
- 552-554. Form of injunction.
- 555-557. Command to abate.
- 558-561. Difficulty in framing or fulfilling order, effect.
- 562-568. Bills of peace.
- 569-578. Specific performance.

§ 506. Injunctions — Establishing right at law.— Nuisances and injuries affecting waters are remedied in equity by the writ of injunction. The ground upon which equity takes jurisdiction is that the injury complained of is irreparable or of such a nature that there is no adequate remedy at law. It is an extraordinary remedy, and granted only where the plaintiff's right and his danger of suffering such an injury are clear. If the thing complained of is not itself a nuisance, or the mischief irreparable and capable of compensation in damages, there must first be a judgment at law establishing the existence of the nuisance and measuring the damages.<sup>1</sup> But it is

<sup>1</sup> *Kennerty v. Etiwan Phosphate* *Peters v. Hansen*, 55 Mich. 276; *Co.*, 17 S. C. 411; *Outcalt v. George McClain's Appeal*, 130 Penn. St. 546. *W. Helme Co.*, 42 N. J. Eq. 665;

not indispensable that the plaintiff should establish his title at law before coming into equity; for, if the plaintiff's right had never been drawn in question, he would be put to delay in establishing it at law, and meanwhile the injury threatened might become complete, and the purpose for which equity takes jurisdiction defeated.<sup>1</sup>

§ 507. **Same — Same.**—In *Bush v. Western*,<sup>2</sup> the plaintiff had been for sixty years in possession of the watercourse which was diverted, and it was held proper in such a case to bring the suit in equity in the first instance; and in *Gardner v. Newburgh*,<sup>3</sup> Chancellor Kent held that where the plaintiff showed that he had immemorially enjoyed the right to use the stream, there was no need of a trial at law. In *Holsman v. Boiling Spring Co.*,<sup>4</sup> it is said: "Where the complainant seeks protection in the enjoyment of a natural watercourse upon his land, the right will ordinarily be regarded as clear; and the mere fact that the defendant denies the right by his answer, or sets up title in himself by adverse user, will not entitle him to an issue before the allowance of an injunction." But where the rights of the parties are in dispute, and

<sup>1</sup> *Finch v. Resbridger*, 2 Vern. 390; *Ripon v. Hobart*, 3 Myl. & K. 169; *Dewhirst v. Wrigley*, 1 Cooper Prac. Cas. 319; *Beaufort v. Morris*, 6 Hare, 840; *Goodson v. Richardson*, L. R. 9 Ch. 221. See St. 25 and 26 Vict. ch. 42, § 4; *Seneca Woolen Mills v. Tillman*, 2 Barb. Ch. 9; *Reid v. Gifford*, *Hopk. Ch. (N. Y.)* 416; *Mohawk Bridge Co. v. Utica & Schenectady R. Co.*, 6 Paige, 554; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Denton v. Leddell*, 23 id. 64; *Sprague v. Rhodes*, 4 R. I. 801; *Attorney General v. Hunter*, 1 Dev. Eq. 12; *Burden v. Stein*, 27 Ala. 104; *Switzer v. McCullough*, 76 Va. 777; *Corning v. Troy Iron Factory*, 40 N. Y. 191; *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Lux v. Haggin*, 69 Cal. 225; *Stone v. Roscommon Lumber Co.*, 59 Mich. 24; *Learned v. Hunt*, 63 Miss. 373;

*Lyon v. Ross*, 2 Bibb (Ky.), 466. Originally the rule undoubtedly was that the plaintiff must, in every case, first establish his right at law. In *Weller v. Smeaton*, 1 Cox. 102; 1 Bro. C. C. 572 (1784). Lord Thurlow said that in no instance, except that of *Bush v. Western* (1720), had equity ever interposed in a mere question of right between A. and B. See also *Welby v. Rutland*, 2 Bro. P. C. (Tomlin's ed.), 39; *Lond v. Murray*, 17 L. T. 248. Under the Massachusetts statute it is not necessary, where the legal right is not clear, that the plaintiff should first establish it at law, if in other respects he shows a case for proceedings in equity. *Smith v. Smith*, 148 Mass. 1, 5.

<sup>2</sup> *Prec. in Ch.* 530.

<sup>3</sup> 2 Johns. Ch. 162.

<sup>4</sup> 1 McCarter (N. J.), 335, 343; *Sanford v. Lyon*, 37 N. J. Eq. 94.



have never been adjudicated, equity will not undertake to try the right on a bill for injunction, but will direct an issue and require the plaintiff first to establish his title at law.<sup>1</sup> If it is not clear that the acts of a corporation in obstructing a stream are unauthorized by its charter, that question must be determined against it by an action at law, before it will be restrained by injunction.<sup>2</sup> But even in such case, if an act is threatened which would be an irreparable injury to the rights in question, if established, the court will interfere by an interlocutory injunction, and preserve the property and rights of the parties *in statu quo* until the question of right is determined.<sup>3</sup> Where the alternative is interference or probable destruction of property, the court will be ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant.<sup>4</sup>

§ 508. **Same — Irreparable injury.**— By irreparable injury, which is the equity of the bill, is meant one for which there is no adequate remedy at law.<sup>5</sup> In *Wood v. Sutcliffe*,

<sup>1</sup> *Agar v. Regent's Canal Co.* (*per* Lord Eldon), Cooper, Chan. Cas. 77; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Cardiff v. Cardiff Water Works*, 4 De Gex & J. 596; *Bradbury v. Manchester Ry. Co.*, 15 Jur. 1167; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Seneca Woolen Mills v. Tillman*, 2 Barb. Ch. 9; *Porter v. Witham*, 17 Maine, 292; *Cummings v. Barrett*, 10 Cush. 186; *Prentiss v. Larnard*, 11 Vt. 135; *White v. Forbes*, Walk. (Mich.) 112; *Heiskell v. Gross*, 7 Phila. 317; *Bliss v. Kennedy*, 43 Ill. 67; *Stolp v. Hoyt*, 44 Ill. 219; *Attorney General v. Hunter*, 1 Dev. Eq. 12; *Parker v. Winnipiseogee Lake Co.*, 2 Black, 545.

<sup>2</sup> *Sheboygan v. Sheboygan R. Co.*, 21 Wis. 667; *Vick v. Rochester*, 46 Hun, 607; *McLaren v. Caldwell*, 5 Ont. App. 363.

<sup>3</sup> *Ripon v. Hobart*, 3 Myl. & K. 169, 181, 182; *Beaufort v. Morris*, 6 Hare,

340; *Whitchurch v. Hide*, 2 Atk. 391; *Buller v. Society*, 12 N. J. Eq. 264; *Morris Canal Co. v. Central R. Co.*, 16 N. J. Eq. 419, 425; *Troy v. Normont*, 2 Jones Eq. (N. C.) 318; *Richmond v. Dubuque R. Co.*, 33 Iowa, 482; *United States v. Duluth*, 1 Dillon, 469; *Ingraham v. Dunnell*, 5 Met. 118; *McCallum v. Germantown Water Co.*, 54 Penn. St. 40; *Sprague v. Rhodes*, 4 R. I. 301, 309; *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Phillips v. Stockett*, 1 T. R. 200; *Binney's Case*, 2 Bland Ch. 99; *Bliss v. Kennedy*, 3 Ill. 67. See 1 High on Injunctions (2d ed.), § 8; Kerr on Injunctions (2d ed.), ch. 3; *Great Western Ry. Co. v. Birmingham Co.*, 2 Phila. 597, 603.

<sup>4</sup> *Per* Lord Cranworth, in *Shrewsbury & Chester Ry. Co. v. Shrewsbury & Birmingham Ry. Co.*, 1 Sim. N. S. 410; *Fulton v. Greacen*, 36 N. J. Eq. 216, 220.

<sup>5</sup> *Shields v. Arndt*, 3 Green Ch. 234;

which was a case for injunction against corrupting water, it is stated among other conditions that, "if the injury complained of is of such a nature that damages will not be an adequate compensation, that is, such a compensation as will in effect, though not *in specie*, place them in the position in which they previously stood," equity will interfere.<sup>1</sup>

§ 509. **Same — Same.**— The court is not governed by questions of pecuniary value, but will remedy and prevent an injury which it may be reasonably supposed would materially lessen the enjoyment of property by its owner.<sup>2</sup> Where the damage is inconsiderable, or accurately ascertainable, and capable of adequate compensation at law, equity will not usually interfere,<sup>3</sup> unless the injury resulting from each act is trifling as compared with the expense of prosecuting actions at law.<sup>4</sup> The recovery of nominal damages at law, establishing a riparian proprietor's legal right, does not necessarily entitle him

Holsman v. Boiling Spring Co., 1 McCarter, 335; Scudder v. Trenton Delaware Falls, 1 Saxt. (N. J.) 694; Lamborn v. Covington Co., 2 Md. Ch. 409; Nicodemus v. Nicodemus, 41 Md. 529; Coe v. Winnipiseogee Lake Co., 37 N. H. 254, 264; Parker v. Winnipiseogee Lake Co., 2 Black, 545; Legg v. Horn, 45 Conn. 409; Crown v. Leonard, 32 Ga. 241; Wright v. Moore, 38 Ala. 593; Laney v. Jasper, 39 Ill. 46; Welton v. Martin, 7 Mo. 307; Hoxsie v. Hoxsie, 38 Mich. 77; Fairhaven Marble Co. v. Adams, 46 Vt. 496; Heiskell v. Gross, 7 Phila. 317; Mason v. Cotton, 2 McCrary, 82; Schneider v. Brown, 85 Cal. 205; Hahn v. Thornberry, 7 Bush, 403.

<sup>1</sup> Wood v. Sutcliffe, 2 Sim. N. S. 163.

<sup>2</sup> White v. Forbes, Walker (Mich.), 112; Clifton Iron Co. v. Dye, 87 Ala. 468; Learned v. Castle, 78 Cal. 454. In New York, by statute, interference by equity was formerly limited to injuries amounting to \$100, and in case of diversion causing recurring damage to cases where the annual injury equalled the interest on \$100.

Smith v. Adams, 6 Paige, 435. Under a similar statute in Michigan, it is held that equity will take jurisdiction of suits involving land worth in itself less than \$100, if the riparian right annexed makes it worth more. Blodgett v. Dwight, 38 Mich. 596.

<sup>3</sup> Wood v. Sutcliffe, 2 Sim. N. S. 163; Attorney General v. Gee, L. R. 10 Eq. 131; Lillywhite v. Trimmer, 36 L. J. Ch. 525; Wing v. Fairhaven, 8 Cush. 363; Shreve v. Voorhees, 2 Green Ch. 25; Quackenbush v. Van Riper, 2 Green Ch. 350; Van Winkle v. Curtis, id. 422; Stevens v. Ryerson, 2 Hal. Ch. 477; Morris Canal Co. v. Central Railroad Co., 16 N. J. Eq. 419; Smith v. Adams, 6 Paige, 435; Heiskell v. Gross, 7 Phila. 317; Eason v. Perkins, 2 Dev. Eq. 38; Wilder v. Strickland, 2 Jones Eq. 386; Nicodemus v. Nicodemus, 41 Md. 529; Fox v. Holcomb, 32 Mich. 494; Stone v. Peckham, 12 R. I. 27; Thornton v. Grant, 10 R. I. 477. See Wright v. Turner, 10 Ch. (Can.) 67.

<sup>4</sup> Lembeck v. Nye, 47 Ohio St. 336.

to an injunction, but the exercise of this jurisdiction is discretionary, depending much upon the reality and irreparable nature of the injury complained of, and, when no *mala fides* is shown, upon the balance of convenience.<sup>1</sup> And even when an injunction is issued, the defendant is only liable in proceedings for contempt for acts enjoined or commanded by the decree and such as are within his power to perform.<sup>2</sup>

§ 510. **Same — Same.**— A mere trespass and entry, as for the enlargement of a course for the discharge of water, is not such an injury.<sup>3</sup> The pollution of a stream causing serious and continuous, or frequently recurring obstruction of the plaintiff's use of the water, is ground for injunction.<sup>4</sup> A diversion depriving the plaintiff of the use of a stream is such an injury,<sup>5</sup> and it is said that a disturbance or deprivation of one's riparian right is in itself an irreparable injury.<sup>6</sup> Thus the habit, continued in the past and threatened as to the future, of discharging freight from a steamboat at a private wharf, against the protest of its owner, whose business of sawing, receiving, and delivering lumber and ties is thereby seriously interfered with, is properly restrained by injunction.<sup>7</sup> The erection of a raceway which would involve cutting down a river-bank, destroying trees, and exposing ground to be washed away is a clear case of waste, in which equity will interfere.<sup>8</sup> But the overflowing of land, causing the destruction of timber, and other damages has been held not a sufficient injury to justify interference.<sup>9</sup> Where the diversion of a stream will cause the stoppage of the plaintiff's mill and throw a number of servants out of employment, the injury is plainly irreparable.<sup>10</sup> Depriving the plaintiff of his right to a supply of

<sup>1</sup> *Graham v. Northern Ry. Co.* 10 Ch. (Can.) 259; *William v. Heath*, 1 L. T. N. S. 267.

<sup>2</sup> *Dewey v. Superior Court*, 81 Cal. 64.

<sup>3</sup> *Jerome v. Ross*, 7 Johns. Ch. 815; *Nicodemus v. Nicodemus*, 41 Md. 529. See *Crown v. Leonard*, 32 Ga. 241.

<sup>4</sup> *Wood v. Sutcliffe*, 2 Sim. N. S. 168.

<sup>5</sup> *Dayton v. Rutherford*, 128 Ill. 271.

<sup>6</sup> *Holsman v. Boiling Spring Co.*, 1 McCarter (N. J.), 335.

<sup>7</sup> *Turner v. Stewart*, 78 Mo. 480.

<sup>8</sup> *Scudder v. Trenton Delaware Falls*, 1 Saxt. (N. J.) 694.

<sup>9</sup> *Coe v. Winnipiseogee Lake Co.*, 37 N. H. 254, 264.

<sup>10</sup> *Wright v. Moore*, 38 Ala. 593; *Proprietors v. Braintree Water Supply Co.*, 149 Mass. 478; *Fuller v. Swan River Placer M. Co.*, 12 Cal. 12; *Crescent City Mill Co. v. Hayes* (Cal.), 11 Pac. 319; *Ball v. Kehl*, 87 Cal. 505. The remedy for breach of

water for his house from a spring, and the cutting and destruction of his pipes laid for conducting the water, are also grounds for interference.<sup>1</sup> So the threatened discontinuance of a water supply by a city water-works company, to settle a dispute as to the water rate, is an injury sufficiently irreparable to support an injunction.<sup>2</sup>

§ 511. *Same — Same.*— If a statute authorizing the taking of property, or flowage of land, or use of a stream, provides an adequate remedy by special proceeding to parties injured thereby, equity will not take jurisdiction.<sup>3</sup> The mere existence of a legal remedy will not bar equitable jurisdiction where the remedy in equity is more adequate, comprehensive, and effectual.<sup>4</sup> So, where a Mill Act gave the court power to abate and remove a dam, without having a prospective effect, it was held that equity would take jurisdiction to determine the proper height of the dam, fix terms upon which it could be maintained, and perpetually enjoin the nuisance.<sup>5</sup> An injunction will not be granted merely as a means of compelling a defendant to make compensation; as if having had the lease of a water-right, he holds over and refuses to pay for the use and occupation.<sup>6</sup> But where the defendant is insolvent and unable to respond in damages, this is itself a ground upon which equity will take jurisdiction, as a recovery at law would necessarily be an inadequate remedy;<sup>7</sup> and in such case, as an

the defendant's promise, made at the hearing of a bill for a preliminary injunction to restrain him from preventing the flow of water in a stream, and for damages, that if the hearing was postponed, the water would be permitted to flow during the postponement, is to be sought only in the suit in equity. *Howe v. Salisbury*, 145 Mass. 279.

<sup>1</sup> *Hayward v. East London W. Co.*, 28 Ch. D. 188.

<sup>2</sup> *Legg v. Horn*, 45 Conn. 409; *Difendal v. Virginia M. Ry. Co.*, 86 Va. 459.

<sup>3</sup> *Bull v. Valley Falls Co.*, 8 R. I. 42; *Spangler's Appeal*, 64 Penn. St. 387; *ante*, § 250.

<sup>4</sup> *Bemis v. Upham*, 13 Pick. 169; *Boston Water Power Co. v. Boston & Worcester R. Co.*, 16 Pick. 512; *Ballou v. Hopkinton*, 4 Gray, 324; *Lawson v. Menasha Wooden-ware Co.*, 59 Wis. 393.

<sup>5</sup> *Bemis v. Upham*, 13 Pick. 169.

<sup>6</sup> *Warne v. Morris Canal Co.*, 1 Hal. Ch. 410. See *Gulf Ry. Co. v. Dunman (Texas)*, 11 S. W. 1094. A lease forever of the "use and occupation" of a certain amount of water from a public canal amounts to an absolute grant of the right to draw the water. *French v. Gapen*, 105 U. S. 509.

<sup>7</sup> *Winnipiseogee Lake Co. v. Wors-ter*, 29 N. H. 433; *Hart v. Mayor of*

incident to the relief by injunction, it will consider and adjust the question of damages.<sup>1</sup>

§ 512. **Same — Present and prospective injury.**—The remedy being preventive, past injuries are not in themselves grounds for equitable interference.<sup>2</sup> But where some degree of injury is shown, the court will consider its probable continuance;<sup>3</sup> and if the injury seems likely to continue, equity will not refuse to interfere because the damage is slight.<sup>4</sup> The fact that the act complained of is completed will not prevent an injunction from issuing against the continuance of a trespass or nuisance.<sup>5</sup> An uncertain future injury will not be ground

Albany, 3 Paige, 212; *Mulry v. Norton*, 100 N. Y. 424; *Wilson v. Hill*, 46 N. J. Eq. 367; *Graham v. Dahlonga Gold M. Co.*, 71 Ga. 296; *Atchison v. Peterson*, 20 Wall. 507, 515; *Sword v. Allen*, 25 Kansas, 67; *Derry v. Ross*, 5 Col. 295. In *Heilman v. Union Canal Co.*, 37 Penn. St. 100, which was upon a bill to restrain a canal company from using the water of a certain creek, it is said: "It is not intended here to say that insolvency is never a consideration moving a chancellor. It frequently does, but not alone. The equitable remedy must exist independently. In balancing cases, it is a consideration that gives preponderance to the remedy. Hence, the alleged insolvency of the company, and the supposed inability to collect damages that may be recovered from it, is no reason for interfering by injunction." This position is adopted by Mr. High (*Injunctions*, 2d ed., § 18). It is called "an important consideration" in 29 N. H. p. 449. In the Pennsylvania case, the defendant had used water belonging to the plaintiff for twenty years with his consent, and had paid him therefor. But in the leading case on the point, *Smallman v. Onions*, 3 Bro. Ch. 621, Lord Eldon granted an injunction to stay waste against the

tenant in common of the plaintiff solely on the ground of insolvency. The law is the same in New Jersey. *West v. Walker*, 2 Green Ch. 279, note B. 291, citing MS. cases of *Read v. Cornelius*, and *Norcross v. Fisher*. In Missouri it is sufficient if an action for damages does not afford an adequate remedy. *Sedalia Brewing Co. v. Sedalia W. W. Co.*, 34 Mo. App. 49.

<sup>1</sup> *Milan Steam Mills v. Hickey*, 59 N. H. 241.

<sup>2</sup> *Coalter v. Hunter*, 4 Rand. (Va.) 58; *Coe v. Winnipiseogee Lake Co.*, 37 N. H. 254, 266; *Burnham v. Kempton*, 44 N. H. 78, 101; *Society v. Morris Canal Co.*, 1 Saxt. Ch. 157; *Cobb v. Smith*, 16 Wis. 661; *Loker v. Simpson*, 7 Cal. 340; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

<sup>3</sup> *Goldsmid v. Turnbridge Wells*, L. R. 1 Ch. 349; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78; *Attorney General v. Sheffield Gas Co.*, 3 De Gex, M. & G. 304; *Attorney General v. Leeds*, L. R. 5 Ch. 583; *Attorney General v. Luton*, 2 Jur. N. S. 180; *Bemis v. Upham*, 13 Pick. 169; *Bal-lou v. Hopkinton*, 4 Gray, 324; *ante*, § 846.

<sup>4</sup> *Ibid.*; *Attorney General v. Sheffield Gas Co.*, 3 De Gex, M. & G. 304.

<sup>5</sup> *Goodson v. Richardson*, L. R. 9

for exerting the extraordinary power of equity.<sup>1</sup> Thus a city cannot maintain a bill to enjoin the erection of a permanent building upon a wharf extending into navigable water upon the ground that the city may, in the future, condemn the premises for a bridge.<sup>2</sup> It has sometimes been said that some degree of present injury is necessary before equity will interfere. Thus, in *Elmhirst v. Spencer*, Lord Chancellor Cottenham said: "Now the plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendants, as would have entitled him to a verdict at law in an action for damages;" and there are cases in which this is true, viz., where the character of the act as a nuisance is doubtful, and where it is not clear that any damage will follow.<sup>3</sup>

§ 513. *Same—Same.*—Actual damage, or even a completed violation of the plaintiff's rights, is not necessary to entitle a

Ch. 221. In this case a mandatory injunction was granted, directing the defendant to remove waterpipes which he had laid under the surface of the complainant's land. In *Balantine v. Harrison*, 87 N. J. Eq. 560, 563, Beasley, C. J., said, that unless the circumstance in that case that the pipes were laid under a public road (so that, as the court said, the defendant, by removing them, might subject himself to indictment) constituted a proper discrimination, the decision could not be harmonized with the current of authority. In some States the plaintiff is allowed to join an action at law for past damages with a bill for an injunction. *Akin v. Davis*, 11 Kansas, 580; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481; *Barnes v. Sabron*, 10 Nev. 217; *Columbia Mining Co. v. Holter*, 1 Mont. 296.

<sup>1</sup> *Ripon v. Hobart*, 3 Myl. & K. 169; *Attorney General v. Kingston*, 13 W. R. 888; s. c. 11 Jur. N. s. 596; *Mayor v. Pemberton*, 1 Swanst. 244, 251; *Goldsmid v. Tunbridge*, L. R. 1 Ch.

349; *St. Louis v. Knapp Co.*, 104 U. S. 658; 2 McCrary, 224; *Kimberly Co. v. Hewitt*, 75 Wis. 371; *Janesville v. Carpenter*, 77 Wis. 288; *Rochester v. Erickson*, 46 Barb. 92; *Hough v. Doylestown*, 4 Brewst. 333; *Walton v. Mills*, 86 N. C. 280; *Shreve v. Voorhees*, 2 Green Ch. 25; *Ellison v. Commissioners*, 5 Jones Eq. 57; *Mohawk Bridge Co. v. Utica R. Co.*, 6 Paige, 54; *Lytton v. Stewart*, 2 Tenn. Ch. 586; *Society v. Morris Canal Co.*, 30 N. J. Eq. 145, note.

<sup>2</sup> *Chicago v. Reed*, 27 Ill. App. 482. See *Bond v. Wool*, 107 N. C. 139.

<sup>3</sup> *Elmhirst v. Spencer*, 2 Macn. & G. 45; *Elwell v. Crowther*, 81 Beav. 163; *Attorney General v. Cambridge Co.*, L. R. 4 Ch. 86; *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349; *Lillywhite v. Trimmer*, 36 L. J. Ch. 525; *Oldaker v. Hunt*, 6 De Gex, M. & G. 376; *Westbrook Manuf. Co. v. Warren*, 77 Maine, 437; *New Boston Coal Co. v. Pottsville Water Co.*, 54 Penn. St. 164; *Shreve v. Voorhees*, 2 Green Ch. 25; *Pinney v. Luce*, 44 Minn. 367; *Norris v. Hill*, 1 Mich. 202.



plaintiff to the protection of equity. In *Webb v. Portland Manuf. Co.*,<sup>1</sup> Story, J., said: "If the doctrine were otherwise, and no action were maintainable at law without proof of actual damage, that would furnish no ground why a court of equity should not interfere and protect such a right from violation and invasion. . . . If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs." It is settled in England and America that where irreparable injury is threatened, it is not necessary for the plaintiff to wait until some injury has been done before filing his bill, but that equity will take jurisdiction to prevent, if possible, any injury.<sup>2</sup>

§ 514. *Same — Same.*— That Lord Cottenham did not intend by the decision in *Elmhirst v. Spencer*<sup>3</sup> to exclude equitable jurisdiction to prevent threatened injuries, may be inferred from his decision in *Attorney General v. Forbes*,<sup>4</sup> in 1836. In that case the magistrates of the County of Berks threatened to cut the timbers of a bridge over the Thames, being partly in Berkshire and partly in Buckinghamshire. Upon a bill by the attorney general for the inhabitants of the latter county, the threatened injury was enjoined. Lord Cottenham said: "It is the duty of the Court to take care that

<sup>1</sup> 3 Sumner, 189, 197.

<sup>2</sup> *Attorney General v. Forbes*, 2 Myl. & Cr. 123; *Manchester Ry. Co. v. Workson*, 23 Beav. 198; *Wicks v. Hunt*, Johns. 372; *Elliot v. North-eastern Ry. Co.*, 1 J. & H. 145; s. c. 2 De Gex, F. & J. 423; 10 H. L. Cas. 333; *Hext v. Gill*, L. R. 7 Ch. 699; *Wilts Canal Co. v. Swindon Water Works Co.*, L. R. 9 Ch. 451; *Bickett v. Morris*, L. R. 1 H. L. (Sc.) 47; *McSwiney v. Haynes*, 1 Ir. Eq. 322. Lord Hardwicke so held in cases of waste. *Gibson v. Smith*, 2 Atk. 182. For American cases. see *Van Winkle v. Curtis*, 2 Green Ch. 422; *Shields v. Arndt*, 3 Green Ch. 234, 245; *Hulme v. Shreve*, 3 Green Ch. 116; *Case v. Haight*, 8 Wend. 632; *Corning v. Troy Iron Factory*, 39 Barb. 311; s. c. 34 Barb. 475, 492; 40 N. Y. 191, 220;

*Rochester v. Erickson*, 46 Barb. 92; *Burnham v. Kempton*, 44 N. H. 78, 101; s. c. 37 N. H. 485, 488; *Lyon v. McLaughlin*, 32 Vt. 423; *Baltimore v. Appold*, 42 Md. 442; *Varney v. Pope*, 60 Maine, 192; *McArthur v. Kelley*, 5 Ohio, 139; *Bell v. Blount*, 4 Hawks (N. C.), 384. See *Burwell v. Hobson*, 12 Gratt. 322, 332; *Gates v. Blincoe*, 2 Dana (Ky.), 158. In *Lyon v. McLaughlin*, 32 Vt. 423, Barrett, J., says: "For the very doubtfulness as to the extent of the prospective injury, and the impossibility of ascertaining the measure of just reparation, render such injury irreparable in the sense of the law relating to this subject."

<sup>3</sup> 2 Macn. & G. 45 (1849).

<sup>4</sup> 2 Myl. & Cr. 123; *Ripon v. Hobart*, 3 Myl. & K. 169.

while these magistrates attempt to exercise their respective rights, the public shall not sustain any injury, and that a public nuisance shall not be occasioned.”

§ 515. *Same — Same.*— The rule is the same in the case of private nuisances. In *Hext v. Gill*,<sup>1</sup> the bill for injunction was filed by a purchaser of land. A former grantor had reserved the mines and minerals, with liberty of ingress and egress, and to dig, search for, and work such minerals. After the conveyance, a bed of china clay, previously unknown, was discovered in the land. The defendants, claiming under the former grantor, had asserted their right to work this bed. It appeared in evidence that china clay was worked by removing the soil covering the clay, turning a stream of water over it, and washing it into channels and reservoirs, producing an almost total destruction of the surface where the excavations were made. It also appeared that the land was underlaid with tin, which was usually worked by “streaming,”— a process equally destructive to the surface of the land. It was held that while the defendants were entitled to take out the minerals, equity would enjoin them from doing it in such a way as to destroy or seriously injure the surface. The defendants by their answer claimed the right to work the minerals, but said that they had no present intention of doing so; and their counsel argued that therefore equity ought not to grant an injunction. Mellish, L. J., after referring to the answer, said: “We are of opinion that after this it is idle for the defendants to say they do not threaten to get the china clay,” “and to contend that this Court is precluded from deciding the question whether they are entitled to get it in the way in which they say they have a right to get it.”

§ 516. *Same — Same.*— In *Wicks v. Hunt*,<sup>2</sup> alterations were made in a road which were likely to produce damage to the plaintiff by preventing the escape of water from a marsh. While the alterations were in progress, the plaintiff threatened to take proceedings to stop them, but waited for two years, until he had suffered damage by a flood, and then filed his bill for an injunction and for damages. It was held that the

<sup>1</sup> L. R. 7 Ch. 699, 711.

<sup>2</sup> Johns. 372.

plaintiff had lost his equitable right to an injunction by his delay. It follows from this that where the injury may be reasonably expected to occur, unless prevented, the plaintiff need not wait for damage to accrue before filing his bill. On proof that the defendant threatens to do the wrong, where it appears that he has the power, the court will issue the writ or order.<sup>1</sup> In *Baltimore v. Appold*,<sup>2</sup> the allegations were that the defendants intended, as a part of a system of water-works, to increase the volume of a stream flowing through the plaintiff's land; that the plaintiff was credibly informed and believed that such increase would cause the stream to overflow its banks and render his land valueless; and these were accompanied by a statement of the facts upon which the bill was founded. It was held that the allegations made out a sufficient case for equitable interference.

§ 517. *Same — Same.*—The danger threatened must be such as to cause reasonable fear of irreparable injury.<sup>3</sup> In *Vanwinkle v. Curtis*,<sup>4</sup> Chancellor Vroom said: "In a court of law the inquiry is whether a wrong has been committed, and if it has been, reparation must be awarded. Here the inquiry is, whether the injury about to be committed is of a serious, permanent, and irreparable character, such as cannot well be compensated in damages, and which therefore requires the extraordinary power of chancery to prevent its commission."

§ 518. *Same — Adverse right in defendant.*—It has been held that a mere claim of an adverse right by the defendant, if not exercised or attempted to be exercised, may not be ground for an injunction. In Massachusetts, where the plaintiff alleged that the defendants were entitled to draw from a common reservoir 12,335 cubic feet of water per minute, but

<sup>1</sup> *McArthur v. Kelley*, 5 Ohio, 139, 154; *Manchester Ry. Co. v. Worksop*, 23 Beav. 198, 210.

<sup>2</sup> 42 Md. 442; *Howe v. Norman*, 13 R. I. 488.

<sup>3</sup> *Ripon v. Hobart*, 3 Myl. & K. 169; *Fletcher v. Bealey*, 28 Ch. D. 688; *Burnham v. Kempton*, 37 N. H. 485, 488; s. c. 44 N. H. 78, 95, 101; *Varney v. Pope*, 60 Maine, 192. The erec-

tion of a new mill by the owner of a dam does not involve an increase of flowage, and is not in itself ground for an injunction. *Wheeler v. Steele*, 50 Ga. 24.

<sup>4</sup> 2 Green Ch. 422. In *Hathaway v. Mitchell*, 84 Mich. 164, held that equity will not enjoin flowage which may be made lawful at any time.

that they claimed the right to use more, and were preparing works which would require more, and that they threatened to use more water; and the defendants by their answer claimed the right to use more than 12,335 cubic feet, but denied that they had used or intended to use more than they were entitled to, and there was no evidence that they had in fact used more than 12,335 cubic feet, Shaw, C. J., held that upon these pleadings the plaintiff was not entitled to an injunction.<sup>1</sup>

§ 519. *Same — Same.*— If the defendant insists upon his alleged right to commit an act which, if completed, will, in the opinion of the court, give a ground of action, equity will protect the plaintiff by injunction.<sup>2</sup> In the important case of *Attorney General v. Acton Local Board*,<sup>3</sup> which was an action to restrain the board from permitting sewage to flow into a stream, or into the sewers of the Metropolitan Board, the injunction was granted although no substantial damage was shown, on the ground that the defendants by their pleading claimed a right to continue doing that which the court held they were not entitled to do. In *Wilts Canal Co. v. Swindon Waterworks Co.*,<sup>4</sup> the canal company had, under Act of Parliament, for many years obtained a supply of water from a certain stream. The waterworks company afterwards diverted a portion of this stream, and thereby supplied the neighboring town, and an injunction was sought to prevent this injury. Lord Justice James said: “But the defendants not only allege that there was no damage, but they have put most distinctly and clearly on their answer a claim of right of such

<sup>1</sup> *Bardwell v. Ames*, 22 Pick. 333, 375. In *Wicks v. Hunt*, Johns. 372, a claim of right, though coupled with a disclaimer of present intention to exercise it, was held ground for injunction.

<sup>2</sup> *Tipping v. Eckersley*, 2 K. & J. 264; *Goodson v. Richardson*, L. R. 9 Ch. 221; *Lowndes v. Bettle*, 33 L. J. Ch. 451 (a case of waste); *Simonds v. Haithcock*, 18 S. C. 604; *ante*, § 111, note.

<sup>3</sup> *Per Fry, J.*, 22 Ch. D. 221.

<sup>4</sup> L. R. 9 Ch. 451. So, if the defendant persists in a course which will, if continued, ripen, into an adverse right, the plaintiff is entitled to an injunction. *Per Mellish, J.*, *supra*. See, also, *Barnes v. Sabron*, 10 Nev. 247; *Brown v. Ashley*, 16 Nev. 311. Against such a claim, the plaintiff will be entitled to an injunction without proof of any present damage. *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Goodson v. Richardson*, L. R. 9 Ch. 221; *Eardley v. Granville*, 3 Ch. D. 826.

a kind as to make it absolutely imperative on this Court, as it seems to me, to determine the question of right and to declare the right one way or the other; and as the matter now stands, with the bill dismissed by the Vice Chancellor with costs, it is an adjudication in favor of the defendants that they have the right they claim. It is true that one of their defences is that there has been no injury to the plaintiffs; but it appears to me that the plaintiffs are entitled to have a declaration from the Court that the defendants are not at liberty to divert the water from the Wroughton Stream into their reservoir, for their own purposes and profits whenever the demand on them for water requires it." Lord Justice Mellish, in a concurring opinion, held that equity would protect a substantial right from loss by a continuous invasion and long user by a wrongdoer, on the same ground as that on which courts at law entertain an action in such cases.

§ 520. *Same — Same.*— Where the defendant persists in injuring the plaintiff by a wrongful course of action, equity will take jurisdiction, although the damage caused is at the time of suit inconsiderable. In such cases the only legal remedy open to the plaintiff is a series of actions from day to day. But where the defendant so persists in his wrongful act after the plaintiff has exhausted his legal remedy by actions at law, equity holds that the legal remedy is shown to be inadequate, and interferes to protect his right.<sup>1</sup> Referring to the repeated actions to which the plaintiff might be driven at law, Lord Justice Mellish said: "It is because it is most inconvenient to leave the rights of parties to be determined in that way, and in fact impossible to leave in that way, that this Court has always in such cases given relief."<sup>2</sup> Another reason frequently

<sup>1</sup> Rochdale Canal Co. v. King, 2 Sim. N. S. 78; Attorney General v. Luton Local Board, 2 Jur. N. S. 180; Clowes v. Staffordshire Waterworks Co., L. R. 8 Ch. Ap. 125; Pennington v. Brinsop, 5 Ch. D. 769; Society v. Morris Canal Co., 1 Saxt. 157, 191; Hill v. Sayles, 12 Cush. 454; Carlisle v. Stevenson, 3 Md. Ch. 499; Coe v. Winnipiseogee Lake Co., 37 N. H. 254, 265; Corning v. Troy Iron

Factory, 89 Barb. 311, 327; s. c. 34 Barb. 492; Smith v. Olmstead, 5 Blackf. 37; Whitfield v. Rogers, 26 Miss. 84; Fairhaven Marble Co. v. Adams, 46 Vt. 496; Lyon v. McLaughlin, 32 Vt. 423, 425, 426; Sword v. Allen, 25 Kansas, 67; Cotton v. Mississippi Boom Co., 19 Minn. 497.

<sup>2</sup> Clowes v. Staffordshire Waterworks Co., L. R. 8 Ch. 125, 142.

given for equitable cognizance of such cases is the prevention of a multiplicity of suits. But this, as we shall see, is not a proper application of that principle.<sup>1</sup> It has been said that repeated actions at law are necessary to demonstrate their inadequacy to protect the plaintiff,<sup>2</sup> but the better opinion seems to be that, after the plaintiff has established his right by one action at law, he may have an injunction restraining the defendant from continuing the grievance.<sup>3</sup>

**§ 521. Same — Allegations of bill.**— The plaintiff must in his bill set forth his title, or, if his interest is limited, the facts constituting his interest,<sup>4</sup> and must allege facts showing the nature and extent of his injury, and the inadequacy of the remedy at law.<sup>5</sup> If he sets forth a title which would be insufficient at law, the bill is open to demurrer.<sup>6</sup> “The mere allegation,” said Chancellor Johnson, “that irreparable injury will result to the complainant unless protection is extended to him, is not sufficient; the facts must be stated, that the Court may see that the apprehensions of irreparable mischief are well founded.”<sup>7</sup>

<sup>1</sup> That the principle of preventing multiplicity of suits has no proper application to these cases, see *Hart v. Albany*, 9 Wend. 571, 581; *Jerome v. Ross*, 7 Johns Ch. 315, 336. And see *post*, §§ 562 *et seq.*

<sup>2</sup> *Carlisle v. Stevenson*, 3 Md. Ch. 499, 506.

<sup>3</sup> *Rochdale Canal Co. v. King*, 2 Sim. N. s. 78.

<sup>4</sup> *Boston Water Power Co. v. Boston & Worcester R. Co.*, 16 Pick. 512; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Wason v. Sanborn*, 45 N. H. 169; *Wattier v. Miller*, 11 Oregon, 329. So if the bill is for the protection of an easement, it is necessary to allege title to the right claimed, as an incident to land, or by grant or prescription. An allegation of title to flow, by grant from all the owners of land known to be flowed, is *prima facie* sufficient. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420. See 1 *High on Injunctions*, §§ 84–86; *Kerr*

on *Injunctions*, 13; *Rosamund v. Forgie*, 18 Ch. (Can.) 370.

<sup>5</sup> *Ripon v. Hobart*, 3 My. & K. 169; *Carlisle v. Stevenson*, 3 Md. Ch. 499; *Welton v. Martin*, 7 Mo. 307; *Olmstead v. Loomis*, 6 Barb. 152; *Perkins v. Collins*, 2 Green Ch. 482; *Fairhaven Marble Co. v. Adams*, 46 Vt. 496, 503; *Corning v. Troy Iron Factory*, 6 How. Pr. 89. Where the plaintiff has only a limited right in a stream, he must show an injury to such right. *Oldaker v. Hunt*, 6 De Gex, M. & G. 376. A lessee is entitled to an injunction against the continuance of a nuisance interfering with his enjoyment of the possession. The wrongful continuance of a drain across his land is such an injury. *McAuley v. Roberts*, 5 Grant's Ch. (Up. Can.) 565.

<sup>6</sup> *Kerr on Injunctions*, 81.

<sup>7</sup> *Carlisle v. Stevenson*, 3 Md. Ch. 499, 505. A somewhat different rule is laid down in *Sprague v. Rhodes*, 4



§ 522. *Same — Same.*— It is generally true that allegations upon information and belief will not be sufficient to obtain an injunction;<sup>1</sup> but we have seen that in *Baltimore v. Appold*<sup>2</sup> an allegation that the plaintiff was credibly informed and believed that the threatened increase in the volume of the stream would render his lands valueless, together with the statement of facts upon which his belief was founded, was held sufficient.

§ 523. *Same — Same.*— It is also necessary for the plaintiff to make a full statement of the entire case upon which he desires the intervention of the court; and if he withholds material facts, this will be ground for denying the relief.<sup>3</sup> If

R. I. 301, 303, 310, 312. The case was upon a bill to enjoin the defendants from continuing to flow the plaintiffs' lands, and a demurrer was filed for want of equity. Ames, C. J., said: "We are not at liberty to infer from facts stated in the bill, facts unfavorable to the plaintiffs' right to relief, if indeed we are not bound to make, as in case of a demurrer to evidence at law, every reasonable intendment in his favor. . . . Another ground of demurrer set up by the defendants is that the bill does not state a case of irreparable or destructive mischief. The case stated in the bill is a flowage of the lands of the plaintiffs, in its nature as destructive a nuisance to land, for all the purposes of land, as distinguished from water, as can well be imagined, provided the flow be to any considerable extent. It is true that the bill does not allege the extent of the flow; but under the allegations of the bill, the plaintiffs will be at liberty to prove a flow to *any* extent; and again, under the rules first adverted to, applicable to demurrers of this sort, we have no right to intend against the bill that a flow cannot be proved to any the most destructive extent imaginable. . . . This bill is certainly very meagre in its statements, and quite possibly, as sug-

gested by the counsel for the defendants, was purposely so drawn to escape a demurrer, to which a fuller statement of the truth of the case would have properly subjected it. If this be so, the defendants will have the advantage of this yet undisclosed truth by way of defence in their answers and proofs; but for the reasons above stated, this demurrer cannot be allowed, and the defendants must answer over."

<sup>1</sup> 1 High on Injunctions (2d ed.), § 85.

<sup>2</sup> 42 Md. 442, 476; *ante*, § 516.

<sup>3</sup> *Reddall v. Bryan*, 14 Md. 444, 476. See *St. John v. Brown*, 1 Pugsley (N. B.), 100. In this case, the plaintiff sought to enjoin the construction through his land of an aqueduct, which was to supply the city of Washington with water. Bartol, J., said: "In the opinion of a majority of this Court, the nature of the acts complained of in this bill, and of the injury alleged, is such as to present a case of irreparable damage, which would entitle the complainant to the interposition of a court of equity by injunction, if it sufficiently appeared on the face of the bill that the acts charged were done by the defendants without authority of law. We think there is great force in the view taken

an answer under oath, when filed, denies categorically all the material averments of the bill, this may be ground for dissolving a temporary injunction already granted.<sup>1</sup>

**§ 524. Preliminary injunction.**—Where the plaintiff's allegations show a good title *prima facie*, and an injury present or threatened, which if established would be reasonable ground for the interference of equity, a preliminary injunction is usually granted upon the filing of the bill, to preserve the property in dispute *in statu quo* until the parties' rights can be determined, or until further order.<sup>2</sup> In order to entitle himself to a perpetual injunction, it is necessary for the plaintiff strictly to prove his allegations, and if the claim is founded upon a contract relation, privity between the parties must be shown and established.<sup>3</sup> If the testimony as to the injurious consequences of the act complained of, as *e. g.*, the maintenance of a dam, consists merely of opinions which are opposed by similar testimony, the court will be slow to grant a perpetual injunction.<sup>4</sup> The bill should also contain a special prayer for the injunction, when desired, as an injunction is rarely granted under the prayer for general relief.<sup>5</sup>

by the Circuit Court of the manner in which the case of the complainant is stated in the bill, and cannot avoid the conclusion 'that it is made out by the concealment of facts having a very important bearing upon it, and which would (if fully stated) act materially upon the conscience of the court.' The right to an injunction is not *ex debito justitiæ*, but such application is addressed to the sound conscience of the chancellor, acting upon all the circumstances belonging to each particular case. He has the right to require a full and candid disclosure of all the facts, and if there appears in the proceedings sufficient to show that this has not been made, he may properly refuse to exercise the extraordinary power of the court, through the instrumentality of a writ of injunction." *Ibid.*

<sup>1</sup> *Morrison v. Coleman*, 87 Ala. 655.

<sup>2</sup> *Buller v. Society*, 12 N. J. Eq. 264; *Morris Canal Co. v. Central R. Co.*, 16 N. J. Eq. 419, 425; *Arthur v. Case*, 1 Paige, 447; *Troy v. Norment*, 2 Jones Eq. (N. C.) 318; *Richmond v. Dubuque R. Co.*, 33 Iowa, 482; *United States v. Duluth*, 1 Dillon, 469; *McCallum v. Germantown Water Co.*, 54 Penn. St. 40; *Sprague v. Rhodes*, 4 R. I. 301, 309; *Phillips v. Stockel*, 1 Tenn. 200; *Ripon v. Hobart*, 3 Myl. & K. 169, 181, 182; *Beaufort v. Morris*, 6 Hare, 340.

<sup>3</sup> *McCann v. Oregon Ry. Co.*, 18 Oregon, 455.

<sup>4</sup> *Woodruff v. Lockerby*, 8 Wis. 369. See *Bailey v. Schnitzins*, 45 N. J. Eq. 178.

<sup>5</sup> *Rigg v. Hancock*, 36 N. J. Eq. 42; *Story, Eq. Pl.* (10th ed.) § 41.

§ 525. Same.— Where the plaintiff's right and his need of the protection of the court are clear, it is said that equity will determine the rights of the parties at once, and grant a final injunction without further delay.<sup>1</sup> But the case must be very clear to lead the court to adopt such a course.<sup>2</sup> Where the right is uncertain, or the nature of the alleged injury is not clearly such as to require a permanent order of the court, equity may either grant an interlocutory injunction pending the trial of the right, or may direct the plaintiff first to establish his right at law, or put over the motion until after the hearing. In determining which course to pursue, the court will consider the situation of the parties and the comparative inconvenience which will be caused by the order. If a temporary injunction would cause serious damage to the defendant, in case the plaintiff should fail to establish his right, and would not materially benefit the plaintiff, if successful, it will be withheld until after the hearing;<sup>3</sup> but if, assuming the facts alleged to be true, more harm would be caused to the plaintiff by withholding the order than, in the event of his failure, would be caused to the defendant by granting it, it will be granted.<sup>4</sup> A decree dismissing a bill to restrain flow-

<sup>1</sup> Kerr on Injunctions, 26; Bacon v. Jones, 4 Myl. & Cr. 433. In this case (relating to a patent), Lord Chancellor Cottenham said: "When the application is for an interlocutory injunction, several courses are open: the Court may at once grant the injunction, *simpliciter*, without more,— a course which, though perfectly competent to the Court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual and, as I apprehend, more wholesome practice in such a case of either granting an injunction, and, at the same time, directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the

legal investigation has been ascertained, the defendant in the meantime keeping an account. Which of these several courses ought to be taken must depend entirely upon the discretion of the Court, according to the case made."

<sup>2</sup> Cardiff v. Cardiff Waterworks, 4 D. G. & J. 596; Holsman v. Boiling Spring Co., 1 McCarter, 335.

<sup>3</sup> Ripon v. Hobart, 3 Myl. & K. 169, 182; Elmhirst v. Spencer, 2 Macn. & G. 45; Ingraham v. Dunnell, 5 Met. 118, 123, 127; Wason v. Sanborn, 45 N. H. 169. See Kerr on Injunctions, 27, 28.

<sup>4</sup> Ibid. Attorney General v. Johnson (*per* Lord Eldon), 2 Wils. 87, 97. For similar reasoning applied to injunctions generally, see Wood v. Sutcliffe, 2 Sim. N. S. 163; Attorney General v. Birmingham, 4 K. & J. 528;

ing is not a bar to an action for damages caused by the overflow.<sup>1</sup>

§ 526. *Same.*— The controlling principle, in the absence of special circumstances, is, in the language of Lord Brougham, “that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and where it is to stay farther injury, to keep things as they are for the present.”<sup>2</sup> Where the United States had filed a bill in the Circuit Court for an injunction to protect improvements which it was making in its navigable waters, and conflicting affidavits were filed as to the effect of the works sought to be enjoined, Miller, J., in delivering the opinion, granting a temporary injunction, said: “In this emergency I am relieved by a principle which has generally governed me, and which I believe governs nearly all judges in applications for preliminary injunctions. It is that, when the danger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. In this case I am not satisfied that it is so refuted.”<sup>3</sup>

§ 527. *Same.*— Where the plaintiff, with knowledge of his rights, has acquiesced in the act of the defendant, or has been guilty of laches in the pursuit of his remedy, this will generally be sufficient to prevent his obtaining the preliminary injunction, his conduct being taken as proof that the danger is not so imminent as to require an interference by the court before his right is established.<sup>4</sup> A less degree of acquiescence

*Pennington v. Brinsop*, 5 Ch. D. 769; *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71; *Bassett v. Salisbury Manuf. Co.*, 47 N. H. 426; *Wilcox v. Wheeler*, 47 N. H. 488; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333.

<sup>1</sup> *Coulter v. Davis*, 13 Lea (Tenn.), 451.

<sup>2</sup> *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & K. 154, 185.

<sup>3</sup> *United States v. Duluth*, 1 Dillon, 469, 474.

<sup>4</sup> *Weller v. Smeaton*, 1 Bro. C. C. 572; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 87; *Ware v. Regent's Canal Co.*, De Gex & J. 212, 230; *Wicks v. Hunt*, Johns. 372; *Reid v. Gifford*, 6 Johns. Ch. 19; *Society v. Holsman*, 1 Halst. Ch. 128; *Herbert v. Penn. R. Co.*, 43 N. J. Eq. 21; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Rich v. Brantford*, 14 Ch. (Can.) 88. See *Sprague v. Rhodes*, 4 R. I. 301.

or delay will defeat the plaintiff's application for a preliminary injunction than is necessary to operate as a bar to equitable interference when his right is established.<sup>1</sup> It is always open to the plaintiff to explain his conduct, and show excuse for his delay, although he has not alleged it in his bill.<sup>2</sup> An acquiescence in an injury which at the time is small and which might reasonably be supposed to be temporary, is no bar to an application for relief when the same injury has increased to serious proportions, and is likely to become permanent.<sup>3</sup> So delay which has been induced by the defendant's representations will not prejudice the application.<sup>4</sup> If the character of the act is not defined, and it is necessary to wait for some time to ascertain its injurious nature and consequences, or if it is continually growing, as in case of the retention of offensive water in a canal,<sup>5</sup> or the corruption of a stream by sewage,<sup>6</sup> such delay will not operate as a bar. Where an interlocutory application is granted for the purpose of protecting the plaintiff in a legal right which is still in dispute, the court will provide in the order for the speedy trial of the right.<sup>7</sup>

§ 528. **Perpetual injunction.**— Upon the establishment of his legal rights, and of an injury not adequately remediable at law, the plaintiff is usually entitled, as of course, to a perpetual injunction.<sup>8</sup> The balance of convenience between the parties will be considered in deciding upon the plaintiff's right to a perpetual injunction, as well as upon the interlocutory motion;<sup>9</sup> but in general a much more serious case of inconvenience

<sup>1</sup> *Attorney General v. Birmingham*, 4 Kay & J. 528, 545, 546; *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 146, 160.

<sup>2</sup> *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349.

<sup>3</sup> *Attorney General v. Halifax*, 17 W. R. 1088; *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349, 355; *Attorney General v. Luton Local Board*, 2 Jur. N. S. 180.

<sup>4</sup> *Attorney General v. Luton Local Board*, 2 Jur. N. S. 180. See *Attorney General v. Birmingham*, 4 Kay & J. 528, 546.

<sup>5</sup> *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71.

<sup>6</sup> *Attorney General v. Halifax*, 17 W. R. 1088; *Attorney General v. Leeds*, L. R. 5 Ch. 583.

<sup>7</sup> *Beaufort v. Morris*, 6 Hare, 340 (*per* Wigram, V. C.); *Dewhurst v. Wrigley*, Cooper Prac. Cas. 319.

<sup>8</sup> *Kerr on Injunctions*, 344; *Stumbo v. Seeley*, 23 Neb. 212.

<sup>9</sup> *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Attorney General v. Birmingham*, 4 K. & J. 528; *Pennington v. Brinsop*, 5 Ch. D. 769; *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71; *Basset v.*

to the defendant is necessary to induce the court to withhold a final injunction than is sufficient to defeat the interlocutory motion. Where the plaintiff has made out a strict case of right, he will usually be protected, although the defendant is seriously inconvenienced thereby.<sup>1</sup> So where the plaintiff was entitled to the flow of a stream in its natural purity, and the defendants, in the construction of a system of drainage, turned the sewage of a large district into the stream, Vice Chancellor Wood, in granting an injunction, said: "There are cases at law in which it has been held that where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience to the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected against an infraction of the law, the question is simply whether he has those rights, and if so, whether the Court, looking to the precedents by which it must be governed in the exercise of its judicial discretion, can interfere to protect them. Now, with regard to the question of the plaintiff's right to an injunction, it appears to me, that so far as this Court is concerned, it is a matter of almost absolute indifference whether the decision will affect a population of 250,000, or a single individual carrying on a manufactory for his own benefit. The rights of the plaintiff must be measured precisely as they have been left by the Legislature."<sup>2</sup>

§ 529. Same.—It is no part of the office of the court to consider the ways and means by which the defendant may comply with its acts. In a case of corrupting water by sewage,<sup>1</sup> the same judge (Lord Chancellor Hatherley) said: "Cases like the present no doubt show the difficulty in which persons who are desirous of getting rid of refuse sewage are constantly placed; but it is a difficulty which must be met, not by applying to a court of law to escape from the exigencies of the condition in which they find themselves, but by an application

Salisbury Manuf. Co., 47 N. H. 426; Board, L. R. 1 Eq. 42; Attorney General v. Bradford Canal, L. R. 2 Eq. 71.  
Wilcox v. Wheeler, 47 N. H. 488.

<sup>1</sup> Attorney General v. Birmingham, 4 K. & J. 528; <sup>2</sup> Attorney General v. Birmingham, 4 K. & J. 528, 539.



to the Legislature. Now, I believe the Court will always find that its simplest course, as far as regards the administration of justice, is to ascertain the exact state of the law which regulates the relations of the parties, and having done so, to proceed to act on it, without any reference to the difficulties of the case on the part of those against whom it is obliged to decide, leaving those parties to relieve themselves as they best can from the position in which they have placed themselves, and if there be no other mode of escape, to cease to do the acts which occasion the wrong."<sup>1</sup>

§ 530. **Same — Laches.**— Acquiescence or laches by the party injured may bar his right to the interference of equity even though the legal right is clearly made out,<sup>2</sup> but a greater degree of consent or delay is necessary than in the case of the interlocutory motion.<sup>3</sup> Any contribution by the plaintiff to

<sup>1</sup> *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 146, 153. In a similar case the same judge, sitting as Vice Chancellor, held that, where the defendants failed to comply with the order, alleging that they had found no means of deodorizing the nuisance, and that obedience was practically impossible, the defendants were guilty of gross contempt, and a sequestration was ordered. *Spokes v. Banbury*, L. R. 1 Eq. 42. See *ante*, § 223.

<sup>2</sup> *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78; 16 Beav. 630; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Jones v. Royal Canal Co.*, 2 Molloy, 319; *Attorney General v. Halifax*, 39 L. J. Ch. 129. Facts held not to amount to laches. *Attorney General v. Birmingham*, 4 K. & J. 528; *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601; *Heiskell v. Gross*, 7 Phila. 317; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Trenton Water Power Co. v. Chambers*, 1 Stockt. Ch. 471; and see *Coalter v. Hunter*, 4 Rand. 59; *Sprague v. Steere*, 1 R. L. 247; *Sheldon v. Rockwell*, 9 Wis. 166; *Cobb v. Smith*,

16 Wis. 661; *Crosby v. Smith*, 19 Wis. 449; *Blanchard v. Deering*, 23 Wis. 200; *Prentiss v. Wood*, 118 Mass. 589; *Logansport v. Uhl*, 99 Ind. 531; *Pennsylvania R. Co.'s Appeal*, 125 Penn. St. 189.

<sup>3</sup> *Attorney General v. Birmingham*, 4 K. & J. 528, 545, 546; *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 146, 160; *Carlisle v. Cooper*, 6 C. E. Greene, 576; *Hartlepool Gas Co. v. West Hartlepool Harbor Co.*, 12 L. T. N. S. 366. The plaintiff is sometimes placed in a dilemma between the rule against laches and that against merely prospective injuries. In such cases the court may issue a general order forbidding acts which will amount to a nuisance, and retain the bill, with leave to the plaintiff to apply for further order. See *Elwell v. Crowther*, 31 Beav. 163; 10 W. R. 615; *Wicks v. Hunt*, Johns. 872. In *Carlisle v. Cooper*, 21 N. J. Eq. 576, 591; 19 N. J. Eq. 256, the New Jersey Court of Errors and Appeals, *per* Depue, J., said: "Where the legal right is settled, and the more efficacious remedy

the acts producing the injury *a fortiori* bars his right to an injunction.<sup>1</sup> Such acquiescence is not only a bar to the injured party's right to an injunction, but may become a ground for a counter injunction against any proceedings either at law or in equity.<sup>2</sup>

§ 531. **Same—Same.**—Acquiescence is no bar to the plaintiff's right where his position does not entitle him to object to the act in question. Thus if A., owning land on one side of a stream, takes a lease of the land opposite, and then diverts water from the leased premises, in favor of his land on the other side, the diversion is not, during the life of the lease, adverse to the lessor, and his acquiescence is no bar to his right to have the land and water restored in their original condition. It does not diminish this right that the tenant has made expensive improvements upon his other land in order to use the water so diverted. He knew that his right to divert the water terminated with the lease. And the landlord may, by conveying the land, transfer his right to another.<sup>3</sup>

of a court of equity is necessary to complete relief, delay is no ground for a denial of its aid, unless it is coupled with such acquiescence as deprives the party of all right to equitable relief. A person may so encourage another in the erection of a nuisance as not only to be deprived of the right of equitable relief, but also to give the adverse party an equity to restrain him from recovering damages at law for such nuisance (citing *Williams v. Earl of Jersey*, 1 Cr. & Ph. 91). So a party who knowingly, though passively, encourages another to expend money under an erroneous opinion of his rights, will not be permitted to assert his title and thereby defeat the just expectation upon which such expenditure was made."

<sup>1</sup> *Carlisle v. Stevenson*, 3 Md. Ch. 499. So in the case of license to maintain a dam. *Ogle v. Dill*, 55 Ind. 180.

<sup>2</sup> Eq. Cas. Abr. 522. "A. diverted a watercourse, which put B. to great expenses in laying sooths, etc., and the diversion being a nuisance to B., he brought his action; but an injunction was decreed upon a bill exhibited for that purpose, it being proved that B. did see the work when it was carrying on and connived at it, without showing the least disagreement, but rather the contrary." See, also, *Sprague v. Steere*, 1 R. I. 247, 259; *Trenton Banking Co. v. McKelway*, 4 Halst. Ch. 84; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463; *Carlisle v. Cooper*, 21 N. J. Eq. 576, cited *supra*; *Cobb v. Smith*, 23 Wis. 261; *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, 608; *Society v. Lehigh Valley R. Co.*, 32 N. J. Eq. 329. Same rule in case of noxious trade. *Williams v. Jersey*, Cr. & Ph. 97.

<sup>3</sup> *Corning v. Troy Iron Factory*, 40 N. Y. 191, 201; 34 Barb. 485; 39 Barb. 311. Where A. gave a parol license

§ 532. **Same — Same.**— Since laches or acquiescence in the defendant's act for less than the prescriptive period may defeat the plaintiff's right to an injunction,<sup>1</sup> *a fortiori* adverse possession and exercise of any right in water, in derogation of the rights of other owners for twenty years, or for a period sufficient to establish a prescriptive right, necessarily defeat the right of such owners to an injunction against a private nuisance.<sup>2</sup> In the case of a public nuisance the right of the public is, upon principle, never barred. One cannot acquire a prescriptive right to maintain a public nuisance,<sup>3</sup> and no prescription will deprive the public of the remedies against such an injury.<sup>4</sup> But an individual, who suffers special injury

to B. to erect and maintain a dam and ditch upon A.'s land, to supply with water a mill on B.'s land, and A. afterwards sold his land to C. without any reservation, and C. objected to the dam and ditch, and requested B. not to maintain them, but B. continued to use them and forcibly prevented C. from removing them, and the dam and ditch were found to constitute a nuisance, it was held that C. was not bound by the license given by A., and was entitled to an injunction restraining B. from maintaining the dam. *Stevens v. Stevens*, 11 Met. 251.

<sup>1</sup> *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601; *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Cobb v. Slimmer*, 45 Mich. 176; *Vick v. Rochester*, 46 Hun, 607; *Outcalt v. The George W. Helme Co.*, 42 N. J. Eq. 665; *Hyde v. French* (N. J. Eq.), 21 Atl. 1069.

<sup>2</sup> *Shields v. Arndt*, 3 Green Ch. 234; *Holsman v. Boiling Spring Co.*, 1 McCarter, 334, 345; *Coalter v. Hunter*, 4 Rand. 58; *McCallum v. Germantown Water Co.*, 54 Penn. St. 40; *Pratt v. Lamson*, 2 Allen, 275; *Ogle v. Dill*, 55 Ind. 130. See 1 High on Injunctions (2d ed.), § 799. But where one has erected a dam upon the lands of another, without right,

nothing short of adverse user for the full time will give him a right, or entitle him to an injunction against obstructions of his raceway. *Sherwood v. Vliet*, 20 Wis. 441. That the user must be adverse, see *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 180. As to acquiescence in the unlawful exercise of statutory powers, where great and important public works have been completed, see *Herron v. Rathmines Com'rs*, 27 L. R. Ir. 179.

<sup>3</sup> *Vooght v. Winch*, 2 B. & Ald. 662; *Weld v. Hornby*, 7 East, 199; *Stoughton v. Baker*, 4 Mass. 522, 528; *Commonwealth v. Upton*, 6 Gray, 473; *Mills v. Hall*, 9 Wend. 315; *Dyergert v. Schenck*, 23 Wend. 446; *Jersey City v. Morris Canal Co.*, 1 Beas. (N. J.) 547, 660; *Cross v. Morristown*, 18 N. J. Eq. 305; *Waterloo v. Union Mill Co.*, 72 Iowa, 437; *Wright v. Moore*, 38 Ala. 593; *Rhodes v. Whitehead*, 27 Texas, 304, 316; *Regina v. Brewster*, 8 Up. Can. C. P. 208. See *ante*, § 331. That the statute of limitations on actions for damages does not extend to actions to enjoin or abate, see *Cook v. Kendall*, 13 Minn. 324; *Thornton v. Webb*, 13 Minn. 498.

<sup>4</sup> *Rochester v. Erickson*, 46 Barb. 92.

from a public nuisance, is entitled to the benefit of the conduct of the community, and is not bound by tacit acquiescence, if such conduct shows constant opposition to the defendant's acts since the injury became material.<sup>1</sup>

§ 533. *Same — Same.*—Neglect on the part of the public may create such an equitable estoppel as to lead courts of equity to decline to exert the extraordinary remedy of an injunction in its behalf. Such neglect is not in any sense a bar of the right of the public, but is a circumstance to be considered by the court, in connection with the other circumstances of the case, in determining whether the conduct of a plaintiff justifies an interference by equity. Thus, in *Attorney General v. Johnson*,<sup>2</sup> which was a case of purpresture, Lord Eldon said: "If the king's subjects have permitted the erection of a building which they were aware would, when completed, be a nuisance, without promptly applying to the Court to prevent it, the Court would not consider them entitled to the extraordinary assistance of a Court of Equity, but leave them to their legal remedy." In *Attorney General v. Bradford Canal*,<sup>3</sup> Vice Chancellor Wood expressed a similar opinion. This was the *ratio decidendi*, so far as the public right was concerned, in the case of *Attorney General v. Sheffield Gas Consumers' Co.*,<sup>4</sup> where Turner, L. J., said: "That delay will affect the Attorney General as much as a private individual I am not prepared to say; but in my opinion, it is a circumstance to be considered in determining the question whether this Court shall interfere, although the application to the Court be on behalf of the Attorney General, and I ground myself in that opinion upon what fell from Lord Eldon in the case of the *Attorney General v. Johnson*." But where the public makes out a plain case of injury by nuisance, and shows that it has no adequate remedy at law, it seems that its right to the protec-

<sup>1</sup> *Woodruff v. North Bloomfield G. M. Co.*, 8 Sawyer, 628; 9 id. 441. lightly treated by the court. See a remark of Wood, V. C., in *Attorney General v. Plymouth*, 1 W. R. 445,

<sup>2</sup> 2 Wils. C. C. 87, 102.

<sup>3</sup> L. R. 2 Eq. 71.

<sup>4</sup> 3 De Gex, M. & G. 304, 324. In that case the alleged injury to the public was called an afterthought by Lord Cranworth (p. 314), and was distinguished this case, which, as is said in *Attorney General v. Cambridge Gas Consumers' Co.*, L. R. 4 Ch. 71, is doubtless to be taken upon its own circumstances.

tion of a court of equity will not be lost by the delay or neglect of its servants in asserting its rights.<sup>1</sup>

§ 534. **Same — Diversion — Obstruction.**— The principles upon which equity interferes, as stated in the foregoing sections, are accepted in all jurisdictions administering equitable relief, but in applying them to concrete cases widely different results have been reached. The diversion or obstruction of a watercourse has been the subject of frequent equitable interference by way of injunction, both in England and America.<sup>2</sup>

<sup>1</sup> *Rochester v. Erickson*, 46 Barb. 92. In this case the decision is apparently contrary to the English decisions cited above. An injunction was sought to restrain the defendants from repairing a building projecting into a river, which had stood in that position for about forty years. The court said: "If it is such a nuisance, no period of use and occupancy, however extended and uninterrupted, and under whatever claim of right, will protect it from abatement by the public authorities, or the preventive remedy by injunction to restrain its perpetuation by additions and repairs." And see *Wright v. Moore*, 38 Ala. 593, where a dictum of similar effect was made in an injunction case. Most of the cases in which the question has been raised are where the State, in its sovereign capacity, has exercised the harsher remedy of indictment or abatement. This has frequently been done after the nuisance has continued for above twenty years. *Stoughton v. Baker*, 4 Mass. 522; *Commonwealth v. Upton*, 6 Gray, 473; *Mills v. Hall*, 9 Wend. 315; *Renwick v. Morris*, 3 Hill, 621; *Rhodes v. Whitehead*, 27 Texas, 304, 316. See 1 Russell on Crimes (9th Am. ed.), 456.

<sup>2</sup> *Bush v. Western*, Prec. in Ch. 530; *Weller v. Smeaton*, 1 Bro. C. C. 572; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Universities v. Richardson*,

6 Ves. 706; *Lane v. Newdigate*, 10 Ves. 194; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 79; *Blakemore v. Glamorganshire Canal*, 1 My. & K. 154; *Elwell v. Crowther*, 31 Beav. 163; *Chalk v. Wyatt*, 3 Meriv. 688; *Martin v. Stiles*, Mosely, 145; *Tipping v. Eckersley*, 2 K. & J. 264; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Attorney General v. Great Eastern Ry. Co.*, L. R. 6 Ch. 577; *Wilts Canal Co. v. Swindon Water Works Co.*, L. R. 9 Ch. 451; *Clowes v. Staffordshire Water Works Co.*, L. R. 8 Ch. 125; *Webb v. Portland Manuf. Co.*, 3 Sumner, 189; *Tyler v. Wilkinson*, 4 Mass. 397; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 273; 3 Johns. Ch. 282; *Case v. Haight*, 3 Wend. 632; *Arthur v. Case*, 1 Paige Ch. 447; *Seneca Woolen Mills v. Tillman*, 2 Barb. Ch. 9; *Varick v. Smith*, 5 Paige, 137; *Reid v. Gifford*, Hopk. Ch. 416; *Corning v. Troy Iron Factory*, 40 N. Y. 191; 34 Barb. 485; 39 Barb. 311; *Corning v. Troy Factory*, 6 How. Pr. 89; *Garwood v. N. Y. Central R. R. Co.*, 17 Hun, 356; *Binney's Case*, 2 Bland Ch. 99; *Lamborn v. Covington*, 2 Md. Ch. 409; *Scudder v. Trenton Delaware Falls*, 1 Saxt. (N. J.) 694; *Holsman v. Boiling Spring Co.*, 1 McCarter, 335; *Shreve v. Voorhees*, 2 Green Ch. 25; *Shields v. Arndt*, 3 Green Ch. 234; *Hulme v. Shreve*, 3 Green Ch. 116; *Carlisle v.*

It is said that a diversion will not be restrained by injunction where there is ample water left for the plaintiff's needs.<sup>1</sup> So if the water diverted be returned in undiminished quantity before reaching the plaintiff's premises, equity will not interfere.<sup>2</sup> And where an upper mill-owner, who diverts water for his mill, offers to discharge it directly into the plaintiff's race above his mill, and thus to give the plaintiff the full benefit of its use, with substantially the same results as if it were returned into the stream, such diversion will not be enjoined.<sup>3</sup> So if there is a channel departing from the main stream, and returning, and the defendant cuts a raceway from the main stream, giving the narrower channel a straighter course, but not decreasing the amount of the main stream, there is no injury cognizable in equity.<sup>4</sup> An injunction is the appropriate remedy to prevent a land-owner from diverting from its natural channel water from his land, which lies outside the district, into a district ditch.<sup>5</sup> The jurisdiction to issue a preliminary injunction against diversion includes the power to direct the removal of the means by which it is accomplished.<sup>6</sup>

§ 535. Same — Same.— The obstruction of an artificial channel, in which the plaintiff is entitled to the flow of water,

Cooper, 21 N. J. Eq. 576; Denton v. Leddell, 23 N. J. Eq. 64; Sprague v. Rhodes, 4 R. L. 301; Bemis v. Upham, 13 Pick. 169; Bardwell v. Ames, 22 Pick. 353, 379; Smith v. Olmstead, 5 Blackf. 37; Burden v. Stein, 27 Ala. 104; Wright v. Moore, 38 Ala. 593; Tuolumne Water Co. v. Chapman, 8 Cal. 392; Sanford v. Felt, 71 Cal. 249; McKenzie v. Ballard, 14 Col. 426; White v. Forbes, Walker's Ch. (Mich.) 112. See Fleming's Appeal, 65 Penn. St. 444; Switzer v. McCulloch, 76 Va. 777; Shively v. Hume, 10 Oregon, 76.

<sup>1</sup> Cilly v. Cincinnati, 2 Cin. Weekly Bulletin, 135. So where the injury complained of was done and completed by the acts of others than the defendants, an injunction will not lie to restrain the defendants from acts which will work no injury. An alleged injury to the bare right of navi-

gating a canal which has been abandoned and in part filled up by others, is no ground for an injunction. It is a mere *damnum absque injuria*. The injury which the party apprehends must be real. Erkenbrecher v. Este, 1 Cin. Sup. Ct. 368. Diversion above on the stream is not fraud, giving jurisdiction in equity. Galvin v. Shaw, 12 Maine, 454.

<sup>2</sup> Elmhirst v. Spencer, 2 Macn. & G. 45; Edleston v. Crossley, 18 L. T. N. S. 15; Kensit v. Great Eastern Ry. Co., 27 Ch. D. 122; 23 Ch. D. 566; Canfield v. Andrews, 54 Vt. 1.

<sup>3</sup> Mason v. Cotton, 2 McCrary, 82.

<sup>4</sup> Potier v. Burden, 38 Ala. 651.

<sup>5</sup> Dayton v. Rutherford, 128 Ill. 271; 29 Ill. App. 81.

<sup>6</sup> Johnson v. Superior Court, 65 Cal. 567.



is equally within the remedial powers of courts of equity.<sup>1</sup> So if the plaintiff has, by grant or otherwise, the right to convey water through a conduit beneath the surface of the defendant's land, and the defendant wrongfully stops the channel or cuts the pipes, the plaintiff is entitled to an injunction.<sup>2</sup> And if the plaintiff's right is merely that of a licensee, but the defendant has encouraged the expenditure of money in constructing the course, and acquiesced in its use, equity will restrain the defendant from obstructing it.<sup>3</sup>

§ 536. **Same — Same.**— Where water flows from surface springs, though not in a perfectly defined channel, into adjoining lands, the owners of such lands are entitled to the flow, and will be protected in it by injunction against any diversion by the owner of the springs.<sup>4</sup> The discharge of surface-water through an artificial channel, upon the lands of another, is ground for an injunction,<sup>5</sup> subject to the general principles

<sup>1</sup> *Dewhirst v. Wrigley*, 1 C. P. Cooper, 819; *Manser v. Northern Ry. Co.*, 2 Ry. & C. Cas. 380; *Coats v. Clarence Ry. Co.*, 1 Russ. & My. 181; *Varick v. Smith*, 5 Paige, 137; *Sanderlin v. Baxter*, 76 Va. 299. An injunction will be granted to restrain the obstruction of a canal constructed pursuant to a statute for the purpose of draining a swamp. *Houston v. Wheeler*, 52 N. Y. 641. See *Heilbron v. Land Co.*, 80 Cal. 189; *Van Bibber v. Hilton*, 84 Cal. 585; *Bass v. Fort Wayne*, 121 Ind. 389; *Chambers v. Kyle*, 87 Ind. 83; 15 Sol. J. 487.

<sup>2</sup> *Devonshire v. Eglin*, 14 Beav. 530; *Legg v. Horn*, 45 Conn. 409; *Wilcox v. Wheeler*, 47 N. Y. 488; *Bitting's Appeal*, 105 Penn. St. 517.

<sup>3</sup> *Devonshire v. Eglin*, 14 Beav. 530; *Legg v. Horn*, 45 Conn. 409. But see *Owen v. Feld*, 12 Allen, 457. In this case no facts of acquisition are stated. The plaintiff had been conveying water across the defendant's land by an aqueduct under a license; the defendant revoked the license and took

up the aqueduct. The court refused to enjoin him from preventing the plaintiff from replacing it.

<sup>4</sup> *Ennor v. Barwell*, 2 Giff. 410; 4 L. T. N. S. 597; *Foot v. Van Giesen*, 4 Lans. 47; 35 L. T. 362. For a similar case at law, see *Dudden v. Clutton Union Co.*, 1 H. & N. 627. It is no justification of a detention of water, which flows in a natural channel and supplies the lands of the plaintiff, that the defendant intercepted the flow at its source on his own land, nor is it any defence in such case to show that the water has been ponded in a reservoir which may be needed to supply a town with water under a contract made by the defendant with the town. *Howe v. Norman*, 13 R. L. 488. See *Ferris v. Wellborn*, 64 Miss. 29; *Perkins v. Foye*, 60 N. H. 496.

<sup>5</sup> *Ante*, ch. 9; *Pettigrew v. Evansville*, 25 Wis. 223; *Davis v. Londgreen*, 8 Neb. 48; *Hicks v. Silliman*, 93 Ill. 255; *Miller v. Morristown* (N. J. Eq.), 20 Atl. 61.

heretofore stated, as that the injury must be beyond compensation at law.<sup>1</sup>

§ 537. **Same — Same.**—The unreasonable detention and discharge of water by alternately opening and closing the gates of a dam is an injury remediable by injunction.<sup>2</sup> So the wrongful opening of the gates of a dam, letting down a flood of water and preventing the prosecution of a lawful public work in the stream, will be prevented by injunction.<sup>3</sup> Where one has lawfully maintained a dam at a certain height, a wrongful increase in its height is not necessarily an injury beyond the powers of courts of law to remedy.<sup>4</sup> But where a dam maintained at a lawful height did not affect the plaintiff's land, and the increase of height caused its overflow, it was held that equity would prevent such injury, and to that end would determine the proper height of the dam, and forbid its maintenance above that height.<sup>5</sup> Where the alleged injury results from conflicting uses of a common stream, equity will determine the rights of both parties by one decree.<sup>6</sup>

§ 538. **Same — Rights fixed by parties.**—Where parties have regulated their rights in water by a contract, it is not the province of equity to construe such contract and determine their rights under it;<sup>7</sup> but where its meaning is

<sup>1</sup> *Laney v. Jasper*, 89 Ill. 46.

<sup>2</sup> *Pollitt v. Long*, 58 Barb. 20.

<sup>3</sup> *Longwood Valley Co. v. Baker*, 21 N. J. Eq. 166.

<sup>4</sup> *Colwell v. May's Landing Co.*, 19 N. J. Eq. 245.

<sup>5</sup> *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Longwood Valley R. Co. v. Baker*, 27 N. J. Eq. 166; *Crosby v. Smith*, 19 Wis. 449. The wrongful addition of flashboards to a dam rightfully maintained may cause such an injury as to call for an injunction. *Knapp v. Douglas Axe Co.*, 13 Allen, 1; *Beamish v. Barrett*, 16 Grant's Ch. (Can.) 318. Unhealthfulness caused by the increased height of a dam may be ground for an injunction. *Norwood v. Dickey*, 18 Ga. 282.

<sup>6</sup> *Arthur v. Case*, 1 Paige, 446; *Bel-*

*knapp v. Trimble*, 3 Paige, 577; *Lehigh Valley R. Co. v. Society*, 30 N. J. Eq. 145; 32 N. J. Eq. 329; *Atlanta Mills v. Mason*, 120 Mass. 244. In such cases it is necessary so to frame the decree as to protect the rights of each, and, unless the injury clearly calls for equitable interference, it is best to leave the parties first to their remedies at law. *Hoxsie v. Hoxsie*, 38 Mich. 77. If one erects a new mill so close above an existing mill as to suffer from its back flowage, equity will not interfere until he has established his right at law. *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282.

<sup>7</sup> *Fisk v. Wilber*, 7 Barb. 395; *Burnham v. Kempton*, 44 N. H. 78, 93; *Morris Canal Co. v. Society*, 1 Halst. Ch. 203. In *Mayor v. Commission-*

clear,<sup>1</sup> or has been adjudicated, equity will restrain the parties from any breach of it, although the acts proposed would not apparently be injurious to the plaintiff.<sup>2</sup> Where the act is not clearly a breach, equity will not interfere<sup>3</sup> unless serious injury is shown;<sup>4</sup> but where great changes are proposed, in breach of the rights alleged under the contract, and the meaning of the contract is doubtful, equity will enjoin the parties from making such changes until the rights can be determined at the hearing, or by issue at law.<sup>5</sup>

§ 539. **Same — Same.**—So equity will adjust the respective rights of grantors and grantees of water or riparian property.<sup>6</sup> Where a riparian owner conveys a portion of his land including a water-power, equity will restrain him from disturbing his grantee in violation of the express terms of his grant without first sending the grantee to a court of law.<sup>7</sup> So, where under a Mill Act, rights of the parties have been fixed and a jury have found that the dam should be kept open at certain seasons, an injunction will be granted to protect the plaintiff's right under such finding.<sup>8</sup>

§ 540. **Same — Common rights regulated in equity.**—Another ground of equity jurisdiction is the regulation of common rights in water. Judge Sargeant says: "Courts of

ers of Spring Garden, 7 Penn. St. 348, where the legislature had granted an exclusive right to the water-power of a navigable stream to the grantors of the plaintiff, and afterwards granted a privilege of taking water from the stream to supply the inhabitants of a district with water, but not for use as water-power, and it was shown that the taking of the amount necessary to supply the district would have no effect upon the power, the court held that the latter grant was not in derogation of the former, and refused to grant an injunction against the erection of works for taking the water.

<sup>1</sup>Tipping v. Eckersley, 2 K. & J. 264; Olmsted v. Loomis, 9 N. Y. 423; 6 Barb. 52.

<sup>2</sup>Dickinson v. Grand Junction Canal Co., 15 Beav. 260.

<sup>3</sup>Morris Canal Co. v. Society, 1 Halst. Ch. 203.

<sup>4</sup>Ingram v. Morecraft, 33 Beav. 49.

<sup>5</sup>Johnston v. Hyde, 25 N. J. Eq. 454.

<sup>6</sup>Seneca Woollen Mills v. Tillman, 2 Barb. Ch. 9; Crittenden v. Field, 8 Gray, 621; Patten v. Marden, 14 Wis. 473; Hanna v. Clarke, 31 Gratt. 36; Comstock v. Johnson, 46 N. Y. 615; Wakely v. Davidson, 26 N. Y. 387; Merrill v. Calkins, 74 N. Y. 1; 10 Hun, 497.

<sup>7</sup>Seneca Woollen Mills v. Tillman, 2 Barb. Ch. 9.

<sup>8</sup>Hill v. Sayles, 12 Cush. 454.

equity have jurisdiction of that class of cases where there is an admitted common right among several owners of the same privilege, to regulate the common use, to determine the extent of their respective rights and the proper mode for exercising and enjoying them, as tending to prevent litigation, and as affording a more complete and perfect remedy than could be obtained at law, and as furnishing, in fact, the only adequate means of ascertaining and determining the respective rights of the parties.”<sup>1</sup> The jurisdiction in this class of cases rests on the inadequacy of legal remedies, and the prevention of multiplicity of suits.<sup>2</sup> The majority of an association have been restrained from letting water run to waste without regard to the interests of the minority;<sup>3</sup> and where one of several parties having a common interest in a water-power uses more than his share, equity will call all the parties before it, if necessary, determine their respective rights and obligations by one decree, and enjoin those using more than their share from such use,<sup>4</sup> or from permitting the water to

<sup>1</sup> *Burnham v. Kempton*, 44 N. H. 78, 100. Where two corporations have conflicting claims under their charters to the use of the waters of the same streams, equity has jurisdiction to settle their relative rights, and for that purpose may enjoin further prosecution of suits at law. *Lehigh Valley R. Co. v. Society*, 30 N. J. Eq. 145; 32 N. J. Eq. 329. See, also, *Ranlet v. Cook*, 44 N. H. 512; *Ballou v. Wood*, 8 Cush. 48; *Lyon v. McLaughlin*, 32 Vt. 423; *Sanborn v. Braley*, 47 Vt. 170; *Adams v. Manning*, 48 Conn. 477; 51 Conn. 5; *Hoxie v. Hoxie*, 38 Mich. 77; *Hanna v. Clarke*, 31 Gratt. 36; *Switzer v. McCulloch*, 76 Va. 777, 789; *Ballou v. Hopkinton*, 4 Gray, 324; *Bardwell v. Ames*, 22 Pick. 333, 354; *Belknap v. Trimble*, 3 Paige, 377; *Boston Water Power Co. v. Boston & Worcester R. Co.*, 16 Pick. 512, 526. That allegations must show injuries of such rights, see *Norris v. Hill*, 1 Mich. 202.

<sup>2</sup> *McConnaughy v. Pennoyer*, 43

Fed. Rep. 339; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; *Patten Paper Co. v. Kaukauna Water Power Co.*, 70 Wis. 659; *Frey v. Lowden*, 70 Cal. 550; *Lowden v. Frey*, 67 Cal. 474. See *Pomeroy on Riparian Rights*, § 154; 1 Pom. Eq. § 255 *et seq.*

<sup>3</sup> *Ballou v. Wood*, 8 Cush. 48.

<sup>4</sup> *Kennedy v. Scovil*, 12 Conn. 317; *Adams v. Manning*, 48 Conn. 477; *Mason v. Hoyle*, 56 Conn. 255; *Ottaquechee Woolen Co. v. Newton*, 57 Vt. 451; *May v. Parker*, 12 Pick. 34; *Bliss v. Rice*, 17 Pick. 23; *Ballou v. Hopkinton*, 4 Gray, 324; *Salem Co. v. Salem F. M. Co.*, 12 Oregon, 374; *Hanna v. Clarke*, 31 Gratt. 36. Where several have a right of passage in a private canal, equity will enjoin a party in interest from injuring the canal. *Page v. Young*, 106 Mass. 313. An oral agreement by tenants in common of a dam, giving each other a way over it, will not, though executed, give a good right of way to one co-tenant against a purchaser

run to waste.<sup>1</sup> Parties who are jointly interested in the use and benefit of a mill or water-power are held liable in equity to a proportional share of the expenditures for the common benefit, necessary for maintaining such mill or power;<sup>2</sup> and if they co-operate for a long time in conveying water to irrigate their respective lands, they will be presumed entitled to an equal share of the water under a tacit agreement which a court of equity may enforce.<sup>3</sup> But this principle does not apply when the deeds of conveyance fix the rights of each mill-owner, and define his liability as to contribution in maintaining a dam in which all have a common interest.<sup>4</sup>

§ 541. **Same — Health.**— An injury to health by the obstruction and accumulation of water is ground for injunction.<sup>5</sup> But in States where the law favors the development of mills, it is held that if the injury to health is merely to one family or to a few individuals, the private right must give way to the public convenience, at least so far that equity will not enjoin the accumulation of water, but leave the plaintiffs to their legal remedies.<sup>6</sup> And an injunction will not be granted, on the ap-

for value from the other without notice of the agreement, and will not be enforced against him in equity. *Bush v. Golden*, 17 Conn. 594. In *Woodruff v. North Bloomfield Gravel Mining Co.*, 8 Sawyer, 628; 9 *id.* 441, it is held that one tenant in common of land injured by a public and private nuisance may sue to enjoin the nuisance without making his cotenant a party, either as complainant or defendant.

<sup>1</sup> *Fuller v. Daniels*, 63 N. H. 395.

<sup>2</sup> *Bradfield v. Dewell*, 48 Mich. 9; *Denman v. Prince*, 40 Barb. 213; *Clark v. Plummer*, 31 Wis. 442; *Sanborn v. Braley*, 47 Vt. 170; *Carver v. Miller*, 4 Mass. 559; *Buck v. Spofford*, 47 Vt. 170. In several of the States this liability is regulated by statute, proceedings are authorized to determine the necessity and extent of repairs and liens on the property, or,

as in Massachusetts, on the profits of business, given to enforce payment. See Mass. Pub. Stats. 1882, ch. 190, § 59 *et seq.*; N. H. Rev. Stats. (1878), Title 17, ch. 141; Maine Rev. Stats. (1871), Title 4, ch. 57; *Alden v. Carleton*, 81 Maine, 358; Wisconsin Rev. Stats. (1878), ch. 146, § 3403 *et seq.*; *Cheshire Mills v. Gowing*, 62 N. H. 618.

<sup>3</sup> *Combs v. Slayton*, 19 Oregon, 99; *Frey v. Lowden*, 70 Cal. 550.

<sup>4</sup> *Tullar v. Baxter*, 59 Vt. 467.

<sup>5</sup> *Bell v. Blount*, 4 Hawks (N. C.), 384; *Attorney General v. Hunter*, 1 Dev. Eq. (N. C.) 12; *Ogletree v. McQuagga*, 67 Ala. 580; *Norwood v. Dickey*, 18 Ga. 528; *Adams v. Popham*, 76 N. Y. 410.

<sup>6</sup> *Eason v. Perkins*, 2 Dev. Eq. (N. C.) 38; *Wilder v. Strickland*, 2 Jones Eq. (N. C.) 386; *Fox v. Holcomb*, 82 Mich. 494.

plication of individuals, to prevent injuries to the public health unless it is alleged in the bill that their health will be directly affected by the nuisance.<sup>1</sup>

§ 542. **Same — Subterranean waters.**—In general equity will not interpose to prevent the diversion of subterranean waters by an excavation on the defendant's own land.<sup>2</sup> This follows from the principles with regard to subterranean waters, which have been stated in a former chapter.<sup>3</sup> But where such diversion of subterranean water will have the effect of cutting off the supply of a stream in a defined surface channel through other lands, the diversion will be enjoined.<sup>4</sup> And where subterranean water flows in a defined channel and a known course, equity will protect the rights of property-owners in such stream.<sup>5</sup> Where a well is supplied by water percolating through the earth, the owner of the well is not entitled to the water until it enters his well, and equity will not enjoin the opening and maintenance of a new well which diverts water therefrom.<sup>6</sup> The occupier of neighboring property will be restrained from collecting rubbish on his property, or using a cesspool therein in such a manner as to pollute the water coming through his property and supplying the well,<sup>7</sup> but a stable built twenty-five feet from the plaintiff's house and well is not a nuisance *per se*.<sup>8</sup>

<sup>1</sup> Vail v. Mix, 74 Ill. 127. See Adams v. Popham, 76 N. Y. 410.

<sup>2</sup> Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. 483; Roath v. Driscoll, 20 Conn. 533; Ellis v. Duncan, 21 Barb. 230; Mosier v. Caldwell, 7 Nev. 363.

<sup>3</sup> *Ante*, ch. 9.

<sup>4</sup> Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. 483; Redman v. Forman, 84 Ky. 214.

<sup>5</sup> Delhi v. Youmans, 50 Barb. 316; 45 N. Y. 362; Cole Silver Mining Co. v. Virginia Water Co., 1 Sawyer, 470, 686; Burroughs v. Satterlee, 67 Iowa, 396; Keeney v. Carillo, 2 New Mex. 480.

<sup>6</sup> Hammond v. Hall, 10 Sim. 551; Ellis v. Duncan, 21 Barb. 230; Delhi v. Youmans, 50 Barb. 316; 45 N. Y.

362. See Acton v. Blundell, 12 M. & W. 324; and see *ante*, ch. 9.

<sup>7</sup> Womersley v. Church, 17 L. T. N. S. 190. It is held in Indiana that equity will not restrain a municipality from establishing a cemetery which will destroy the plaintiff's well. There was some doubt as to the effect of the work proposed, but the court went upon the broad ground that it is "impossible to establish correlative rights in a subterraneous stream, the situation of which is not known;" and that the defendant, as owner of land, owns whatever may be found below the surface, and may dig for and apply such articles to his own purposes. Greencastle v. Hazelett, 23 Ind. 186.

<sup>8</sup> Keiser v. Lovett, 85 Ind. 240;



§ 543. **Same — Prior appropriation.**— Under the customs of miners, adopted in the mining States and Territories, and allowing priority of right to the first appropriator of a stream,<sup>1</sup> which doctrine has been extended by the courts to appropriations of streams flowing through public lands,<sup>2</sup> for any beneficial use, an appropriator of such a stream in whole or in part<sup>3</sup> will be protected by injunction in the enjoyment of that portion of the stream to which he is entitled,<sup>4</sup> and to prevent wrongful acts acquiring the appearance of right by lapse of time.<sup>5</sup> Such right<sup>6</sup> extends to subterranean currents of water, which will be protected by injunction; but one who claims to be injured by a diversion which affects only the overflowing waters of a natural stream is not entitled to have it restrained.<sup>7</sup>

§ 544. **Same — Pollution.**— The pollution of a stream or supply of water is another frequent ground for equitable in-

*Pennoyer v. Allen*, 56 Wis. 502; 42 Am. Rep. 540, note.

<sup>1</sup> *Ante*, ch. 7; *Irwin v. Phillips*, 5 Cal. 140; *Atchison v. Peterson*, 20 Wall. 507; 1 Mont. 561; *Basey v. Gallagher*, 20 Wall. 670; *Bear River Co. v. York Mining Co.*, 8 Cal. 327; *Butte Canal Co. v. Vaughan*, 11 Cal. 143; *McDonald v. Bear River Co.*, 13 Cal. 220; *Phoenix Water Co. v. Fletcher*, 23 Cal. 482; *Hill v. Smith*, 27 Cal. 476; *Smith v. O'Hara*, 43 Cal. 371; *Lobdell v. Simpson*, 2 Nev. 274; *Ophir Mining Co. v. Carpenter*, 4 Nev. 534; *Hobart v. Ford*, 6 Nev. 80; *Proctor v. Jennings*, 6 Nev. 83; *Dalton v. Bowker*, 8 Nev. 201; *Barnes v. Sabron*, 10 Nev. 217; *Columbia Mining Co. v. Holter*, 1 Mon. 296; *Woolman v. Garringer*, 1 Mon. 535; *Keeney v. Carillo*, 2 New Mex. 480; *Hungarian Hill Co. v. Moses*, 58 Cal. 168; *ante*, ch. 7. See Cal. Civ. Code, §§ 1410-1422.

<sup>2</sup> *Ante*, § 240; *Wixon v. Bear River Co.*, 24 Cal. 367; *McDonald v. Askew*, 29 Cal. 201; *Basey v. Gallagher*, 20 Wall. 670; *Ellis v. Tone*, 58 Cal. 289; *ante*, ch. 9.

<sup>3</sup> *Butte Canal Co. v. Vaughan*, 11 Cal. 143; *Keeney v. Carillo*, 2 New

Mex. 480; *Farley v. Spring Valley Mining Co.*, 58 Cal. 142.

<sup>4</sup> *Phoenix Water Co. v. Fletcher*, 23 Cal. 482; *Ophir Mining Co. v. Carpenter*, 4 Nev. 534; *Hobart v. Ford*, 6 Nev. 80; *Barnes v. Sabron*, 10 Nev. 217; *Hoye v. Sweetman*, 19 Nev. 376; *Roberts v. Arthur*, 15 Col. 100; *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, 20 Wall. 670; *Columbia Mining Co. v. Holter*, 1 Mon. 296; *Keeney v. Carillo*, 2 New Mex. 480.

<sup>5</sup> *Moore v. Clear Water Co.*, 68 Cal. 146; *Creighton v. Kaweah Canal Co.*, 67 Cal. 221.

<sup>6</sup> *Ante*, § 281; *Cross v. Kitts*, 69 Cal. 217; *Brown v. Ashley*, 16 Nev. 317; *Parker v. Larsen*, 86 Cal. 236. Where the plaintiff in excavating a tunnel in a mountain to its mining claim, on government lands, struck a subterranean flow of water, and appropriated and used it, and several years afterward the defendants, by another tunnel, intercepted the flow of water and appropriated it to their own use, an injunction was issued restraining the defendants from such diversion. *Cole Silver Mining Co. v. Virginia Water Co.*, 1 Sawyer, 476.

<sup>7</sup> *Edgar v. Stevenson*, 76 Cal. 286.

terference.<sup>1</sup> There must be a perceptible pollution, injuring the plaintiff, to justify the granting of an injunction. Where a local board maintaining waterworks on a stream sought to restrain the defendant from polluting the stream by the discharge of sewage eight miles above, on the ground of nuisance, and the evidence showed that there was such pollution at the point of discharge, but that it was wholly imperceptible by chemical analysis at the intake of the waterworks, Jessel, M. R., dismissed the bill.<sup>2</sup> The injury must be to the plaintiff in his rightful use of the water. Where the plaintiff brought suit to restrain the defendant from discharging muddy water from a gravel-pit into a stream used by the plaintiff in cultivating water-cress beds, Wood, V. C., held that in the absence of a prescriptive right, the defendant had as much right to use the stream for drainage as the plaintiff for growing water-cresses, and refused the injunction.<sup>3</sup> But where perceptible pollution is shown to the damage of the plaintiff, an injunction will be granted to prevent its continuance,<sup>4</sup> although the damage may be merely nominal.<sup>5</sup> A corruption of water will be enjoined if causing injury to the plaintiff in any rightful use of

<sup>1</sup> Wood v. Sutcliffe, 2 Sim. N. S. 163; Oldaker v. Hunt, 6 De Gex, M. & G. 376; 19 Beav. 485; Lingwood v. Stowmarket, L. R. 1 Eq. 77; Goldsmid v. Tunbridge Wells, L. R. 1 Ch. 349; L. R. 1 Eq. 161; Attorney-General v. Bradford Canal, L. R. 2 Eq. 71; Crossley v. Lightowler, L. R. 2 Ch. 418; Clowes v. Staffordshire, L. R. 8 Ch. 125; Pennington v. Brinsop, 5 Ch. D. 769; Jamieson v. Russel, 8 Pat. Ap. (Scot.) 403; ante, § 214; Holsman v. Boiling Spring Co., 1 McCarter, 385; Attorney General v. Steward, 20 N. J. Eq. 415; 21 N. J. Eq. 340; Merrifield v. Lombard, 13 Allen, 16; Richmond Manuf. Co. v. Atlantic Delaine Co., 10 R. I. 106; Seaman v. Lee, 10 Hun, 607; Canfield v. Andrews, 54 Vt. 1. See New Boston Coal Co. v. Pottsville Water Co., 54 Penn. St. 164; Woodycar v. Schaefer, 57 Md. 1; Woodruff v. North Bloomfield Gravel Mining Co.,

8 Sawyer, 628; 9 id. 441; Silver Spring Co. v. Wanskuck Co., 13 R. I. 611. In the last case it was decided that the change of a community from agricultural to manufacturing does not change the policy of the law, nor the rights of riparian owners to the natural purity of the stream.

<sup>2</sup> Attorney General v. Cockermouth Local Board, L. R. 18 Eq. 172. See also Silver Spring Co. v. Wanskuck Co., 13 R. I. 611.

<sup>3</sup> Weeks v. Heward, 10 W. R. 557.

<sup>4</sup> Goldsmid v. Tunbridge, L. R. 1 Ch. Ap. 349; Crossley v. Lightowler, L. R. 2 Ch. Ap. 478; Bidder v. Croyden, 6 L. T. N. S. 778; Manchester v. Work-sop, 23 Beav. 198; Oldaker v. Hunt, 6 De G., M. & G. 376; Attorney General v. Birmingham, 4 K. & J. 528; Attorney General v. Sutton, 2 Jur. N. S. 180; Pennington v. Brinsop, L. R. 5 Ch. D. 769.

<sup>5</sup> Crossley v. Lightowler, L. R. 2

the water, as by rendering it unfit for manufacturing purposes,<sup>1</sup> or for domestic uses,<sup>2</sup> or for the drink of cattle,<sup>3</sup> or for fish to live in,<sup>4</sup> or when it impairs the health of those in the community.<sup>5</sup> So the accumulation of corrupting deposits in a stream,<sup>6</sup> the pollution of a canal,<sup>7</sup> the discharge into a stream of heated water,<sup>8</sup> or of the offal of abattoirs,<sup>9</sup> or of sawdust from a mill,<sup>10</sup> will be prevented by injunction. And the fact that others also pollute the stream, and that the pollution caused by the defendant is an inconsiderable part of the whole corruption, is no bar to an injunction.<sup>11</sup> If the defendant has a right to discharge corrupting matter into the stream to a certain extent, he may be enjoined from polluting the stream beyond his right; but the plaintiff of course must show that there has been such an increase.<sup>12</sup> The same rules apply

Ch. Ap. 478; *Attorney General v. Leeds*, L. R. 5 Ch. Ap. 583, 589 (*per James, V. C.*, in note); *Clowes v. Staffordshire*, L. R. 8 Ch. Ap. 125; *Pennington v. Brinsop*, L. R. 5 Ch. D. 769. See *Coulson & Forbes on Waters*, 669.

<sup>1</sup> *Wood v. Sutcliffe*, 2 Sim. N. s. 168; *Tipping v. Eckersley*, 2 K. & J. 264; *Crossley v. Lightowler*, L. R. 2 Ch. Ap. 478; *Clowes v. Staffordshire*, L. R. 8 Ch. Ap. 125; *Pennington v. Brinsop*, L. R. 5 Ch. D. 769; *Merrifield v. Lombard*, 13 Allen, 16.

<sup>2</sup> *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Attorney General v. Cockermouth Board*, L. R. 18 Eq. 172; *Holsman v. Boiling Spring Co.*, 1 McCarter, 335; *Attorney General v. Steward*, 20 N. J. Eq. 415; *Baltimore v. Warren Manuf. Co.*, 59 Md. 96.

<sup>3</sup> *Oldaker v. Hunt*, 6 De Gex, M. & G. 376; 19 Beav. 485; *Attorney General v. Birmingham*, 4 K. & J. 528; *Attorney General v. Luton Local Board*, 2 Jur. N. s. 180.

<sup>4</sup> *Oldaker v. Hunt*, 6 De Gex, M. & G. 376; 19 Beav. 485; *Bidder v. Croydon*, 6 L. T. N. s. 778; *Attorney General v. Luton Local Board*, 2 Jur. N. s. 180; *Attorney General v. Birming-*

*ham*, 4 K. & J. 8; *Seaman v. Lec*, 10 Hun, 607.

<sup>5</sup> *Ante*, § 220.

<sup>6</sup> *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71; *Attorney General v. Luton Local Board*, 2 Jur. N. s. 180; *Hudson River R. R. Co. v. Loeb*, 7 Rob. (N. Y.) 418; *Attorney General v. McLaughlin*, 1 Ch. (Can.) 34.

<sup>7</sup> *Attorney General v. Basingstoke*, 45 L. J. Ch. 726; *Boston Rolling Mill v. Cambridge*, 117 Mass. 396.

<sup>8</sup> *Tipping v. Eckersley*, 2 K. & J. 264. For recovery at law for discharging heated water into a stream, see *Mason v. Hill*, 5 B. & Ad. 1.

<sup>9</sup> *Attorney General v. Steward*, 20 N. J. Eq. 415; 21 N. J. Eq. 340; *Babcock v. New Jersey Stockyard Co.*, 20 N. J. Eq. 296; *Woodyear v. Schaefer*, 57 Md. 1.

<sup>10</sup> *Canfield v. Andrew*, 54 Vt. 1.

<sup>11</sup> *Pennington v. Brinsop*, 5 Ch. D. 769.

<sup>12</sup> *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Attorney General v. Leeds*, L. R. 5 Ch. 583; *Holt v. Rochdale*, L. R. 10 Eq. 354; *Metropolitan Board v. London Ry. Co.*, 17 Ch. 246; *Attorney General v. Acton Local Board*, 22 Ch. D. 221; *Charles v. Finchley Local Board*, 48 L. T. N. s. 569. See *Spence v. McDonough*, 77 Iowa, 460.

to the corruption of navigable or tidal waters as to private streams.<sup>1</sup>

§ 545. **Same — Same.**— The pollution of streams by municipalities and public bodies in charge of sewage and drainage has occasioned frequent exercise of the preventive powers of equity. Upon principle a public body has no more right at common law than a private person. Its duty to prevent public nuisances by taking care of the sewage or drainage of a district gives it no right to create another nuisance by the pollution of a stream.<sup>2</sup> If special powers have been granted to it by statute for the performance of a given object, it is bound to act strictly within its powers.<sup>3</sup> If it exercises such powers so as to injure the property of individuals, it is responsible for the injury as a tort, unless the act done was strictly necessary for the performance of the objects for which the powers were granted; and in such case the remedy of the individual is under the compensation clauses of the Act,<sup>4</sup> or, in America, usually under the provisions for exercising the power of eminent domain.<sup>5</sup> Any pollution of a stream by a public body, in taking care of sewage, is therefore a nuisance unless expressly authorized,<sup>6</sup> and is liable to injunction.<sup>7</sup>

<sup>1</sup> *Attorney General v. Kingston*, 34 L. J. Ch. 481, 486.

<sup>2</sup> *Dillon, Mun. Corp.* (3d ed.), § 1048.

<sup>3</sup> *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 146; *Belknap v. Belknap*, 2 Johns. Ch. 463. See *Cowell v. Martin*, 43 Cal. 605.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Martin, Ex parte*, 13 Ark. 198. See *Fleming's Appeal*, 65 Penn. St. 444; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

<sup>6</sup> See *ante*, § 223; *Truman v. London Ry.*, 50 L. T. N. S. 89. If the work authorized is the drainage and reclamation of overflowed lands, for sanitary and agricultural purposes, the court will not enjoin, as a nuisance, a dam erected in pursuance of the legislative authority, and nearly completed, if, upon the evidence, the effect of the dam upon the public

health is uncertain. *McNeal v. Assiscunk Creek Meadow Co.*, 37 N. J. Eq. 204. As a sanitary authority, in whom the sewers are vested, have only a limited ownership in them, they are not in the same position as to responsibility for fouling a stream as a private individual, because they cannot stop the sewers on account of the damage to the inhabitants of the neighborhood. *Attorney General v. Dorking Guardians*, 20 Ch. D. 585. In construing powers conferred upon boards of works, acting for the public benefit alone, the legislative intent is not measured by the more guarded powers given to public trading companies. *North London Ry. Co. v. Metropolitan Board of Works*, 28 L. J. Ch. 909.

<sup>7</sup> *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *At-*

§ 546. *Same — Same.*— An authority over sewage is no authority to commit a nuisance.<sup>1</sup> An owner of land upon a stream below a city is entitled to an injunction against injury by the outflow of sewage.<sup>2</sup> So an injunction will lie to prevent the opening of additional sewers into a stream in such a manner as to render the water unfit for use,<sup>3</sup> and it is not a defense that the city cannot lawfully enter upon the premises of those who use the sewer for the purpose of abating the nuisance.<sup>4</sup> And if a few house-holders upon a stream have used it as a drain, a modern board cannot found a prescriptive right to corrupt the stream upon such usage.<sup>5</sup> If any nuisance of this kind be shown, though causing inconsiderable damage, equity will enjoin its continuance.<sup>6</sup> In deciding upon the right of a proprietor to an injunction against such a nuisance the court will not consider the convenience of the public. The fact that a large population will be affected by an interruption of the

*torney General v. Richmond*, L. R. 2 Eq. 306; *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 146; *Attorney General v. Leeds*, L. R. 5 Ch. 583; *Holt v. Rochdale*, L. R. 10 Eq. 354; *Attorney General v. Cockermouth Board*, L. R. 18 Eq. 172; *Attorney General v. Hackney Board*, L. R. 20 Eq. 626; *Metropolitan Board v. London Ry. Co.*, 17 Ch. D. 246; *Attorney General v. Acton Local Board*, 22 Ch. D. 221; *Attorney General v. Luton Local Board*, 2 Jur. N. S. 180; *Bidder v. Croydon Board*, 6 L. T. N. S. 778; *Attorney General v. Kingston*, 34 L. J. Ch. 481; *Attorney General v. Halifax*, 39 L. J. Ch. 129; *North Staffordshire Ry. Co. v. Tunstall Local Board*, *id.* 131; *Attorney General v. Basingstoke*, 45 L. J. Ch. 726; *Oldaker v. Hunt*, 6 De Gex, M. & G. 376; 19 Beav. 485; *Manchester v. Workson Board*, 23 Beav. 198; *Attorney General v. Birmingham*, 4 K. & J. 528; *Attorney General v. Public Board*, 1 H. & M. 298; *Belknap v. Belknap*, 2 Johns. Ch. 463; *Woodruff v. Fisher*, 17 Barb. 224; *Haskell v. New Bedford*, 108 Mass. 208; *Boston Rolling*

*Mills v. Cambridge*, 117 Mass. 396; *Morse v. Worcester*, 139 Mass. 389; 2 N. East. Rep. 694, and note; *Columbus v. Woollen Mills Co.*, 33 Ind. 435; *State v. Bergen Freeholders*, 46 N. J. Eq. 173; *Topeka W. S. Co. v. Potwin Place*, 43 Kansas, 404; *Hutchinson v. Delano (Kansas)*, 26 Pac. 740.

<sup>1</sup> *Attorney General v. Leeds*, L. R. 5 Ch. 583; *Attorney General v. Hackney Board*, L. R. 20 Eq. 626. Same point in case at law. *Cator v. Lewis-ham Board*, 5 B. & S. 115.

<sup>2</sup> *Oldaker v. Hunt*, 6 De Gex, M. & G. 376; *Attorney General v. Leeds*, L. R. 5 Ch. 583. Trespass also lies. *Beach v. Elmira*, 11 N. Y. S. 913.

<sup>3</sup> *Attorney General v. Birmingham*, 4 K. & J. 528; *Metropolitan Road v. London R. Co.*, 17 Ch. D. 246; *Attorney General v. Acton Local Board*, 22 Ch. D. 221; *Holt v. Rochdale*, L. R. 10 Eq. 354.

<sup>4</sup> *Demby v. Kingston*, 14 N. Y. S. 601.

<sup>5</sup> *Attorney General v. Luton Board*, 2 Jur. N. S. 180.

<sup>6</sup> *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349; L. R. 1 Eq. 161.

use of a system of sewers is immaterial where the rights of an individual are invaded. The inconvenience is one of the public's own creation, and should be borne by it rather than the individual.<sup>1</sup> But where the nuisance is public, an individual is not entitled to an injunction unless he shows a substantial injury to himself.<sup>2</sup> An injunction will be granted to prevent a local board from polluting surface-water flowing by an open gutter into a canal and supplying it with water, by first diverting it into a sewer and discharging sewage into the canal.<sup>3</sup> So a city council will be restrained from discharging sewage into a private canal.<sup>4</sup> Where a discharge of sewage into a stream has been continued for several years, but in quantities not producing perceptible injury, and is afterwards increased so as to cause a serious injury, a party applying for an injunction against such increase will not be held guilty of laches.<sup>5</sup> Where a city made a contract with the proprietor of land to enlarge a ditch through his premises, so as to provide for carrying off the drainage of the city, and performed its part of the contract in good faith, and was not shown to be guilty of any serious fault or neglect, an injunction was granted to restrain the owner from filling in the ditch and obstructing the flowage.<sup>6</sup>

§ 547. Same — Protecting navigation and access.— Remedies for injuries to navigation are treated in that part of this work devoted to public waters.<sup>7</sup> It may be remarked here, that where such a nuisance causes, or is about to cause, special injury to an individual, he is entitled to an injunction against its creation or continuance as a private nuisance, but that such special injury must be clearly shown, to warrant the interfer-

<sup>1</sup> *Attorney General v. Birmingham*, 4 K. & J. 528.

<sup>2</sup> *Lillywhite v. Trimmer*, 15 W. R. 763; *Attorney General v. Gee*, L. R. 10 Eq. 131.

<sup>3</sup> *Manchester v. Worksop Board*, 23 Beav. 198.

<sup>4</sup> *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

<sup>5</sup> *Attorney General v. Luton Local Board*, 2 Jur. N. S. 180; *Goldsmid v.*

*Tunbridge Wells*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Metropolitan Board v. London & N. W. Ry. Co.*, L. R. 17 Ch. D. 246; *Attorney General v. Acton Local Board*, 22 Ch. D. 221; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

<sup>6</sup> *Coldwater v. Tucker*, 36 Mich. 474. See *Whipple v. Fairhaven* (Vt.), 21 Atl. 533.

<sup>7</sup> *Ante*, §§ 121-128.



ence of the court at his suit.<sup>1</sup> So an interference with one's private right of access to a body of water from his own land, or by a particular wharf, will be enjoined at his private suit.<sup>2</sup> An obstruction or injury to the navigation of a private canal will be restrained at the suit of the parties injured thereby.<sup>3</sup>

<sup>1</sup> *Crowder v. Tinkler*, 19 Ves. 617; *Spencer v. London Ry. Co.*, 8 Sim. 193; *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91; *Mississippi R. Co. v. Ward*, 2 Black, 485; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Penniman v. New York Balance Dock Co.*, 3 How. Pr. 40; *Hecker v. New York Balance Dock Co.*, 13 How. Pr. 549; *Hudson River R. Co. v. Loeb*, 7 Rob. (N. Y.) 418; *Gillespie v. Forrest*, 18 Hun, 110; *Maryland R. Co. v. Stump*, 8 Gill & J. 479; *Frink v. Lawrence*, 20 Conn. 117; *Thornton v. Grant*, 10 R. I. 477; *Hickok v. Hine*, 23 Ohio St. 523; *Cowell v. Martin*, 43 Cal. 605; *Parrish v. Stephens*, 1 Oregon, 73; *Parker v. Taylor*, 7 Oregon, 435; *Musser v. Hershey*, 42 Iowa, 356; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; *Cotton v. Mississippi Boom Co.*, 19 Minn. 497. See *Morris & Essex R. Co. v. Prudden*, 20 N. J. Eq. 530.

<sup>2</sup> *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713; *Cowell v. Martin*, 43 Cal. 605; *Parker v. Taylor*, 7 Oregon, 435. See *Thornton v. Grant*, 10 R. I. 477; *Knickerbocker Ice Co. v. Forty-Second Street Ferry R. Co.*, 65 How. Pr. 210. As to injuries to such right by the public in the construction of public works, see *Attorney General v. Conservators of the Thames*, 1 H. & M. 1, 31; *Marcy v. Metropolitan Board*, 33 L. J. Ch. 379; *Sutton Harbor Improvement Co. v. Hitchins*, 21 L. J. Ch. 73.

<sup>3</sup> *London Ry. Co. v. Grand Junction Canal Co.*, 1 Railway & C. Cas. 224. In

States where streams having only capacity to float logs to market at certain seasons of the year are not considered navigable, the diversion of water from such streams will not be enjoined as an injury to navigation. *Hubbard v. Bell*, 54 Ill. 110. The Illinois courts followed the early New York doctrine. *Munson v. Hungerford*, 6 Barb. 265. So the owner of a dam on such a stream was held entitled to an injunction against injury by the rafting of logs over it. *Curtis v. Keeler*, 14 Barb. 511. The New York rule was modified in *Morgan v. King*, 18 Barb. 277; 30 Barb. 9. The stricter rule as to the right of navigation was favored in the same case, 35 N. Y. 454, and *Pierrepoint v. Lovelass*, 4 Hun, 696. But in 72 N. Y. 211, the latter decision was reversed, and the rule that streams capable of floating logs at certain seasons will be protected as navigable for such purposes, adopted. See, also, *ante*, § 107; *Rowe v. Titus*, 1 Allen (N. B.), 326; *Essen v. McMaster*, 1 Kerr (N. B.), 501; *McLaren v. Caldwell*, 6 Tupper's App. Rep. (Canada) 456. On a bill for an injunction by a mill-owner to protect his dam from injuries by floods, and jams of logs caused by the defendant's booms, *Cooley, J.*, held, in dismissing the bill without prejudice, that the parties' rights mutually modified each other, and that, while the exercise of each might render the other less valuable, there was no ground for complaint, if the use was reasonable. *Buchanan v. Grand River Log Co.*, 48 Mich. 364.

§ 548. **Same — Other cases.**— Other instances of injuries affecting waters, in which injunctions have been granted, are: against the flooding of another's mine by permitting a communication between the mines to remain open;<sup>1</sup> preventing a person from exercising his right to enter upon the lands of the defendant to repair his dam or works erected for the use of water;<sup>2</sup> against erecting a house upon land which is subject to an easement of supplying water through pipes to the adjoining land, when access to the pipes for the purpose of repairing them is thereby materially interfered with and rendered more expensive;<sup>3</sup> the erection of a railway bed in and upon an artificial basin, diminishing its capacity;<sup>4</sup> maintaining a boom which drives logs upon another's land;<sup>5</sup> interference with an exclusive right to supply a town with water;<sup>6</sup> the holding of a regatta upon a lake, and thereby injuring an exclusive right of fishery;<sup>7</sup> the diminution of the volume of a stream by pumping out large quantities of water for mechanical purposes;<sup>8</sup> the building of a dike along the bank of a stream in such a way as to throw the water in unnatural quantities upon the lands on the other side, and injure them;<sup>9</sup> and the destruction of a dam and works, where the plaintiff's right to maintain them is clear.<sup>10</sup>

§ 549. **Same — Same.**— The abatement, as a nuisance, of works authorized by law, or whose character as a nuisance is not clear, will be enjoined until the character of the structure is ascertained, and if it be decided to be lawful, a perpetual injunction will issue.<sup>11</sup> So the abatement, as a nuisance to nav-

<sup>1</sup> *Mexborough v. Bower*, 7 Beav. 127; *ante*, § 295.

<sup>2</sup> *McSwiney v. Haynes*, 1 Ir. Eq. (1839) 322; *post*, § 553.

<sup>3</sup> *Goodhart v. Hyett*, 25 Ch. D. 182. See *Sandgate Local Board v. Leney*, *id.* 183, note; *Birkenhead v. London & N. W. Railway*, 15 Q. B. D. 572.

<sup>4</sup> *Boston Water Power Co. v. Boston R. Co.*, 16 Pick. 572. For cases at law upon the same point, see *Beeston v. Wheate*, 5 E. & B. 986; *Peter v. Daniel*, 5 C. B. 568; *Frailey v. Waters*, 7 Penn. St. 221.

<sup>5</sup> *Cotton v. Mississippi Boom Co.*, 19 Minn. 497.

<sup>6</sup> *Whitchurch v. Hide*, 2 Atk. 391.

<sup>7</sup> *Bostock v. North Staffordshire Ry. Co.*, 5 De Gex & Sm. 584.

<sup>8</sup> *Attorney General v. Great Eastern Ry. Co.*, L. R. 6 Ch. 572.

<sup>9</sup> *Burwell v. Hobson*, 12 Gratt. 322.

<sup>10</sup> *Great Falls Manuf. Co. v. Worster*, 23 N. H. 462; *Morris Canal Co. v. Society*, 1 Hal. Ch. 203.

<sup>11</sup> *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706; 30 N. J. Eq. 180. In this case a company authorized to

igation, of a dam maintained as by right, will be restrained until the right can be determined, where great loss to the owner and inconvenience to the public would be occasioned by its destruction.<sup>1</sup> So equity will prevent the abatement of an alleged nuisance by an unreasonable method, or one causing needless damage. So, where a municipal body attempted to fill up a canal which was a public highway, because it had become unwholesome, such action was restrained by an injunction at the instance of an owner of property abutting thereon.<sup>2</sup> In a suit to quiet title, a decree for the plaintiff cuts off an easement claimed by the defendant.<sup>3</sup>

§ 550. *Same — Practice.*— The plaintiff's equitable right to an injunction must appear on the face of the bill, or it will be held bad on demurrer.<sup>4</sup> The jurisdiction of the court must also be shown where the court is not of general jurisdiction, or the bill will be demurrable.<sup>5</sup> But the pendency of an action at law by the plaintiff is no reason why equity will not grant an injunction. And the court will not withhold its hand on account of the pendency of an appeal at law from the decision establishing the legal right, unless it doubts the correctness of the decision,<sup>6</sup> but the pendency of the appeal may influence

maintain a canal and take property therefor had maintained a dam for many years as a part of their works. They increased its height by flash-boards. The defendant, who was injured by back-flowage caused by the increased height, removed the flash-boards. It was held that the only remedy was by an action for damages, and he was enjoined from interfering with the dam in future. Upon an indictment for maliciously breaking down A.'s dam, A.'s ownership or interest must be proved. *State v. Weeks*, 30 Maine, 182.

<sup>1</sup> *Crenshaw v. Slate River Co.*, 6 Rand. 245.

<sup>2</sup> *Clark v. Syracuse*, 13 Barb. 32; *Babcock v. Buffalo*, 1 Sheld. (N. Y. Sup. Ct.) 817; 56 N. Y. 268. See *Finley v. Hershey*, 41 Iowa, 389.

<sup>3</sup> *Indiana Ry. Co. v. Allen*, 113 Ind.

308, 581. See *Riverside Land & Ir. Co. v. Jansen*, 66 Cal. 300.

<sup>4</sup> *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

<sup>5</sup> *May v. Parker*, 12 Pick. 34.

<sup>6</sup> *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71. But equity may decline to exercise jurisdiction where actions at law are pending, and the effect of taking jurisdiction would be to produce, and not to prevent, multiplicity of suits. In *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71, the court said: The plaintiffs "bring forth their own suits at law, and no final judgment is obtained in either of them. They then bring their bill in equity, and ask this court for the writ of injunction, and among other things, for *damages*, since the last or second suit at law. We approve of the plaintiffs' prosecuting one

the court in determining the date at which the injunction should take effect.<sup>1</sup> Generally the court will not grant an injunction seriously affecting the rights of persons not before the court.<sup>2</sup> But we have seen that in such a case it may call the persons to be affected before it.<sup>3</sup> And where a person undertakes the prosecution or defence of a case, as where a landlord assumes the defence of a bill against his tenant, he is within the jurisdiction of the court, and may be included in the terms of the decree.<sup>4</sup>

§ 551. *Same — Same.*— Where a preliminary injunction has been granted upon the filing of the bill, it is always open to a motion to dissolve before the coming in of the answer;<sup>5</sup> and sometimes provision will be made in the preliminary order for hearing such a motion.<sup>6</sup> Where the preliminary injunction appears to have been granted in a case perfectly remediable at law, it will be dissolved.<sup>7</sup> It may also be modified, in the discretion of the court, so as to permit the defendant to complete the work enjoined, if such completion will not prejudice the plaintiff's right to relief on the final hearing.<sup>8</sup> But a partial removal of the nuisance before the injunction issues will not deprive the plaintiff of his right where the existence and continuance of an injury in the past are shown.<sup>9</sup>

§ 552. *Same — Form.*— In form the injunction may be either prohibitory or mandatory. The power to issue a mandatory injunction was formerly doubted; and resort was had to

of these suits at law to final judgment, so that their legal right be fully established, and they have doubtless the right to resort to another suit at law. But when a party brings forth his two suits at law before he appeals to the equitable tribunal, we think the presumption may be fairly entertained that he has elected a favorite remedy, and must abide by it, and should not ask for equity while inflicting a multiplicity of suits at law upon his opponents."

<sup>1</sup> *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71.

<sup>2</sup> *Hartlepool Gas Co. v. West Hartlepool Harbor Co.*, 12 L. T. N. S. 366.

<sup>3</sup> *Adams v. Manning*, 48 Conn. 477; 51 Conn. 5.

<sup>4</sup> *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71.

<sup>5</sup> 2 Dan. Ch. Prac. (5th ed.) 1675; *Wing v. Fairhaven*, 8 Cush. 353.

<sup>6</sup> *Binney's Case*, 2 Bland Ch. 99.

<sup>7</sup> *Wing v. Fairhaven*, 8 Cush. 363; *Wheeler v. State*, 50 Ga. 34; *Phillips v. Stockett*, 1 Tenn. 200.

<sup>8</sup> *Hugg v. Fath*, 37 N. J. Eq. 46.

<sup>9</sup> *Carlisle v. Cooper*, 21 N. J. Eq. 576. See *Conkling v. Pacific Imp. Co.*, 87 Cal. 296.

prohibitory circumlocutions.<sup>1</sup> Thus Lord Eldon refused to order repairs to be made to a canal, but granted an injunction restraining the defendant from impeding the use of the canal by continuing to keep it or its works out of repair.<sup>2</sup> Where the injunction requires a positive act on the part of the defendant, it is called a mandatory injunction, although expressed in negative terms.<sup>3</sup> But the power to issue a mandatory injunction is completely established, and has been frequently exercised in cases affecting waters.<sup>4</sup> It has also been questioned whether a mandatory injunction may be granted preliminarily or upon interlocutory motion,<sup>5</sup> but it is settled that the court has power to grant such orders at any stage of the proceedings, subject to the limitation that before the hearing it is to be exercised with great caution and only in case of extreme necessity.<sup>6</sup>

<sup>1</sup> *Anon.* 1 Ves. Jr. 140; *Robinson v. Byron*, 1 Bro. C. C. 588; *Blakemore v. Glamorganshire Canal Co.*, 1 Myl. & K. 154; *Spokes v. Banbury Board*, L. R. 1 Eq. 42; *Mexborough v. Bower*, 7 Beav. 127.

<sup>2</sup> *Lane v. Newdigate*, 10 Ves. 192. See *Murdock's Case*, 2 Bland Ch. 470, 471.

<sup>3</sup> *Kerr on Injunctions*, 50. See *Carlisle v. Stevenson*, 3 Md. Ch. 499.

<sup>4</sup> *Harrop v. Hirst*, as cited in 1 Seton on Decrees (4th ed.), 213; *Attorney General v. Metropolitan Board*, 1 H. & M. 298, 312; *Manchester v. Worksop Board*, 23 Beav. 198, 209; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272; *Buck Mountain Coal Co. v. Lehigh Coal Co.*, 50 Penn. St. 91; *Corning v. Troy Iron Factory*, 40 N. Y. 191; 39 Barb. 311; 34 Barb. 485; *Foot v. Bronson*, 4 Lans. 47; *Shannon v. Wisconsin*, 18 Wis. 604. In *Blakemore v. Glamorganshire Canal*, 1 Myl. & K. 154, 184, Lord Brougham, in speaking of the form of the order in *Lane v. Newdigate*, said: "I take leave to agree with Lord Lyndhurst in the opinion that if the court has this jurisdiction, it would be better to

exercise it directly, and at once; and I will further take leave to add, that the having recourse to a roundabout mode of obtaining the object seems to cast a doubt upon the jurisdiction."

<sup>5</sup> *Audenried v. Philadelphia R. Co.*, 68 Penn. St. 370.

<sup>6</sup> *Westminster Brymbo Coal & Coke Co. v. Clayton*, 36 L. J. Ch. 476. In *Cole Silver Mining Co. v. Virginia Water Co.*, 1 Sawyer, 470, 482, where the defendant had tapped a subterranean stream of water to which the plaintiff had a prior right, on a motion to dissolve, Field, J., p. 685, said: "These are sufficient, I think, to show that a court of equity has jurisdiction to issue, upon an interlocutory application, an injunction which will operate to compel the defendants, in order to obey it, to do substantive acts. . . . Undoubtedly the general purpose of a temporary injunction is to preserve the property in controversy from waste or destruction or disturbance until the rights and equities of the contesting parties can be fully considered and determined. Usually this can be effected by restraining any interference with

§ 553. Same — Same.— Where the wrongful diversion of water has been completed before the filing of the bill, equity will compel the restoration of the stream to its natural channel by a mandatory injunction.<sup>1</sup> And where the defendants, in relieving their lands from surface-water, deepened a ditch upon the highway, and thus caused an increased and unnatural flow of water through the surface-drains of adjacent owners, causing injury to their lands, and making further injuries probable, a mandatory injunction was issued directing the defendants to fill up the ditch.<sup>2</sup> In *Carlisle v. Cooper*<sup>3</sup> the decree authorized the maintenance of a dam at a certain height, with the addition of movable gates in ordinary stages of water, subject to the obligation in times of freshets or high water, so as to raise the said gates, that the surface of the water should not be raised above a line twelve and a quarter inches above the top of the mud-sill upon the permanent dam, and directed the abatement of the dam to such limits. The court above, in approving this decree, said: "The decree, by its reference to

it, but, in some cases, the continuance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to the waste and destruction of the property. It is just here where the special jurisdiction of the court is needed — to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree." In *Longwood Valley R. Co. v. Baker*, 27 N. J. Eq. 166, 170, an injunction was granted to restrain mill-owners from overflowing lands condemned for a railway, and preventing the laying of a track over it. Chancellor Runyan said: "The injunction is against causing the water to rise any higher than it was accustomed to rise on the day designated. The injury was a continuing injury from day to day. The mill-owners were not required to reduce their dam, but to refrain from raising the

water beyond a certain height. Besides, if the injunction were regarded as strictly mandatory, that would not constitute a valid objection to it. There is no general rule against granting such relief interlocutorily, where the damage has been completed before the filing of the bill, and there is no difference between the case of injury to easements and injury to other rights. The court will not, however, interfere by mandatory injunction, unless extreme or very serious damage, at least, will ensue from withholding that relief, and each case must depend on its own circumstances." See, also, *Durell v. Pritchard* (obstruction of light), L. R. 1 Ch. 244; *Smith v. Phillips* (Utah), 23 Pac. 932.

<sup>1</sup> *Corning v. Troy Iron Factory*, 40 N. Y. 191; 39 Barb. 311; 34 Barb. 485.

<sup>2</sup> *Foot v. Bronson*, 4 Lans. 47; *Oliver v. New York Bay Cemetery Co.*, 38 N. J. Eq. 109.

<sup>3</sup> 21 N. J. Eq. 576, 598.



the cap-piece as fixing the extreme height to which the water may be raised by the use of the gates when shut, is probably more specific in its direction than usual; but it removes all uncertainty in the adjudication of the court as to the extent of the rights of the respective parties." So an injunction will be granted restraining the defendant from preventing the plaintiff's repair of the banks of a stream, or clearing the channel, and from entering on the defendant's land for such purposes, if necessary.<sup>1</sup>

§ 554. **Same — Same.**— The court will not consider an application for a mandatory injunction where the plaintiff has been guilty of any delay in asking its aid. It will not undo what the plaintiff might have prevented by filing his bill promptly.<sup>2</sup> In deciding upon an application, the court will consider the inconvenience likely to be caused. Where an order was asked against a local board to close up certain sewers, it was refused on the grounds of inconvenience, and of a doubt as to the powers of the board.<sup>3</sup>

§ 555. **Command to abate.**— Equity has jurisdiction to decree the abatement of a nuisance as well as to prevent its erection or continuance.<sup>4</sup> Such a decree is a mandatory injunction in nature, for equity jurisdiction is properly *in personam*

<sup>1</sup> Sheetz's Appeal, 35 Penn. St. 88; Bitting's Appeal, 105 Penn. St. 517. In McSwiney v. Haynes, 1 Ir. Eq. 322, where a stream broke through its bank upon the land of the defendant and began to change its channel, threatening irreparable injury to the plaintiff, such an injunction was granted before the coming in of the answer.

<sup>2</sup> Wicks v. Hunt, Johns. 372; Ward v. Higgs, 12 W. R. 1074.

<sup>3</sup> Attorney General v. Acton Local Board, 22 Ch. D. 221.

<sup>4</sup> Lamborn v. Covington, 2 Md. Ch. 409; Earl v. De Hart, 1 Beas. Ch. 280; Attorney General v. New Jersey R. Co., 2 Green Ch. 136; Mann v. Wilkin-son, 2 Sumner, 272, 273; Pennsylvania v. Wheeling Bridge, 13 How. 518, 557;

Hammond v. Fuller, 1 Paige, 197. See Van Bergen v. Van Bergen, 2 Johns. Ch. 272; 3 Johns. Ch. 282; Stone v. Peckham, 12 R. I. 27, 30; Philips v. Stocket, 1 Tenn. 200; Burwell v. Hobson, 12 Gratt. 322; Ackerman v. Horicon Iron Co., 16 Wis. 150. See Shannon v. Wisconsin, 18 Wis. 604; Eastman v. St. Anthony Water Power Co., 12 Minn. 137; Ames v. Cannon River Manuf. Co., 27 Minn. 245; Brown v. Carolina Central Ry. Co., 83 N. C. 128; Raleigh Co. v. Wicker, 74 N. C. 220. A covenant not to maintain a dam at a particular place is not against public policy, and will be enforced in equity by a decree to abate a dam built in violation thereof. Ulrich v. Hull, 17 Wis. 424.

and not *in rem*, and the order is primarily directed to the defendant.<sup>1</sup> Thus, equity, having jurisdiction to restrain the unlawful diversion of water, may require the defendant to remove the obstructions by which the diversion is made.<sup>2</sup>

§ 556. **Same.**—In exercising this power, equity will not compel the destruction of valuable property, except in a clear case of necessity. The Supreme Court of Michigan, in reversing an order for the removal of a dam, said (*per* Graves, J.): “Property is not to be destroyed until its destruction is lawfully ascertained to be necessary in order to stop the nuisance,

<sup>1</sup> See cases above cited. In some jurisdictions, either by statute or by judicial legislation, the practice is established of directing the order to the officer of the court in the first instance. *Ames v. Cannon River Manuf. Co.*, 27 Minn. 245. But the power of equity was not so exercised originally. *East India Co. v. Vincent*, 2 Atk. 83 (abatement of a wall). To same effect, see *Campbell v. State*, 16 Ala. 144; *Barclay v. Commonwealth*, 25 Penn. St. 503. These are cases of indictments. The power to abate a nuisance is generally lodged by statute with the common-law courts in their criminal jurisdiction. We have noticed (*ante*, § 368) that an equitable action is maintainable in New York in the Supreme Court by any person specially injured by a nuisance, in which judgment will be granted, directing the removal or abatement of the nuisance. *Knox v. Mayor*, 55 Barb. 404; s. c. 38 How. 67; *Delaney v. Blizzard*, 7 Hun, 7; *Van Brunt v. Ahearn*, 13 Hun, 388. The action in *Delaney v. Blizzard* is described as brought “to enjoin the defendant from maintaining a permanent float in front of plaintiff’s premises,” which would be a simple injunction. In the Massachusetts statute of 1828, ch. 137, § 6, it was provided that where judgment should

be rendered in an action on the case for a nuisance, “the court may, on motion of the plaintiff, in addition to the common execution for damages and costs, award and issue a warrant to the sheriff or his deputy to abate and remove the nuisance.” In *Bemis v. Clark*, 11 Pick. 452, this statute was held to leave it within the discretion of the court whether to issue the warrant on such motion or not. *Bemis v. Upham*, 13 Pick. 169; *Codman v. Evans*, 7 Allen, 431. This provision is retained by Mass. Pub. Sts., 1882, ch. 180, § 1. By section 3 of this chapter, the plaintiff is entitled to abatement as of right in a second suit. See Wis. Rev. Stats., 1878, ch. 137, for a similar jurisdiction at law, which abrogated the remedy by abatement in equity. But by St. 1882, ch. 190, the equitable jurisdiction to abate in certain cases was restored. *Denner v. Chicago Co.*, 15 N. W. Rep. 158. Courts at law have a similar power in Oregon. Gen. Laws, 1872, § 330, p. 179; *Marsh v. Trullinger*, 6 Oregon, 356; *ante*, § 368, n.; *Ankeny v. Fairview Milling Co.*, 10 Oregon, 390. For a similar exercise of power in California, see *Blood v. Light*, 31 Cal. 115. See, also, *Williamson v. Yingling*, 93 Ind. 42.

<sup>2</sup> *Johnson v. Superior Court*, 65 Cal. 567.

and then no other and no more is to be destroyed than is thus determined to be needful to effect that object.”<sup>1</sup> Where the injury, present and threatened, is caused by the use of flashboards, the court may command the removal of the flashboards already placed upon the dam, and enjoin the defendant against their future use.<sup>2</sup>

§ 557. **Same.**—The injunction itself must be in clear and definite terms, which will impose a specific prohibition or command upon the defendant. Generally equity will not command the defendant so to use his own rights as not to injure the plaintiff. That duty is already prescribed by the law of the land. The object of equitable interference is to protect parties from specific infringements of their rights. Where an injunction was asked to restrain the defendant from using a steam engine in pumping and draining water into a river, “so as in any manner to injure the banks of said river, or to injure or interfere with the draining” of other lands, Lord Brougham said: “What purpose then could such an injunction serve as the second alternative of the motion describes? It would give no information; it would prescribe no rule or limits to the defendants; it could not in any manner of way be a guide to them if it did not operate as a snare. It would in reality amount to nothing more than a warning, that if they did anything which they ought not to do, they would

<sup>1</sup> *Shepard v. People*, 40 Mich. 487; *Smidt v. People*, 46 Mich. 437 (on an information); *Hill v. Sayles*, 12 Cush. 454; *Stone v. Peckham*, 12 R. L. 27. In this case the court was asked to order the removal of a dam which was also used as a highway, and the restoration of a former highway upon which it infringed. The court said: “From the dam as now used the public receives no detriment. . . . The plaintiffs are entitled to relief only in so far as they are *individually* injured. We think, therefore, that we shall go far enough in this respect, if we require the defendant to widen the aperture in his dam so as to permit the full flow of the river, and

thus relieve the land and pass-way from inundation. We will grant the plaintiffs relief to that extent.” So, where a stopping of the wrongful use of a structure will accomplish the object, the order will be limited to that, and not direct a removal of the structure. *Barclay v. Commonwealth*, 25 Penn. St. 503 (a case of indictment). So a judgment that a dam abate is improper where the court finds that, at the time of the trial, the dam was a lawful structure. *Durning v. Burkhardt*, 34 Wis. 585.

<sup>2</sup> *Knapp v. Douglas Axe Co.*, 13 Allen, 1. See *Lammott v. Ewers*, 106 Ind. 310; *Amoskeag Manuf. Co. v. Worcester*, 60 N. H. 522.

be punished by the court; but it would leave to themselves to discover what was forbidden and what allowed.”<sup>1</sup>

§ 558. **Framing order — Difficulty — Effect.**—The court will not refuse to grant an injunction on account of the difficulty in so framing it as to protect the respective rights of the parties, unless the difficulty is caused by uncertainty as to the rights themselves,<sup>2</sup> or by inability to oversee the future conduct of the parties amid the complexity and uncertainty of conflicting rights.<sup>3</sup> In *Patten v. Marden*,<sup>4</sup> a case in which the court was called on to adjust the rights of a grantor and grantee under a deed conveying a portion of a water-power, Cole, J., said: “However difficult it might be to frame an injunction to meet the emergency of the case, still if the complaint set forth a state of facts calling for the interposition of a court of equity, we are clearly of opinion that an injunction should be granted to protect the rights of the appellant from violation and invasion.” In cases where the injury is continued, but not great at any time, the writ or order should contain the words “to the injury of the plaintiff,” to prevent the authority of the court being invoked for trivial reasons.<sup>5</sup>

<sup>1</sup> *Ripon v. Hobart*, 3 Myl. & K. 169, 173. See, also, *Bradfield v. Dewell*, 48 Mich. 9; *Coalter v. Hunter*, 4 Rand. 58, 67; *Baltimore v. Appold*, 42 Md. 442, 458; *Olmstead v. Loomis*, 6 Barb. 152; 9 N. Y. 423. In this case, at the Supreme Court, the injunction was denied because of the indefiniteness of the injury to be prohibited. But it was overruled on appeal. Parker, J., said: “If it is established that a long-enjoyed right of the plaintiff’s has been improperly interfered with by the defendants, it is no objection to entertaining jurisdiction of the case that there is an uncertainty as to the measure of right, or as to the precise language in which to describe it intelligibly in an injunction; *id certum est quod certum reddi potest*; and if it were necessary, this case might now be sent to a referee to ascertain and report,

after a scientific examination, the precise quantity of water requisite for the use of a forge, such as Wales (the plaintiff) had, and two blacksmith’s bellows. But I think in this case such a reference is unnecessary.” For cases where a general order will be issued, with leave to the plaintiff to apply for further order, see remarks of Kindersley, V. C., in *Hartlepool Gas Co. v. West Hartlepool Harbor Co.*, 12 L. T. N. S. 366, cited *ante*, § 530, note.

<sup>2</sup> *Olmstead v. Loomis*, 9 N. Y. 423, 434; *Patten v. Marden*, 14 Wis. 473.

<sup>3</sup> *Bradfield v. Dewell*, 48 Mich. 9.

<sup>4</sup> 14 Wis. 473.

<sup>5</sup> *Lingwood v. Stowmarket*, L. R. 1 Eq. 77; *Elwell v. Crowther*, 31 Beav. 163, 171. In *Baltimore v. Appold*, 42 Md. 442, the court held that an injunction merely forbidding user to the plaintiff’s damage would be in-

§ 559. **Same — Same.**— Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the court to inquire in what way the defendant can best remove it. The plaintiff is entitled to an injunction at once unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may cause him.<sup>1</sup> The possibility that another nuisance will result from obeying the injunction is no ground for not obeying it.<sup>2</sup> Where compliance with the decree will involve difficulty and expense, the court will usually suspend its operation for a time so as to save the defendant from needless loss.<sup>3</sup> But the plaintiffs' rights will never be abridged for this purpose.

§ 560. **Same — Same.**— Where an injunction to restrain a local board of health from polluting a stream with sewage was suspended for a time, and on the expiration of the time the board failed to comply with the order, alleging that they had not yet found a means of deodorizing the sewage, they were held guilty of wilful contempt, and an order of sequestration was issued.<sup>4</sup> Where time is given for compliance, the court may require an undertaking from the defendant as to their future conduct, and retain the bill, giving the plaintiff

sufficient for the plaintiff's protection, because he would be entitled to an action without damage, and to an injunction to save repeated actions.

<sup>1</sup> *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 146; *Weiss v. Oregon Iron & Steel Co.*, 18 Oregon, 496; 11 Pac. 255, and note; 2 High, Inj. (4th ed.), § 795.

<sup>2</sup> *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71; *Woodruff v. North Bloomfield G. M. Co.*, 8 Sawyer, 628; 9 id. 441.

<sup>3</sup> *Attorney General v. Birmingham*, 4 K. & J. 528, 548; *Attorney General v. Halifax*, 39 L. J. Ch. 129; *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71; *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 161;

*Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Manchester v. Work-sop Board*, 23 Beav. 198; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; 1 Seton on Decrees (4th ed.), 213. In *Attorney General v. Halifax*, 39 L. J. Ch. 129, a municipality was allowed one year in which to comply with an order for the alteration of sewers.

<sup>4</sup> *Spokes v. Banbury Board*, L. R. 1 Eq. 42. See Coulson & Forbes on Waters, 668. The fact that a complete and literal compliance with an injunction would altogether stop the defendants from working, is not an excuse for such non-compliance; a grave inconvenience of such a kind is proper ground for moving the

leave to apply for a further order at any time.<sup>1</sup> Such an undertaking is in effect equivalent to an injunction, and will be enforced by the court.<sup>2</sup> But where the plaintiff does not make out his right to an injunction on the existing state of facts, equity will not retain the bill, and give him leave to apply, in the absence of special reasons for such a course.<sup>3</sup>

**§ 561. Same — Same.**— An account of damages resulting from the injury in the past may be ordered, and payment of the amount found due decreed as incidental to the principal object of the bill;<sup>4</sup> but damages will seldom be granted in lieu of an injunction.<sup>5</sup> On the other hand, if the injunction has been wrongfully sued out, the court may decree the payment of damages to the defendant for the interruption of the enjoyment of his rights.<sup>6</sup>

**§ 562. Bills of peace.**— The prevention of multiplicity of suits is a ground of jurisdiction which courts of equity exercise in several ways.<sup>7</sup> The taking an inquest of past damages, upon

court to modify such injunction, and such motion may be made by a defendant in contempt for disobedience. *Bonshaw v. Prince*, 5 Wyatt, Webb & A'Beckett (Vict.), Eq. 140, cited in 31 Moak's Eng. Rep. 374, notes to *Box v. Judd*.

<sup>1</sup> *Elwell v. Crowther*, 31 Beav. 163.

<sup>2</sup> *London & Birmingham Ry. Co. v. Grand Junction Canal Co.*, 1 Rail. Cas. 224. Where a coal mining company fouled a natural stream of water by pumping water from its mines into the stream, to the damage of a riparian proprietor, it was held (in an action at law) that the act could not be justified either by the importance of the industry to the Commonwealth, or by general custom. *Pennsylvania Coal Co. v. Sanderson*, 94 Penn. St. 302; 86 id. 401; 118 id. 126.

<sup>3</sup> *Pratt v. Lamson*, 6 Allen, 457; *Mann v. Wilkinson*, 2 Sumner, 273.

<sup>4</sup> *Kerr on Injunctions*, 47; *Bliss v. Rice*, 17 Pick. 230; *Canfield v. An-*

*draws*, 54 Vt. 1; *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.* (Wis.), 48 N. W. 371; *Woodbury v. Marblehead Water Co.*, 145 Mass. 509.

<sup>5</sup> *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769. See *Potter v. Howe*, 141 Mass. 357. Under Lord Cairns' Act, in England, if the defendant's act does not render the plaintiff's property absolutely useless, and the injury can be compensated by money without taking away the plaintiff's property, the court may, in its discretion, award damages in place of an injunction. 21 and 22 Vict. ch. 27, § 2; *Holland v. Worley*, 26 Ch. D. 578; *Sayers v. Collyer*, 28 Ch. D. 103; *Dreyfus v. Peruvian Guano Co.*, 43 Ch. D. 316; 42 id. 66; *Phillips v. Homfray*, 44 id. 694.

<sup>6</sup> If the plaintiff acted in good faith, that will be considered by the court. *Muller v. Land*, 31 Texas, 265.

<sup>7</sup> The injunction against repeated trespasses, or vexatious persistence in a tort, is not an instance of this kind.



a bill to prevent a tort, and the determining and adjusting of common rights in the same subject-matter, as, for example, in the same water-power, have been sustained by the courts upon this ground. So, on this ground, a township has been restrained from diverting surface water from a highway and discharging it upon the plaintiff's land.<sup>1</sup> But the principal means by which equity jurisdiction is invoked to prevent a multiplicity of suits is a bill of peace.

§ 563. *Same.*—A bill of peace proper may be filed either by a plaintiff at law or defendant at law. If by a plaintiff at law, it invokes the concurrent jurisdiction of the court upon the ground that there are several parties in the same interest upon one side or the other, whose rights may be made the subject of separate suits at law, but which can be determined by one suit. The only equity of the bill is to make one suit do the work of several.<sup>2</sup> It may be filed by one plaintiff against several defendants who claim in the same right, or by several plaintiffs who each have a claim based in all respects on the same facts, against one defendant. In either case, it would seem that the question whether the bill will lie, would, on principle, be determined by considering whether any one of the several parties, alleged to claim in the same interest, could be made a representative of the whole number, and whether an adjudication as to him as such representative would be conclusive as to the rights of all. If so, equity will take jurisdiction, but if not, it would seem that equity ought not to take jurisdiction, as, instead of preventing a multiplicity of suits, it would only aggravate the evil by confusing several separate suits in one. A different rule, however, was established by Lord Hardwicke in the case of *Mayor of York v. Pilkington*.<sup>3</sup> The decision in that case was that one who had had possession and enjoyment of a fishery for a long time could maintain a bill of peace against several adverse claimants, although they claimed by distinct and separate rights,

*Hart v. Albany*, 9 Wend. 571, 581;  
*Jerome v. Ross*, 7 Johns. Ch. 315, 336.

<sup>2</sup>*Fox River F. & P. Co. v. Kelley*,  
 70 Wis. 287.

<sup>1</sup>*Slack v. Lawrence* (N. J. Eq.), 19  
 Atl. 663; *Whipple v. Fair Haven*  
 (Vt.), 21 Atl. 533.

<sup>3</sup>1 Atk. 282.

and the rule in this case, that a plaintiff who claims by one general right may have a bill of peace against several defendants who dispute it by distinct and separate rights, has been generally followed, both in England and in America.<sup>1</sup> The laxity in this respect has been somewhat restricted, and the principle upon which this branch of equitable jurisdiction is founded has been accurately defined, in *Lehigh Valley R. Co. v. McFarlan*.<sup>2</sup> There the case arose from injuries by a dam, by means of which the Morris Canal crosses the Rockaway River at Dover. Mill-owners above the dam sued the company leasing the dam for the obstruction, throwing the water back upon their mills; and mill-owners below brought suits against the company for the diversion of water by the same dam. The company asserted a general right under its charter to maintain the dam against all claimants of adverse rights, and filed a bill of peace for the determination of the rights of the parties in one suit. It was held that there did not appear to be such a unity either in the grounds on which the several actions of the defendants rested, or in the defences proposed to be made thereto, as would make a bill of peace and an issue thereunder the appropriate method of settling the questions involved.

§ 564. *Same.*— As the jurisdiction in this class of cases rests upon the number of parties, it is not necessary for the plaintiff to have first established his right at law.<sup>3</sup> Where the plaintiff's cause of complaint is of equitable jurisdiction originally, but he has the same cause of complaint against many defendants, who stand in the same position, he may file a single bill against them all, and the same reasons which sustain a bill of peace will save the bill from the charge of multifariousness.<sup>4</sup> In strictness, such a bill should join as defendants only persons

<sup>1</sup> 1 Dan. Ch. Prac. (5th Am. ed.) 841. join in one bill on the same ground. If they do not choose to join, and the

<sup>2</sup> 31 N. J. Eq. 730; 30 N. J. Eq. 135. defendant wishes to be relieved from

<sup>3</sup> *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 730; *Patten Paper Co. v. Kaukauna W. P. Co.*, 70 Wis. 659. the burden of defending several suits at once, he may, on motion, obtain a

<sup>4</sup> On principle, if several plaintiffs have the same equity against a single defendant, they may, if they choose, stay of proceedings in all but one, until it is determined. See *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 730, 754; *ante*, §§ 121, 222.

whose rights can be determined by a single issue; but the departure from principle originating with the case of *Mayor of York v. Pilkington*,<sup>1</sup> prevails here also, and it is settled that where the plaintiff asserts a general equitable right against several persons who infringe it, he may maintain a single bill against them all.

§ 565. *Same.*—The Supreme Court of California, in the case of *Keyes v. Little York Gold Washing Co.*,<sup>2</sup> attempted to confine bills of this class to cases in which they can be sustained on principle. The plaintiff in that case owned bottom lands along the Bear River. The defendants were miners severally and independently engaged in hydraulic mining at points higher up on the Bear River and its tributaries; they discharged their waste earth and debris into the stream, by which they were carried down and deposited upon the plaintiff's lands, covering them, and destroying their value. The plaintiff sought an injunction to restrain the several defendants from depositing the debris of their mines where they would be swept into the river. The defendants demurred to the bill, and the demurrer was sustained. The court said: "If a nuisance was created by the exposure of the dumps to the action of the waters of Bear River and its tributaries, a nuisance was committed by each of the defendants, when he, disconnected from the others, made or threatened such deposit; or if it be said that the matter of the *reasonable use* of the stream can enter into the inquiry, there could be no nuisance by any of the defendants who had made only a reasonable use. In either view of the case there is a misjoinder of parties defendant. The bare statement would seem to prove the proposition, since the very essence of the objection of misjoinder of a defendant with others is that he is not connected with, or affected by," "one or more of several separate and distinct causes of action, if several are alleged. If any one of

<sup>1</sup> 1 Atk. 282.

<sup>2</sup> 53 Cal. 724; 96 U. S. 199. Compare *Woodyear v. Schaefer*, 57 Md. 1, where the bill was to restrain the corruption of a stream by the deposit of offal from a slaughter-house therein. Other similar establishments con-

tributed to the injury. There was no joinder in the case. The court said: "Each and every one is liable to a separate action, and to be restrained." See *Baltimore v. Warren Manuf. Co.*, 59 Md. 96.

these defendants was liable to be enjoined, he could have been enjoined in a separate suit, the subject-matter of such suit being the alleged threatened wrong. If any one of the defendants is not liable to be enjoined in a separate suit, he cannot be made liable in an action like the present, for there is no principle of equity which would make a man responsible for a wrong which he has neither done nor threatened, merely by joining him with other defendants who may independently have threatened a similar wrong.”<sup>1</sup> But in *Hillman v. Newington*,<sup>2</sup> where the plaintiff claimed a right to a certain portion of a stream by prior appropriation, and several defendants, acting separately and independently, diverted the stream so as in the aggregate to diminish the stream available to the plaintiff to a quantity less than that to which he was entitled, it was held that he might join them all in a bill to restrain such diversion, and to recover damages for the injury. *Keyes v. Little York Gold Washing Co.* was cited on the argument, but is not alluded to in the reported opinion. The court speak of the case as *sui generis*, saying: “Each of them (the defendants) diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that, without unity or concert of action, no wrong could be committed; and we think that in such a case, all who act must be held to act jointly.” Yet it is to be observed that if some of the defendants were entitled, by a subsequent appropriation, to the use of a certain portion of the stream after the plaintiff had taken the water to which he was entitled, and a still later appropriator, by diverting a portion of the stream, diverts water from the plaintiff, it is only by acts of all those who take subsequently to the plaintiff that his supply is diminished, and yet the act of one is rightful, and that of the other wrongful. It is impossible to try the rights of these defendants in a single issue.

§ 566. *Same.*—The Supreme Court of Nevada recently passed upon the question in a similar case. Several proprie-

<sup>1</sup>The court attempted to distinguish the case of *York v. Pilkington* title. The cases appear, however, to be irreconcilable.  
as one where the action was to quiet <sup>2</sup>57 Cal. 56.

tors of lands, acting independently, had by user the right of draining a certain amount of waste water which had been used for irrigation over the plaintiff's land; and on one occasion the result of their acts was that an inordinate quantity of water was discharged upon the plaintiff's land. The court held that an injunction would be granted to restrain any and all of the defendants from discharging an inordinate quantity of water upon the plaintiff's land in future, but that the parties had not acted jointly, and could not be held jointly liable for damages. The judgment below for damages was therefore reversed. In the case of *Woodruff v. North Bloomfield Gravel Mining Co.*,<sup>1</sup> in the Circuit Court of the United States, the facts were precisely similar to those in *Keyes v. Little York Gold Washing Co.* Sawyer, J., here adopted the general rule, and held that the bill could be filed against all the defendants who contributed to produce the injury by depositing debris in the stream above. He denied the doctrine of *Keyes v. Little York Gold Washing Co.* Later, in the same case, it was held that the defendants were not justified in their action by either the Federal or State laws; that they could not invoke the doctrine of prescription or the custom of miners; that the plaintiff's special injuries entitled him to maintain the bill, and that the court, in granting relief, could not consider the inconvenience that would result to the defendants.<sup>2</sup> If hydraulic mining impedes navigation, causes overflow, and deposits debris upon riparian estates, it is a public nuisance which may be enjoined at suit of the attorney general in the name of the people.<sup>3</sup>

§ 567. *Same.*—The same principle which enables a plaintiff at law to go into equity in these cases may sometimes apply to a bill by a defendant at law. If a defendant has a defence which cannot be established at law, but which is good in

<sup>1</sup> 8 Sawyer, 628.

<sup>2</sup> 9 *id.* 441. See *Re North Bloomfield Gravel Mining Co.*, 27 Fed. Rep. 795; *Hardt v. Liberty Hill C. M. Co.*, *id.* 788; *Golden Gate M. Co. v. Superior Court*, 65 Cal. 187.

<sup>3</sup> *People v. Gold Run Ditch Co.*, 66

Cal. 138, 155; s. c. 56 Am. Rep. 80; *Hobbs v. Amador Canal Co.*, 66 Cal. 161; *Columbus & Hocking C. & I. Co. v. Tucker* (Ohio), 26 N. E. 630; *Eureka Lake Co. v. Superior Court*, 66 Cal. 311; 18 A. G. Op. 404.

equity, this is in itself ground for going into equity.<sup>1</sup> If the same defence applies to several suits by persons having distinct claims on the same state of facts, he may file one bill against them all; and while it is not primarily a bill of peace, the equity of a bill of peace will apply to it, and save it from the charge of multifariousness or misjoinder. So, where, by the bursting of a reservoir belonging to the Sheffield Waterworks Company, over seven thousand people suffered damage, and had claims against the company, and an Act was passed to regulate proceedings by these claimants, and certificates were issued to them by public commissioners upon which they could recover judgment at law as of course, and a question arose as to the validity of certain certificates so issued which affected fifteen hundred certificates, and since the certificates enabled their holders to take judgment as of course, this defence was not cognizable at law, the company filed a bill praying an injunction against the suits at law, and for cancellation of the certificates. Upon demurrer, Vice Chancellor Kindersley overruled the demurrer, sustained the bill as within the jurisdiction of the court, and reserved the question of cancellation, and upon appeal, the decision was affirmed by Lord Chancellor Chelmsford upon both points.<sup>2</sup>

<sup>1</sup> *Lehigh Valley R. Co. v. McFarlan*, 81 N. J. Eq. 780.

<sup>2</sup> *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8. A court of equity will refuse to interfere for this purpose, where, instead of preventing suits, the effect would be to increase litigation and complicate the rights of the parties. This was decided in the interesting case of *Sutton Harbor Co. v. Hitchins*, 21 L. J. Ch. 73. The company was authorized to improve Sutton Harbor, making compensation under the Lands Clauses Consolidation Act. The company temporarily obstructed the harbor in the course of constructing its works. The defendant, whose business was interrupted, claimed compensation, and proceeded to appoint an arbitrator under the Act.

The company filed a bill denying that he was entitled to compensation, and praying that the suit might be stayed until the defendant had established his right at law. It was urged that if the present claim were successful, the company would be open to a vast number of claims for alleged injuries, each of which would require a separate adjudication, and which the court was asked, in its discretion, to prevent. Lord Langdale, M. R., granted the injunction (20 L. J. Ch. 489), but, on appeal, the decision was reversed by the Lords Justices, on the ground that litigation would be increased by interfering, instead of leaving the parties to their remedies at law.



§ 568. **Same.**— Where a bill of peace is filed by a defendant at law the case is different. His equity is that he is threatened with needless and vexatious litigation respecting the rights which have already been determined at law. He prays for an injunction restraining such suits. The bill is therefore addressed to the exclusive jurisdiction of the court. The number of parties concerned is immaterial, and the bill may be maintained by a single defendant at law against a single plaintiff. But the defendant at law must have successfully defended at least one suit before he can maintain such a bill.<sup>1</sup> Thus in *Eldridge v. Hill*,<sup>2</sup> where the bill prayed an injunction to restrain the defendant from further prosecuting pending suits, and from bringing any more until the principal suit should be determined, Chancellor Kent, following the English cases, held that the bill could not be allowed until the plaintiff had established his defence at law.<sup>3</sup> The appropriate relief against successive suits by the same plaintiff for damages arising from an injury which is continuous, is by application for the consolidation of actions, or for a stay of proceedings, and not by bill in chancery, unless the right in controversy has once been determined adversely to the plaintiff.<sup>4</sup>

§ 569. **Specific performance.**— Courts of equity have at times been called upon to decree specific performance of contracts relating to water, upon the ground that the legal remedy for the breach, by compensation in damages, is inadequate. It is therefore necessary for the plaintiff to show that damages will not be an adequate compensation for the injury caused. Repeated and vexatious breaches of a continuing contract, making repeated suits at law necessary, are ground for specific

<sup>1</sup> *Tenham v. Herbert*, 2 Atk. 483 (case of fishery).

<sup>2</sup> 2 Johns. Ch. 281.

<sup>3</sup> In an action for the reformation and specific performance of a contract regulating the right to overflow lands, the Supreme Court of New Hampshire granted a temporary injunction against the prosecution of a suit at law for such flowage, until the right of the plaintiff could be ascertained. And, upon granting the

decree, they gave the defendant the right to continue his suit to determine other questions, but enjoined the prosecution of further suits inconsistent with the decree. *Winnipiseogee Lake Co. v. Perley*, 46 N. H. 83. It will be seen that here the plaintiff could not first establish his right at law, since it was of exclusively equitable cognizance.

<sup>4</sup> *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 730, 754.

performance, the legal remedy being proved clearly inadequate; but in such case, the plaintiff must have first exhausted his legal remedy by at least one recovery at law. This was ruled on a bill for performance of a contract to furnish facilities for navigation of the defendant's canal for all boats used by the plaintiff.<sup>1</sup> Where the contract is to supply water to a mill, the necessity of receiving such supply must be shown, to support the bill; but if it be shown, specific performance will be decreed.<sup>2</sup> Specific performance of a covenant for quiet enjoyment has been refused where the alleged breach consisted merely in slightly increasing the height of water in a brook flowing through the covenantor's land, and past the premises conveyed, but causing no perceptible damage.<sup>3</sup>

§ 570. *Same.*—It is also necessary that the contract be in clear and definite terms, excluding all uncertainty as to the duties of the parties.<sup>4</sup> Where a contract was alleged for the discharge of water from a canal into the Passaic River above the falls, which contract, it was claimed, entitled the claimants to a constant flow of three square feet of water into the stream, and an injunction was asked to enforce the agreement, Chancellor Halsted refused to grant the relief, saying: "I am not so well satisfied that this agreement calls for a constant flow of any quantity of water as to be willing to grant an injunction on the Society's bill;" "and a doubt as to the correctness of the Society's construction of the agreement in this respect would be sufficient ground for denying the injunction asked by them for the purpose of compelling a constant flow."<sup>5</sup> The court cannot place upon the contract a meaning not originally intended, for the purpose of doing justice between the parties. Where a contract by co-owners of a canal, for its maintenance and repair, authorized any one or more of them to make such repairs as he or they should deem necessary, and bound the others to contribute to the expense of such repairs, and several of the co-owners filed a bill against the

<sup>1</sup> *Pennsylvania Coal Co. v. Delaware Canal Co.*, 31 N. Y. 91. 233; *Ritchie v. Drain*, 25 id. 322; *Paul v. Blackwood*, 3 id. 394.

<sup>2</sup> *Randall v. Latham*, 36 Conn. 48.

<sup>3</sup> *Morris Canal Co. v. Society*, 1

<sup>4</sup> *Ingram v. Morecraft*, 33 Beav. 49. Halst. Ch. 203; *McLaughlin v.*

<sup>5</sup> *Olmstead v. Abbott*, 61 Vt. 281. *Whit-side*, 7 Ch. (Can.) 573; *Dickson v. Covert*, 17 id. 321. See *Hincks v. McKay*, 14 Ch. (Can.)

principal proprietor, alleging that extensive repairs were necessary, for which they could not advance the necessary means, and praying that the defendant be ordered to perform his part of the work, the court declined to make such a decree. The contract only bound the defendant to contribute, and he did not need to undertake repairs in the first instance unless he chose. The court could not add to the contract a further obligation.<sup>1</sup> Where differences arose between the parties as to their respective rights under a contract for the construction of a railroad bridge across a river, it was held that the court could not seize and use the defendant's plant, or undertake the completion of the bridge with the plaintiff's funds, leaving the differences between the parties for future settlement or adjudication.<sup>2</sup> But courts of equity may exercise their power to reform a contract in order to make it express the intention of the parties, upon a bill for reformation and specific performance, and may enforce the contract as reformed.<sup>3</sup> So parol evidence may be admitted to identify a lot intended to be conveyed.<sup>4</sup> A contract containing an option becomes certain as soon as the option is exercised, and will be enforced.<sup>5</sup> So

<sup>1</sup>Cobb v. Cromwell, Phil. Eq. (N. C.) 18.

<sup>2</sup>Texas Ry. Co. v. Rust, 17 Fed. Rep. 275. Specific performance decreed of a written contract, with parol variation so as to include a mill-site, in Creigh v. Boggs, 19 W. Va. 240.

<sup>3</sup>Winnipiseogee Lake Manuf. Co. v. Perley, 46 N. H. 83. For other cases of reformation of a conveyance of water-power, see Bunnell v. Read, 21 Conn. 586; Cole v. Lake Co., 54 N. H. 242. But where a lease of a mill included water-power equal to six horse-power, and upon a bill by the lessor for specific performance and injunction against the wrongful use of the water, it was shown that the parties had fixed upon that amount of power under an erroneous impression as to the amount of water needed to constitute a horse-power at the site of the mill,

the court held that the lessee was entitled to power equal to six-horse-power in fact, and declined to enjoin him from the use of water to that amount. McKelway v. Cook, 3 Green Ch. 102, 115 and note. Specific performance of a contract cannot be enjoined by preliminary injunction. Philadelphia R. Co. v. Philadelphia, 8 Phila. 112.

<sup>4</sup>Colerick v. Hooper, 3 Ind. 316; ante, § 194. It is immaterial on a bill for specific performance, that a deed describes land as on the south side of a river, and refers to the patent which places it on the west side, if the identity sufficiently appears. Newsom v. Davis, 20 Texas, 419.

<sup>5</sup>See Burham v. Ramsay, 32 Q. B. (Can.) 491; Carroll v. Casemore, 20 Ch. (Can.) 16.

a grant of a right perpetually to lay off new boat-landings on a river-bank, as the bank should cave and give way before the stream, with a stipulation that when the landing should give way, the covenantor should permit the covenantee to fix another landing at any point on the front of the plantation where the public interest might require, was held sufficiently definite to be specifically enforced.<sup>1</sup> This case illustrates another element essential to the obtaining of this relief. The contract must be free from taint of fraud or unconscionable dealing.<sup>2</sup> But the grant in this case, for a valuable consideration, of the exclusive right perpetually to lay off such landings upon the river front of a large plantation, near a growing town, was held not unfair, and was enforced.<sup>3</sup>

§ 571. *Same.*— Contracts which are against public policy will not be enforced. But it is held that a covenant not to maintain a dam at a particular place is not opposed to the policy of the law as indicated by the Acts favoring mills, and it will be enforced.<sup>4</sup> So if great inconveniences to the public will be caused in performing the contract, this may influence the court against enforcing it;<sup>5</sup> but a defendant cannot urge, nor will the court consider, an inconvenience to the public caused by the defendant himself, such as the interruption of his business as a carrier.<sup>6</sup>

§ 572. *Same.*— Where a covenant is continuing and is so framed that a breach of it can be ascertained only by a trial at law in each instance, it will not be enforced in equity. This was decided by Lord Eldon upon a covenant by the grantee of land containing a well, not to dispose of water from it to

<sup>1</sup> *Carson v. Perry*, 57 Miss. 97.

<sup>2</sup> Verbal material misrepresentations, made in good faith, and in ignorance of the facts, by the seller of a house as to its drainage, pending the negotiations of sale, and while the house, being occupied, could not be inspected by the purchaser, are a defence to a suit for the specific performance of a written contract to purchase the house, although the contract makes no mention of drain-

age. *Thomson v. Longard*, 1 Nova Scotia Eq. (Russell) 181. Specific performance was refused in case of hardship, in *Hill v. Buffalo Ry. Co.*, 10 Ch. (Can.) 506.

<sup>3</sup> *Carson v. Perry*, 57 Miss. 97.

<sup>4</sup> *Ulrich v. Hull*, 17 Wis. 424.

<sup>5</sup> *Chicago & Alton R. Co. v. Schoeneman*, 90 Ill. 258.

<sup>6</sup> *Raphael v. Thames Valley Ry. Co.*, L. R. 2 Ch. 147, reversing S. C. L. R. 2 Ex. 37.

*the injury* of the proprietors of certain waterworks intended for public supply, but not deriving water from the well.<sup>1</sup> If specific performance of the contract cannot be had in a court of equity, that court has no jurisdiction to award compensation in damages.<sup>2</sup>

§ 573. **Same.**— A contract must be mutual, that is, such that at the time it was entered into, it might have been enforced by either party against the other, in order to be enforceable in equity.<sup>3</sup> If a contract lacks such mutuality at the beginning, but the party against whom it could not be enforced performs in full on his part, he may then have it enforced against the other party.<sup>4</sup>

§ 574. **Same.**— If the performance of a contract has become impossible or useless, specific performance will not be granted, because the decree would be a fruitless exercise of power.<sup>5</sup> Where A. contracted to sell a wharf on the banks of the Thames, with a jetty, and the jetty proved to be liable to be removed by the corporation of London at any time, it was held that the jetty was essential to the beneficial occupation of the premises contracted to be sold, and that a specific performance could not be decreed.<sup>6</sup> And where a railway company had covenanted to erect a drawbridge in their track, so as to admit vessels from a river through a contemplated canal, and owing to an agreement made by the owners of other lands

<sup>1</sup> *Collins v. Plumb*, 16 Ves. 454. The ground of the decision is the inconvenience involved in ascertaining a breach. Cf. *Fry on Specific Performance*, § 70. The case is discredited in 1 Story, Eq. Jur., § 736, note. It would seem that the ground upon which cases of this class are to be sustained, if at all, is the uncertainty of the terms of the contracts in not clearly indicating what will be a breach.

<sup>2</sup> *Sainsbury v. Jones*, 5 Myl. & Cr. 1; *Onions v. Cohen*, 2 H. & M. 354.

<sup>3</sup> *Fry on Specific Performance*, § 286.

<sup>4</sup> *Columbia Water Power Co. v. Columbia*, 5 Rich. (S. C.) 225.

<sup>5</sup> *Huguenin v. Courtenay*, 21 S. C. 403.

<sup>6</sup> *Peers v. Lambert*, 7 Beav. 546. But it is well settled that where full performance is impossible, the plaintiff is entitled to performance, so far as possible, with a rebate of price. *Mortlock v. Buller* (*per* Lord Eldon), 10 Ves. 292, 315; *Waters v. Travis*, 9 Johns. 450, 465; *McKay v. Carrington*, 1 McLean. 50, 54; *Bull v. Bell*, 4 Wis. 54. And *quære* if this rule should not have been applied in the principal case, and performance enforced.

intervening between the river and the track, the canal could not be completed to the river, and would therefore be useless, a decree against the company for specific performance was refused.<sup>1</sup> So where the suit was upon a contract to permit the plaintiff to maintain a ditch across the defendant's land, and the plaintiff sold and assigned his rights pending the suit, and the assignee had acquired by a new contract with the defendant all the rights which the plaintiff was seeking in the cause, specific performance was refused as nugatory.<sup>2</sup> Courts of equity will not enforce covenants in a deed for the non-performance of which the covenantee may declare a forfeiture of the estate conveyed. The grantor has fixed his own remedy, and may forfeit the estate at his pleasure. This was determined upon a bill to enforce a proviso or condition in a deed for the maintenance of a raceway and bridge for the grantor's benefit.<sup>3</sup> Specific performance will generally not be granted where the decree would affect parties not before the court.<sup>4</sup>

§ 575. **Same.**— Where a contract involves the performance of extensive works, equity will not assume the superintendence of such works, and for this reason, it is said, may refuse to decree specific performance; but it will grant an injunction against allowing such work to remain unperformed.<sup>5</sup> Contracts regulating the right to overflow land will be enforced in equity.<sup>6</sup> Where the plaintiff, who owned a tract of land, agreed to permit a neighbor to overflow it in consideration of the neighbor's agreement to purchase the lands, and mean-

<sup>1</sup> *Chicago & Alton R. Co. v. Schoeneman*, 90 Ill. 258. The impossibility of completing the canal was here caused by the company itself.

<sup>2</sup> *Adams v. Patrick*, 30 Vt. 516.

<sup>3</sup> *Woodruff v. Water Power Co.*, 2 Stock. 489.

<sup>4</sup> *Glass v. Clark*, 53 Ga. 380. In this case the original bill was against co-tenants A. and B. for an original injunction against maintaining a dam. The injunction was refused, but the bill retained. The plaintiffs filed a second bill against B., alleging

that A. had sold his interest to B., and that B. had agreed that a decree might be granted in the former suit, and praying specific performance. The evidence as to the transfer by A. was conflicting, and the court declined to make a decree affecting his interests while he was not a party.

<sup>5</sup> *Cooke v. Chilcott*, 3 Ch. D. 694.

<sup>6</sup> *Stevens v. Ryerson*, 2 Halst. Ch. 477; *Winnipiseogee Lake Manuf. Co. v. Perley*, 46 N. H. 88; *Salmon Falls Manuf. Co. v. Portsmouth Co.*, 46 N. H. 249.



while to allow the plaintiff to use certain other lands in exchange, which agreement the neighbor afterwards refused to perform, the court refused to enjoin the flowage, but decreed alternatively that the defendant either perform the agreement or deliver it up to be cancelled, leaving the plaintiff to his remedy at law for future flowage.<sup>1</sup>

§ 576. *Same.*—Covenants running with the land may be specifically enforced against the assignee of the property charged. So a lease of water-power to be taken at a specified place on the land of the lessor conveys an interest in land; its covenants run with the land, and will be enforced against the lessor's assignee or grantee with notice. This rule has been applied to covenants to furnish a certain amount of water, and to raise a dam to a given height for that purpose.<sup>2</sup> Similarly, where a stream of water passing through the lands of

<sup>1</sup> *Stevens v. Ryerson*, 2 Halst. Ch. 477.

<sup>2</sup> *Noonan v. Orton*, 4 Wis. 335; 21 Wis. 288; 27 Wis. 300; 31 Wis. 265. This case deserves further notice as involving several questions of practice in equity. The original bill against the lessor's assignees prayed a decree requiring the defendant to execute and deliver to the plaintiffs a lease of water-power, pursuant to the alleged covenants for renewal, contained in a previous lease; and that the defendant be required to raise his dam, according to certain other covenants in the former lease, and be restrained from interfering with the plaintiffs' enjoyment of the water. Upon demurrer the covenants were held to bind the assignee, and the lessor was held not a necessary party; and this was affirmed on appeal. 4 Wis. 335. By a supplemental bill the plaintiffs charged subsequent interference, by defendant, with their enjoyment of the water-power, and that the defendant had brought suits against persons whom they had employed to remove obstructions to the

flow of water to plaintiffs' mill, and prayed an injunction to prevent further obstructions and suits by the defendant; and for an account of damages for breaches of the covenants which the new lease should contain prior to its execution. A demurrer to the supplemental bill was overruled, and the decision affirmed above; but, instead of taking account as incidental to the principal relief, it was held that in a suit for the specific performance of a covenant to furnish a lease with covenants, the court would not usually decree damages for past breaches, but, in decreeing execution, would order the lease to bear date anterior to the alleged breaches, and give the plaintiff a cause of action at law. It was then suggested that the defendant might plead the statute of limitations; and the court decided that the supplemental bill for an account would be retained unless the defendant would file an undertaking not to avail himself of the statute in such action. 21 Wis. 283, 294. The defendants then answered, and the court decreed execution of a lease with the

different persons was divided by them by parol agreement by which each party was to maintain and repair ditches, and to receive and care for his share of the water, and the agreement was performed by both parties for a number of years, it was held that the agreement was taken out of the statute of frauds, and that it would be enforced against an assignee with notice.<sup>1</sup> Where a contract is in terms assignable, the assignee is entitled to specific performance. So the assignee of a contract to supply a city with water and water-power, having performed its part, was held entitled to a decree against the city.<sup>2</sup> Where the plaintiff and the owner of drowned lands agreed in writing, the plaintiff to fill in and reclaim the lands, and the defendant to convey to him, in payment, one-third of the lands in fee, and the plaintiff performed on his part, and entered into possession, and recorded his contract, it was held that he was entitled to a conveyance, and that a subsequent mortgage by the owner was subject to his rights.<sup>3</sup>

§ 577. Same.— Oral contracts affecting land, when partly performed, have generally been considered enforceable in

proper covenants, and binding the defendant personally in general terms. It appeared in evidence that the defendant had made a voluntary conveyance of the property, *pendente lite*, two years before the decree. The defendant appealed, and the original question of the right of the plaintiffs to a new lease was brought before the Supreme Court for the first time. Dixon, C. J., held that the alleged covenant to renew in the former lease was in reality a demise for a future term, to take effect at the option of the lessees upon notice by them, and that therefore a new lease was not necessary, and could not be granted. Cole, J., held that the covenant called for a new lease, and that the plaintiff was entitled to specific performance, but that the decree should not direct covenants to be inserted in the lease binding the defendant (the assignee) except for breaches during his owner-

ship. The decree was reversed, and the cause remanded without directions. 27 Wis. 300, 326. One of the plaintiffs then disposed of his interest to the defendant, and discontinued the suit as to himself. The court denied a motion to dismiss the whole suit, dismissed the bill so far as it related to the prayer for specific performance, but retained it as to all questions relating to the injunctions. It was held above that the defendant was entitled to a dismissal as to the retiring plaintiff, and that the dismissal, as to the prayer of specific performance, worked no injury to either party. The cause was remanded for further proceedings. 31 Wis. 265.

<sup>1</sup> Coffman v. Robbins, 8 Oregon, 278.

<sup>2</sup> Columbia Water Power Co. v. Columbia, 5 Rich. (S. C.) 225.

<sup>3</sup> Lavery v. Moore, 32 Barb. 347; 83 N. Y. 658.

equity.<sup>1</sup> An oral contract by State drainage commissioners for the drainage of lands, and the assessment and payment of damages, under which the commissioners obtained permission to enter on the plaintiff's lands, occupy, and dig canals, was held binding in equity by the New York courts. The commissioners had power to levy and collect taxes on the lands drained, and to sell them for non-payment, and when they proceeded to exercise these powers, disregarding their contract with the plaintiff, they were enjoined from making such sale until the damages for opening the canal were adjusted according to the agreement.<sup>2</sup>

§ 578. *Same.*— Parol licenses to interfere with rights in water, or in land, have sometimes been made the subject of actions for specific performance.<sup>3</sup> In Pennsylvania it has been held that a parol license, given without consideration, to divert and use the water of a stream for a mill, in consequence of which the licensee erects a mill at great expense, is irrevocable, and that equity will specifically enforce the right of the grantee by an injunction, and will give damages for interference.<sup>4</sup> In Ohio it is said that a written license to put water-pipes in land, and to enter and repair them, cannot be specifically enforced, and that a violation of it is only ground for an action for damages.<sup>5</sup>

<sup>1</sup> See *Coffman v. Robbins*, *supra*;  
*Barnes v. Boston & M. R. Co.*, 180  
Mass. 388.

<sup>2</sup> *Murray v. Jayne*, 8 Barb. 612.

<sup>3</sup> See *ante*, § 823.

<sup>4</sup> *Rerick v. Kern*, 14 S. & R. 267.

<sup>5</sup> *Wilkins v. Irvine*, 33 Ohio, 138,  
145.

## CHAPTER XIV.

### STATUTORY REMEDIES AND EFFECT THEREOF.

#### SECTION.

- 579, 580. Statutory remedies taking away other remedies.
- 581. Whether they protect from indictment.
- 582. Their effect as to damages and modes of recovery.
- 583-585. As to unauthorized and excessive injuries.
- 586. Breach of statutory conditions.
- 587. Injuries unforeseen and unprovided for.
- 588. Case lies for incidental injuries from public works.
- 589. Also for injuries caused by negligence or abuse of powers.
- 590. Contracts and submissions to arbitration.
- 591. Effect of repeal of statute on remedies.
- 592. Mill Acts — Different systems of remedies thereunder.
- 593. Extra-territorial injuries.
- 594. The Massachusetts system.
- 595, 596. Ibid.— The complaint — Who may be complainants.
- 597. Ibid.— Respondents.
- 598. Ibid.— Description of the land injured.
- 599. Ibid.— Mode of trial.
- 600. Ibid.— New complaint.
- 601. Ibid.— Substantially followed in Wisconsin and Maine.
- 602. Ibid.— Prescriptive rights to flow under this system.
- 603. Ibid.— Damages under this system.
- 604. Other States adopting this system — Rhode Island.
- 605. Ibid.— New Hampshire.
- 606. Ibid.— Connecticut.
- 607. Ibid.— Vermont.
- 608. Ibid.— Pennsylvania.
- 609-611. The Virginia system.
- 612. Ibid.— Kentucky.
- 613. Ibid.— West Virginia.
- 614. Ibid.— Mississippi and Alabama.
- 615. Ibid.— Missouri.
- 616. Ibid.— Indiana.
- 617. Ibid.— Iowa and Illinois.
- 618. Ibid.— Michigan.
- 619. Ibid.— Nebraska.
- 620. Ibid.— Kansas and Minnesota.
- 621. Ibid.— North Carolina.
- 622. Ibid.— Tennessee.
- 623. Ibid.— Georgia and other States.

§ 579. **Statutory remedies.**—Special statutory remedies for injuries caused by acts authorized by the Legislature, and otherwise remedial at common law, usually take the place of the common-law remedies, which are thereby taken away by implication. The remedies provided in the Mill Acts for injuries authorized by them have this effect.<sup>1</sup> Equitable remedies,<sup>2</sup> and the common-law remedies by abatement,<sup>3</sup> may also be taken away by such special enactments.

§ 580. **Same — Same.**—In the leading case of *Stowell v. Flagg*,<sup>4</sup> Parker, C. J., said: "From the general purview of the statute, made expressly to relieve mill-owners from the difficulties and disputes they were before subject to, there can be no doubt of the intention of the legislature to take away the

<sup>1</sup> *Stowell v. Flagg*, 11 Mass. 364; *Johnson*, 6 Porter, 472; *Stephens v. Wolcott Woollen Manuf. Co. v. Upham*, 5 Pick. 292; *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68; *Baird v. Wells*, 22 Pick. 312; *Walker v. Oxford Woollen Manuf. Co.*, 10 Met. 203; *Murdock v. Stickney*, 4 Cush. 113, 116; *Leland v. Woodbury*, 4 Cush. 245; *Shaw v. Wells*, 5 Cush. 537; *Henderson v. Adams*, 5 Cush. 610; *Gile v. Stevens*, 13 Gray, 146; *Burnham v. Story*, 3 Allen, 378; *Woods v. Nashua Manuf. Co.*, 4 N. H. 527; *Hill v. Baker*, 28 Maine, 9; *Monmouth v. Gardiner*, 35 Maine, 247; *Wooster v. Great Falls Manuf. Co.*, 39 Maine, 246; *Underwood v. Wayne Co.*, 41 Maine, 291; *Veazie v. Dwinel*, 50 Maine, 485; *Dingley v. Gardiner*, 78 Maine, 63; *Bull v. Valley Falls Co.*, 8 R. I. 42; *Brown v. Commonwealth*, 3 Serg. & R. 273; *Criswell v. Clugh*, 3 Watts, 330; *Speigelmoyer v. Walter*, 3 Watts & S. 540; *Ensforth v. Commonwealth*, 52 Penn. St. 320; *Mumford v. Terry*, 2 Law Rep. (N. C.) 425; *Wilson v. Myers*, 4 Hawks, 73; *Gillet v. Jones*, 1 Dev. & Bat. (N. C.) 339; *Waddy v. Johnson*, 5 Ired. (N. C.) 333; *King v. Shuford*, 10 Ired. 100; *Gilliam v. Canaday*, 11 Ired. 106; *Hendricks v.*

*Johnson*, 6 Porter, 472; *Stephens v. Marshall*, 3 Pin. (Wis.) 203; 3 Chand. 222; *Babb v. Mackey*, 10 Wis. 371; *Newton v. Allis*, 12 Wis. 378; *Wood v. Hustis*, 17 Wis. 416; *Crosby v. Smith*, 19 Wis. 449; *Large v. Orvis*, 20 Wis. 696. For decisions giving the same effect to a statutory remedy against the overseer of highways for injuries in providing for the drainage of the road, see *Elder v. Bemis*, 2 Met. 599; *Benjamin v. Wheeler*, 8 Gray, 409; 15 Gray, 486.

<sup>2</sup> *Bull v. Valley Falls Co.*, 8 R. I. 42; *Lummery v. Braddy*, 8 Iowa, 33. As to injunctions, see *Newton v. Allis*, 12 Wis. 378; *Crosby v. Smith*, 19 Wis. 449.

<sup>3</sup> *Criswell v. Clugh*, 3 Watts, 330; *Speigelmoyer v. Walter*, 3 Watts & S. 540.

<sup>4</sup> 11 Mass. 364. That the Mill Act was intended to fix a measure of damage for the future, and relieve the mill-owner from future suits, as well as afford him a remedy for public past damages, see *Commonwealth v. Ellis*, 11 Mass. 464; *Wolcott Manuf. Co. v. Upham*, 5 Pick. 292; *Walker v. Oxford Woollen Manuf. Co.*, 10 Met. 203; *Craig v. Lewis*, 110 Mass. 379.

common-law action, which might be renewed for every new injury, and so burden the owner of a mill with continual lawsuits and expenses." In *Murdock v. Stickney*,<sup>1</sup> Shaw, C. J., in speaking of the flowage and injury caused by the erection of a dam, said: "Here the law steps in and declares that, in consideration of the advantage to the public to be derived from the establishment and maintenance of mills, the owner of the land shall not have an action for this necessary consequential damage against the mill-owner, to compel him to prostrate his dam, and thus destroy or reduce his head of water; but it authorizes him to keep up his head of water to his own best advantage, having at the same time provided what the law deemed an adequate and practical remedy for all the damage sustained, by a compensation in money, to be paid by the owner of the mill." Some of the more recent Mill Acts have expressly taken away the common-law remedies for injuries so authorized.<sup>2</sup>

<sup>1</sup> 8 Cush. 113.

<sup>2</sup> Mass. Public Sts. (1882), ch. 190, § 28; Maine Rev. Sts. (1871), ch. 92, § 23. In *Ash v. Cummings*, 50 N. H. 591, which was an action at law, the New Hampshire Mill Act of 1868 is construed. The Act provides, § 4: "No person or corporation shall derive any title from said proceedings, or be discharged from any liability in relation to said premises, until he or it has paid or tendered to the person aggrieved or damaged the amount of such adverse judgment." The Act also provides that proceedings under it may be begun by either party, if the injury by the acts authorized be continued for thirty days without adjustment. From these provisions, and from the possibility of an injury being continued for a great length of time, before a judgment could be reached, and the possible insolvency of the respondent at that time, and the possibility that the flowage may be found not to be of public use, the court decide that the act does not

take away the common-law action until after the tender upon the judgment has been made; they even contemplate the pendency of a suit at common law and of another under the statute at the same time. Sargent, J., in delivering the opinion, said: "If the plaintiff recovers a judgment in this suit, and it is not satisfied, and a petition should be brought under the statute, there might, perhaps, be no objection to including in the judgment on the petition the amount of the former judgment and fifty per cent. additional, treating the petition as a suit upon the former judgment as far as it goes, and treating the former judgment as conclusive as to the estimation of the damages included in it. There would be no difficulty in settling every practical question that may arise, nothing to be compared with the difficulties that have been overcome in the construction of the Homestead Act, and some others. If the landowner chooses to go on with his



§ 581. **Same — Effect upon indictments.**— Whether the statutes protect parties proceeding under them from indictments, where their dams injure the public, is a question upon which the courts are divided. In New Hampshire it is held that an indictment will not lie.<sup>1</sup> In Kentucky the statute contains, as we shall see, a provision against injuries to health; and a dam built under permission of court, but which causes injury to the health of the neighborhood, is indictable as a public nuisance.<sup>2</sup> These decisions were followed in Wisconsin, although the statute there contains no such provision.<sup>3</sup> In Indiana the permission to build a dam is held no protection against an indictment for creating a public nuisance by flooding a high-

common-law action, notwithstanding the pendency of a petition, the damages claimed in the former must be excluded from consideration in the latter." In speaking of equitable remedies, he said: "But suppose that the land-owner endeavors to prevent the mill-owner from building his dam or from flowing his land after the dam is built, by injunction, what course is to be taken, and what rule to be applied? A mill-owner, in a given case, may be wholly irresponsible, and in all cases there is a possibility that the flowage may not be deemed of a public benefit and necessary for the use of the mill, and some power must be lodged in the court to apply the general principle involved in ordinary cases of injunction to this new law." The decision is based principally on the special clause in the statute, and in view of this clause the decision that the liability to an action at law remained, was unavoidable. The suggestion that if a judgment were first obtained at law, the petition might be treated as an action on the judgment, is untenable, from the nature and object of the petition, and *a fortiori* because while the judgment at law is obtained by the land-owner, the petition may be by

the mill-owner, who is the judgment defendant at law. It seems, that where the remedy is retained, a better method of avoiding these evils would be for the court to assume jurisdiction, if necessary, to grant a stay of proceedings in all actions at law, until judgment has been obtained on the petition, or the question of public use has been determined. In Indiana the statutory remedies are held not to deprive the injured party of his remedies at common law. *Toney v. Johnson*, 26 Ind. 382. And see *Smith v. Olmstead*, 5 Blackf. 37, where it is held that the common-law remedy lies unless the damages are assessed and paid. In *Snowden v. Wilas*, 19 Ind. 10, the court raise the question without deciding it, whether the statutory remedy is not exclusive. See, further, *ante*, § 250 *et seq.*

<sup>1</sup> *Hooksett v. Amoskeag Manuf. Co.*, 44 N. H. 105; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143. To same effect, see *Ensworth v. Commonwealth*, 52 Penn. St. 320; *Critenden v. Wilson*, 5 Cowen, 165.

<sup>2</sup> Ky. Sta. 1879, ch. 77, § 4; *Mountjoy v. Oldham*, 1 Marsh. 535; *Major v. Taylor*, *id.* 552. See to same effect *Commonwealth v. Faris*, 5 Rand. 691.

<sup>3</sup> *Luning v. State*, 2 Pin. (Wis.) 215.

way;<sup>1</sup> and in Michigan, Cooley, J., in the course of a decision upon the constitutionality of an Act, expressed the opinion in general terms, that such a statute, if constitutional, would be no defence to a prosecution for a public nuisance.<sup>2</sup>

· § 582. Same — Effect upon damages — Recovery.— In Massachusetts it was held that the remedy by assumpsit or debt, allowed by the Mill Act,<sup>3</sup> to enforce payment of the annual compensation or gross damages, awarded for flowage under the Act, was not cumulative, but was substituted for and took

<sup>1</sup> State v. Phipps, 4 Ind. 515. This rule is now made a part of the statute, and applies to all public nuisances created by such dams. Ind. Rev. Sta. (1881) § 1859. See, also, State v. Useful M. Society, 46 N. J. L. 274.

<sup>2</sup> Ryerson v. Brown, 35 Mich. 333, 338. The decision in Massachusetts that the Act did not authorize the flowage of a public highway, and that for such injuries an indictment would lie (Commonwealth v. Stevens, 10 Pick. 247; *ante*, § 214), is in effect an authority for the same proposition. And see Trustees v. Tuttle, 30 Ohio St. 62; Venard v. Cross, 8 Kansas, 248. All the cases are apparently in harmony with the following proposition: The effect of the statute is to authorize the acts provided for, and their necessary consequences, and to take away the public right of indictment or action therefor. So such statutes protect one maintaining a dam in accordance with their provisions from indictment for a nuisance in obstructing the stream. But for other nuisances caused by the dam, which are not necessary consequences of the existence of the dam under any circumstances, the statutes afford no protection. One of the New Hampshire cases, on the one hand, expressly says: "But an Act authorizing one to build a dam on his own

land upon a river which is a highway, merely protects him from an indictment for a nuisance *in obstructing a river*; but if in doing this, he overflows his neighbor's land, he is liable to an action therefor." (Eastman v. Amoskeag Manuf. Co., 44 N. H. 143, 160.) And the Virginia and Kentucky cases, on the other hand, are referable to the provisions of the statutes against injuries to health, or for unforeseen injuries. Where the statute prescribes an indictment with a special form of presentment and procedure, a common-law indictment will not lie. Commonwealth v. Plumer, 1 Am. L. Reg. 124; Brown v. Commonwealth, 3 Serg. & R. 273. See Warren v. Spencer Water Co., 143 Mass. 9. If the charter of a canal company reserves an action to obtain an appraisal and recovery of the land-owner's damages, in case the company does not proceed for that purpose by commissioners, such action is not barred by the statute of limitations, as ordinary actions of debt or trespass are barred, but may be brought at any time before a right or title to the property has been acquired by adverse user or possession. Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605, 614; McFarlan v. Morris Canal Co., 44 id. 471. See Halsey v. Lehigh Valley R. Co., 45 N. J. L. 26.

<sup>3</sup> Rev. St. 1836, ch. 116, § 24.

away the common-law remedy by an action of debt on the judgment.<sup>1</sup> Where an action has been brought for the wrongful erection of a dam built under authority, it cannot be changed by amendment into a proceeding under the statute.<sup>2</sup> But where a special Act authorizes the damming of a stream for manufacturing purposes, but provides no remedy, and makes no reference to the general Mill Act, the common-law remedy must be pursued, and not that provided by the general Act.<sup>3</sup> So Acts authorizing the taking, diversion, or obstruction of streams, for canals or for the improvement of navigation, or for other public purposes, and providing remedies for injuries caused thereby, have generally been construed to exclude the common-law remedies.<sup>4</sup>

<sup>1</sup> *Leland v. Woodbury*, 4 Cush. 245.

<sup>2</sup> *Newton v. Allis*, 12 Wis. 378. Confer *French v. Owen*, 5 Wis. 112, which holds, conversely, that a statutory action cannot be changed by amendment into one at common law.

<sup>3</sup> *Cogswell v. Essex Mill Co.*, 6 Pick. 94; *Lee v. Pembroke Iron Co.*, 57 Maine, 81.

<sup>4</sup> *Lebanon v. Olcott*, 1 N. H. 339; *Steele v. Western Navigation Co.*, 2 Johns. 283; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36; *Elder v. Bemis*, 2 Met. 599; *Tower v. Boston*, 10 Cush. 235; *Perry v. Worcester*, 6 Gray, 546; *Perkins v. Lawrence*, 136 Mass. 305; *Spring v. Russell*, 7 Greenl. 273; *Aldrich v. Cheshire R. Co.*, 21 N. H. 358; *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Spangler's Appeal*, 64 Penn. St. 387; *McKinney v. Monongahela Nav. Co.*, 14 Penn. St. 65; *Fehr v. Schuylkill Navigation Co.*, 69 Penn. St. 161; *Fuller v. Edings*, 11 Rich. (S. C.) 239; *Kimble v. Whitewater Canal Co.*, 1 Ind. 285; *Conwell v. Hagerstown Canal Co.*, 2 Ind. 588; *Null v. Whitewater Canal Co.*, 4 Ind. 431, 435. See *Cooley on Torts*, 652; *Barker v. King's Norton Sanitary*, L. J. 17

Notes of Cas. 16. *Contra*, are *Fryeburg Canal Co. v. Frye*, 5 Maine, 38; *Crittenden v. Wilson*, 5 Cowen, 165; *Selden v. Delaware Canal Co.*, 24 Barb. 362; *Davis v. Sacramento*, 59 Cal. 596; *Wisner v. Great Western Ry. Co.*, 17 Q. B. (Can.) 510. In the first of these cases, it was held that the common-law remedy might be resorted to against one who diverted a watercourse by statutory authority, although a remedy was provided, on the ground that there were no words of negation in the Act. In *Crittenden v. Wilson*, 5 Cowen, 165, a private Act was held merely to relieve the mill-owner from the liability to indictment, and to authorize a summary mode of appraising damages, and not to take away the remedy by action at law, upon the same ground as the preceding case, and relying on *Comyn, Dig. Action Upon Statute (C.)*. ["If a statute gives a remedy in the affirmative (without a negative expressed or implied) for a matter which was actionable by the common law, the party may sue at the common law, as well as upon the statute; for this does not take away the common law."] This case is distinguished by *Marcy, J.*, in *Calking v.*

§ 583. **Same.— Unauthorized and excessive injuries.—** But it is equally clear upon principle, and equally established by authority, that for injuries not authorized and included in the provisions of such statutes, the common-law remedies remain in full force. A frequent example of their use is afforded by injuries by a mill-dam to a mill already existing. Such injuries are usually expressly excluded from the operation and protection of the Acts,<sup>1</sup> and are remediable at common law and in equity;<sup>2</sup> and in the absence of such provisions the stat-

Baldwin, 4 Wend. 667, thus: "If this be a private Act, as contradistinguished from a public Act, the law which was applied to the case of *Crittenden v. Wilson* must govern. The plaintiffs are not in such a case confined to the remedy given by the Act, but may proceed by action according to the common law. But if the work authorized by the Act be of a public character, the case is altered, and the compensation which individuals are entitled to receive for injuries occasioned by it, must be sought in the way pointed out by the Act, and not otherwise." *Crittenden v. Wilson* was cited with approval in *Susquehanna Turnpike Co. v. People*, 15 Wend. 268; *Waterford & Whitehall Turnpike v. People*, 9 Barb. 173; and *Clark v. Syracuse*, 13 Barb. 32. See, also, *Robinson v. New York R. Co.*, 27 Barb. 512. *Selden v. Delaware Canal Co.*, 24 Barb. 362, follows 5 Cowen, 165, and holds that where land and buildings are injured by flooding, or by the percolation of water caused by the enlargement of a canal under statutory authority, the action at common law will lie. Upon appeal, the decision was affirmed on other grounds (29 N. Y. 634), but Selden, J., said that the defendants' contention that the only remedy allowed to the plaintiff to obtain indemnity was that pointed out by the defendants' charter (Laws of 1823,

p. 809), and that the present action, for that reason, could not be maintained, received support from *Calking v. Baldwin*, 4 Wend. 667. The decision upon this point below ought, it seems, to be considered no longer law. *Crittenden v. Wilson* is apparently approved in *Denslow v. New Haven Co.*, 16 Conn. 98.

<sup>1</sup> For statutory provisions protecting existing mills, see Mass. Pub. Sta. (1882), ch. 190, § 2; Maine Rev. Sta. 1871, title 9, ch. 92, § 2; N. H. Rev. Sta. 1878, ch. 141, § 19; Vt. Rev. Sta. 1880, § 3224; Rev. Sta. Conn. 1875, p. 473, §§ 1, 3; Wis. Rev. Sta. 1878, ch. 146, § 3375; Va. Rev. Code, 1873, title 19, ch. 63, § 8; N. C. Rev. Sta. 1873, ch. 72, § 8, pl. 3; Ala. Rev. Code 1876, § 3564, pl. 4; Ill. Rev. Sta. 1881, ch. 92, § 2; Ind. Rev. Sta. 1881, §§ 898, 900; Ky. Gen. Sta. 1879, ch. 77, §§ 6, 8; Mich. Laws, 1873, Act No. 196, § 12; Tenn. Sta. 1871, § 1920; Mo. Rev. Sta. 1879, ch. 132, § 6487. That permission will not be granted to build a mill which will injure one already existing, see *Larsh v. Test*, 48 Ind. 130.

<sup>2</sup> *Bigelow v. Newell*, 10 Pick. 348; *Smith v. Agawam Canal Co.*, 2 Allen, 355, 357; *Burnham v. Story*, 3 Allen, 378; *Brigham v. Wheeler*, 12 Allen, 89; *Williams v. Elting Woollen Co.*, 33 Conn. 353; *Hendricks v. Johnson*, 6 Porter, 472; *Thomas v. Hill*, 31 Maine, 252; *Wentworth v. Poor*, 38

ute is so construed by the courts.<sup>1</sup> What shall be protected as an existing mill has been considered in many cases, and with some difference of opinion. In Massachusetts it is held that the mill must be actually completed before the injury takes place. Where the plaintiff began to erect a mill, and the defendant, beginning later, finished his dam first, and injured the plaintiff's uncompleted mill, it was held that the plaintiff could not maintain a common-law action for the injury to his mill as an existing mill, but must pursue his remedy under the Mill Act.<sup>2</sup> So the common-law remedies for in-

Maine, 243; *Stickney v. Munroe*, 44 Maine, 195; *Lincoln v. Chadbourne*, 56 Maine, 197; *Lee v. Pembroke Iron Co.*, 57 Maine, 481; *Moore v. Coburn*, 1 Pin. (Wis.) 538; *Large v. Orvis*, 20 Wis. 696; *Hill v. Ward*, 2 Gilman, 285; *Close v. Samm*, 27 Iowa, 503.

<sup>1</sup> *Mowry v. Sheldon*, 2 R. I. 369; *Stone v. Peckham*, 12 R. I. 27, 28. Confer *Seeley v. Bridges*, 13 Neb. 547, which holds that such injury will be enjoined, although the statute contains no provision.

<sup>2</sup> *Baird v. Wells*, 22 Pick. 312; *Hendricks v. Johnson*, 5 Porter, 208. But in *Elting Woollen Co. v. Williams*, 36 Conn. 310, the court hold that where two persons are seeking to appropriate the same power, one as owner, and one under the flowage Act, the law will favor the owner; and that this will not be altered by the fact that the owner has recently purchased the power with knowledge at the time that the petitioner was negotiating for the right to flow it. The statute of Wisconsin (Rev. Sts. 1878, ch. 146, § 3375) protects mills already existing or in "process of erection." Water-power held by the owner, near a mill actually in use, with the intention at some future time to use it for the mill, is protected by the act. *Occum Co. v. Sprague Manuf. Co.*, 35 Conn. 496; *Elting Woollen Co. v. Williams*, 36

Conn. 310. But small mills which are not actually used as mills, but were erected merely to protect a right of flowage, are not entitled to the protection of the act. *Occum Co. v. Sprague Manuf. Co.*, 35 Conn. 496. A mill is held to be "lawfully existing," though its dam is maintained a little higher than it should be. *Robertson v. Miller*, 40 Conn. 40. No person can avail himself of the privileges conferred by the Mill Act of Massachusetts, nor bring himself within its protection merely by erecting a dam across a stream running through his land. There must be coupled with such erection the building of a mill for use, or the *bona fide* provable intent to erect one forthwith. *Fitch v. Stevens*, 4 Met. 426; *Veazie v. Dwinel*, 50 Maine, 479. 485. A dam used to float timber to a *steam* saw-mill is not protected. *Bryan v. Burnett*, 2 Jones L. 305. See *Dixon v. Eaton*, 68 Maine, 542. Injury to a canal and waste weir connected with a water-mill has been held an injury to a mill within the Massachusetts statute. *Dean v. Colt*, 99 Mass. 480. In *Bottomly v. Chism*, 102 Mass. 463, a reservoir dam used with a mill was held entitled to protection as an existing mill, under the Massachusetts Act. The owner of property already appropriated for milling purposes cannot have an injunction to restrain

juries to existing mills are strictly confined to injuries to the mills and works. The plaintiff cannot include in his action at law injuries to his meadows; nor will equity enjoin such an injury; for these he must proceed under the Act.<sup>1</sup> On the other hand, the Delaware statute of 1773, for the encourage-

proceedings which will authorize flowage injurious to him. If he can appear in such proceedings, his remedy there is complete; if not, the proceedings will be void as to him, and he can enjoin the flowage itself. *Williams v. Elting Woollen Co.*, 36 Conn. 818. In Rhode Island it is held that where a person has erected a dam for mill purposes, no one is authorized to erect a mill-dam in such a way as to flow out the former dam, or destroy its fall of water, even though no mill has been built or begun thereon, unless the design for building a mill has been abandoned. If the proprietor of such dam should represent that he intended to abandon the dam for mill-purposes, he would be estopped to deny that such were his purposes, as against one who has been influenced by his representations, to build a dam below which injures the fall at the dam above. If the dam is built for other than mill-purposes, it is not entitled to protection under the Act against flowage by a later dam, built for mill-purposes. The erection of a dam or mill-privilege available for mill-purposes furnishes *prima facie* presumption that the dam is intended for such purposes, and the fact that it is slightly built, is not sufficient to rebut the presumption. *Mowry v. Sheldon*, 2 R. I. 369. The right to an injunction to protect an existing mill or mill-site, may be lost by acquiescence in the building of another mill. *Nosser v. Seeley*, 10 Neb. 468. In Indiana, a purchase or holding of land, with the declared

intention to build a mill in the future, does not entitle the holder to the protection of the statutes, but the collection of machinery and materials, and excavation of a foundation, are sufficient to entitle him to the protection of the statute. *Miller v. Stowman*, 26 Ind. 143; *Larsh v. Test*, 48 Ind. 130. Any *bona fide* improvement of a water-power, with intent to use as such, makes it a "power previously improved" under the Minnesota statute. *Miller v. Troost*, 14 Minn. 365. The Missouri statutes formerly contained no provision protecting existing mills. In *Hook v. Smith*, 6 Mo. 225, it is held that where conflicting applications are made on the same day, or within a few days of each other, the court may exercise its discretion and grant permission to the one which will cause least damage to the public or individuals. The present statute gives the court power, on petition of the owner of any existing mill, to restrain such injuries. 2 Mo. Rev. Sta. (1879), § 6437. In a late case it is held that a dam authorized, but not completed within the time prescribed, is not a lawfully existing dam, and cannot be legitimated by lapse of time, so as to entitle the owner to the protection of the statute against injuries by other mills. *Huffman v. Vaughan*, 72 Mo. 465. In *Humes v. Shugart*, 10 Leigh, 332, the Virginia court denied a second application made shortly after granting a former one for erecting a mill in the same neighborhood.

<sup>1</sup> *Large v. Orvis*, 20 Wis. 696.



ment of mill-owners, which gives them a summary remedy for damages occasioned by the erection of other dams, has reference to the location of new mill-sites, and is held not to apply to a change in the construction of dams already erected. For injuries by such changes the common-law remedy must be pursued.<sup>1</sup>

§ 584. **Same.**—For all injuries caused by persons proceeding under such statutes, but acting in excess of their authority, the common law actions lie. So where the height at which a dam may be maintained has been determined by proceedings under the Mill Acts, any injuries caused by maintaining the dam at a greater height are unauthorized and remediable at common law.<sup>2</sup> So if the right to flow lands is limited to certain seasons of the year, and the person using the mill flows the lands at other seasons, he is liable as a wrong-doer.<sup>3</sup> So where the Act authorizes dams across unnavigable streams, a dam across a navigable stream is in no way entitled to the protection of the Act.<sup>4</sup> So, where a dam is maintained by the

<sup>1</sup> *Garrett v. Bailey*, 4 Har. (Del.) 197.

<sup>2</sup> *Johnson v. Kittredge*, 17 Mass. 76; *Winkley v. Salisbury Manuf. Co.*, 14 Gray, 443; *Leonard v. Wading River Co.*, 113 Mass. 235; *Brady v. Blackinton*, 113 Mass. 838; *Arimond v. Green Bay Co.*, 31 Wis. 316; *Hackstack v. Keshena Imp. Co.*, 66 Wis. 439. See *Hiscox v. Sanford*, 4 R. L. 55, where the height was determined by contract. If the defendant increases the height of his dam in order to enlarge his mill, or to supply a new mill with power, this is in effect a new taking under the statute, and the statutory method must be pursued. *Johnson v. Kittredge*, 17 Mass. 76; *Leonard v. Schenck*, 3 Met. 359. A charter giving the right to erect a dam on the company's own land gives no right to flow the land of others without their consent. For such flowage the common-law actions lie. *Company v. Goodale*, 46 N. H. 153.

<sup>3</sup> *Hill v. Sayles*, 12 Met. 142. The

plaintiff in this case afterwards recovered damages in a second action for a repetition of the injury (4 Cush. 549); and then was granted an injunction against such unauthorized flowage. 12 Cush. 454. On the appeal in the first case, Shaw, C. J., said (13 Met. 150): "By the rule of the common law, the land-owner has a right to have the natural watercourse kept open the whole time. By the statute, and the proceedings under it, the mill-owner has acquired a right to keep his dam up a certain part of the time, paying a certain amount of damage. For the residue of the year the land-owner remains in the enjoyment of his common-law right, and is entitled to his common-law remedy for the infringement of it."

<sup>4</sup> *Bryant v. Glidden*, 36 Maine, 36; *Strout v. Millbridge Co.*, 45 Maine, 76. See, also, *Renwick v. Morris*, 7 Hill, 575, where a statute authorized a person to maintain a dam in a navigable

defendants for the use of a mill not owned by them, nor situated on their land, it is not within the provisions of the Mill Act of Maine, and the common-law actions will lie for an injury caused by such a dam.<sup>1</sup> So, an obstruction of the public use of a stream, as a water-way for rafts and timber, is unauthorized by the Acts. The mill-owner may dam streams available for such transportation, but must keep a suitable passage-way for boats and rafts; and for injuries to this use the common-law remedies may be maintained.<sup>2</sup> So it is held in Massachusetts that the Mill Act does not authorize the flowage of a public highway already appropriated and in actual use; and for such flowage an action at law may be maintained, or an indictment will lie.<sup>3</sup> So, if a mill is abandoned, and the right to flow lost, and a highway is laid out over the land formerly flowed, the highway gains the prior right; and if the mill-owner or his grantee injures it in attempting to re-assert the right to flow, he is liable to indictment.<sup>4</sup> In reality any maintenance of the dam apart from the public benefit gained from the mill provided with power thereby, is unauthorized. So, if the mill-owner abandons his mill, but maintains his dam, he is liable at law to those injured.<sup>5</sup>

river, and the dam, being built so as to obstruct the navigation beyond what the Act authorized, was held a public nuisance, and liable to abatement *pro tanto* by any one, though it had stood for more than twenty years.

<sup>1</sup> *Crockett v. Millett*, 65 Maine, 191.

<sup>2</sup> *Pearson v. Rolfe*, 76 Maine, 380; *Veazie v. Dwinel*, 44 Maine, 167; *Veazie v. Dwinel*, 60 Maine, 479; *Knox v. Chaloner*, 42 Maine, 150; *Treat v. Lord*, 42 Maine, 552; *Parks v. Morse*, 52 Maine, 260; *Lancey v. Clifford*, 54 Maine, 487.

<sup>3</sup> *Commonwealth v. Stevens*, 10 Pick. 247; *Charlotte v. Pembroke Iron Works*, 82 Maine, 391. To the same effect under the Kansas statute, see *Venard v. Cross*, 8 Kansas, 248, where an injunction was granted. See *Haines v. People*, 19 Ill. App. 354.

<sup>4</sup> *Commonwealth v. Fisher*, 6 Met. 433. So the remedy of a town against

a mill-owner for overflowing a road which the town is obliged to repair, and does repair, is by action on the case and not under the Mill Act. *Andover v. Sutton*, 12 Met. 182. St. 1873, ch. 144 (Pub. Sta. ch. 190, § 42), establishes a proceeding by which a mill-owner can acquire the right to flow a highway. For the details of this procedure, see *infra*, the sections on Remedies under the Mill Acts. See a similar provision in Minnesota, Gen. Sta. 1878, ch. 31, § 23, p. 331.

<sup>5</sup> *French v. Braintree Manuf. Co.*, 23 Pick. 216; *Hodges v. Hodges*, 5 Met. 205; *Fuller v. French*, 10 Met. 359. Mere disuse of a canal by a canal company and a sale of its mill properties, reserving all rights necessary for the preservation and use of the canal, is not an abandonment. *Heard v. Talbot*, 7 Gray, 113.

§ 585. *Same.*—If a mill-owner makes a canal leading water into another's land, this is not within the protection of the Massachusetts statute.<sup>1</sup> So trespasses in the construction of a dam or boom are not within the scope of the statutory remedy, and are actionable wrongs.<sup>2</sup> So where the provisions of the Mill Act were extended, so as to include the taking of waters to furnish a water-supply to cities and towns, this extension was held not to imply a grant of power so to take water; and where the defendant diverted a stream in order to carry out a contract to supply a town with water, such diversion was enjoined.<sup>3</sup> So under the Virginia system of Acts, if the order granting permission to build the dam is obtained without notice to the person in possession of the lands to be taken, or without adjudicating his rights, his right to possession will be unaffected and he may have a writ of forcible entry and detainer.<sup>4</sup> So where a permission was granted to erect a dam with the condition that it should not be so maintained as to cause injury to a certain ford, a declaration *in case* for raising the dam so as to violate this condition, to the injury of the plaintiff, was held good.<sup>5</sup>

<sup>1</sup> *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68.

<sup>2</sup> *Perry v. Wilson*, 7 Mass. 393; *Henley v. Wilson*, 77 N. C. 216. The North Carolina Mill Act provides for acts done on the defendant's own land. Battle, N. C. Rev. St. ch. 72, §§ 13 *et seq.* It would be a proper exercise of legislative power, however, to authorize an entry on another's land for the purpose of erecting a boom or dam, upon proper conditions as to compensation. *Per* Parsons, C. J., in *Perry v. Wilson*, 7 Mass. 393. In Pennsylvania, an Act authorizing persons to maintain dams and obtain control of the channels of streams, for the purpose of floating lumber and rafts to market, has been construed to authorize such acts only by public companies. Where individuals, acting for their private benefit, erected a

temporary dam for such purposes, which they used in such a way as sometimes to cut off the water from the plaintiff's mill, and at other times flooded out his wheel, and injured his dam, by driving logs upon it, the court held that the plaintiff's remedy was at common law and not under the statute. *Finney v. Somerville*, 80 Penn. St. 59.

<sup>3</sup> *Howe v. Norman*, 13 R. I. 488. The extension was held to be simply of the procedure under the Mill Acts to control the taking for such purposes when the right should be granted. The Mill Act of Mississippi has been held not applicable to injuries caused by a ditch and levee. *Price v. Lagroue*, 57 Miss. 839.

<sup>4</sup> *Wolf v. Coffey*, 4 J. J. Marsh. 41.

<sup>5</sup> *Hardy v. McNeil*, 8 B. Mon. 449.

**§ 586. Breach of conditions.**—Similarly the common-law remedies lie for injuries caused by persons who proceed under the authority of such Acts, but fail to comply with their requirements. If a Mill Act imposes conditions precedent to acquiring the right to flow, they must be strictly performed by one claiming the right, or he is liable as a wrong-doer.<sup>1</sup> So, if the claimant fails to make compensation at the time and in the manner determined by the act or proceedings, or to give the security required for the payment of future damages,<sup>2</sup> or to perform the other duties imposed on him, he forfeits his rights under the Act, and renders a further maintenance of the dam a nuisance to be restrained or abated in equity.<sup>3</sup> This

<sup>1</sup> A strict compliance with the statutory method of procedure is a condition precedent to the acquisition of rights. A failure to follow the statutory method renders the mill-owner liable as a wrong-doer. *Hunting v. Waterman*, 10 Iowa, 152; *Akin v. Davis*, 11 Kansas, 580. So the writ must be sued out before building the mill and dam. A writ sued out afterwards was formerly held ineffectual. *Smith v. Olmstead*, 5 Blackf. 37; *Summy v. Mulford*, 5 Blackf. 113. See a similar opinion in Alabama. *Hendricks v. Johnson*, 5 Porter, 208. *Contra*, see *Wright v. Pugh*, 16 Ind. 106; and Ind. Rev. Sta. 1881, § 883, pl. 9.

<sup>2</sup> *Stowell v. Flagg*, 11 Mass. 364.

<sup>3</sup> *Ackerman v. Horicon Iron Co.*, 16 Wis. 150; *Zweig v. Horicon Iron Co.*, 17 Wis. 362; s. c. 20 Wis. 40; *Akin v. Mills*, 29 Wis. 322; *Arimond v. Green Bay Canal Co.*, 31 Wis. 316; s. c. 35 Wis. 41; *Wight v. Packer*, 114 Mass. 473; *Kirkendall v. Hunt*, 4 Kansas, 514. See, also, *Hill v. Sayles*, 12 Cush. 454, cited above. In New Hampshire, as we have seen, the statute of 1868 is interpreted by the aid of the constitution to require the claimant to make compensation before the land is flowed, and not to

take away the common-law remedies until after an assessment and judgment are had under the Act, and payment or tender of the amount. *Ash v. Cummings*, 50 N. H. 591. See *Head v. Amoskeag Manuf. Co.*, 113 U. S. 1, 20. In Wisconsin, it is held that judgment may be given in the alternative, upon proper allegations and proofs, for the payment of compensation and establishment of the right to maintain the dam; or, on non-payment, for the abatement of the dam. *Cobb v. Smith*, 38 Wis. 21. In an action to abate for non-payment of compensation, it is not necessary to join the mill-owner's grantees of the use of the water; but such grantees may be made defendants at their request, and by payment of the compensation they may prevent an abatement. *Newell v. Smith*, 26 Wis. 582. On the other hand, the mill-owner may maintain an action at law for an obstruction of the stream to his injury, pending the proceedings for acquiring his right. *Hendricks v. Johnson*, 9 Porter, 208. A mere promise by the builder of the dam to pay the damages assessed does not bar the action for nuisance, and will not be ground for an action. *Cave v. Calmes*, 8 Marsh. 36.

rule applies to persons purchasing from the claimant subsequent to the proceedings. They take subject to the duties imposed.<sup>1</sup>

§ 587. **Injuries.**—Injuries unforeseen and unprovided for constitute another class for which the common-law remedies survive.<sup>2</sup> The Virginia Mill Act, and several of the statutes modelled upon it, contain clauses expressly saving existing remedies for injuries not actually foreseen and estimated upon the inquest.<sup>3</sup> These Acts also provide that permission shall not be given to erect dams which will cause injury to health.<sup>4</sup> So where a dam duly authorized, and found by the inquest not likely to injure health, afterwards causes injury to health, the remedy is at common law.<sup>5</sup> So where the statutes contain no such provisions, they are usually construed to provide remedies for injuries by flowage and the withholding of water only; and the common-law remedies are sustained for injuries to health caused by dams maintained under the Acts.<sup>6</sup> The sav-

<sup>1</sup> *Wight v. Packer*, 114 Mass. 473.

<sup>2</sup> *Denslow v. New Haven & Northampton Co.*, 16 Conn. 98; *Eames v. New England Worsted Co.*, 11 Met. 570; *Coe v. Hall*, 41 Vt. 325; *Calhoun v. Palmer*, 8 Gratt. 88, 100; *Waddy v. Johnson*, 5 Ired. 333; *Watson v. Van Meter*, 43 Iowa, 152. See *Smith v. Olmstead*, 5 Blackf. 37.

<sup>3</sup> Va. Code, 1873, Title 19, ch. 63, § 11; Miss. Rev. Code, 1880, § 932; 2 Mo. R. S. 1879, § 6435; Iowa Rev. Sts. 1882, § 1201. See Ind. Rev. Sts. 1831, ch. 1, § 8; Ind. Rev. Sts. 1881, § 1859.

<sup>4</sup> Ala. Code, 1876, § 3564; Ark. Rev. Sts. 1874, § 4225; Fla., McClellan's Dig. ch. 152, § 6; Ill. Rev. Sts. 1881, ch. 92, § 1; Ind. Rev. Sts. 1881, § 887; Ky. Rev. Sts. 1879, ch. 77, § 4; Miss. Code, 1880, § 928; N. C. St. 1873, ch. 72, § 9; Va. Code, 1873, Title 19, ch. 63, § 6; 2 West Va. Sts. 1879, ch. 91, § 81; 2 Tenn. Sts. 1871, § 1920.

<sup>5</sup> *Commonwealth v. Favis*, 5 Rand. 691; *Miller v. Trueheart*, 4 Leigh, 569; *State v. Holman*, 104 N. C. 861. See

*Waddy v. Johnson*, 5 Ired. 333, in which it is held that, where a person's lands are *flowed*, the statute intended to allow all incidental injuries caused by *such flowage*, *e. g.*, injuries to health to be included in the finding; but that where a person's lands are not flowed, the remedy is by common-law action. And see *Bridges v. Purcell*, 1 Ired. 232, establishing the first part of the rule.

<sup>6</sup> *Rooker v. Perkins*, 14 Wis. 79; *Eames v. New England Worsted Co.*, 11 Met. 570. In *Palmer Co. v. Ferrill*, 17 Pick. 58, 66, Shaw, C. J., says: "The rule, therefore, which seems to be derived from the statutes construed together, seems to be to estimate the pecuniary loss arising to the proprietor from the direct injury done to his estate, taken as a whole, by flowing, deducting therefrom any benefit which may be done to the same estate by the same cause, namely, by flowing." In *Gile v. Stevens*, 13 Gray, 146, flowage below a dam was held

ing clause in the Virginia statute, and those which follow it, extend to damages which though contemplated by the statute as grounds for recovery in the special proceeding, were not included in the finding of damages. It is held that in a second action, the jury in the original proceedings will be presumed, in the absence of proof, to have foreseen and estimated all the damages which it was then practicable to foresee and estimate,<sup>1</sup> and the statute does not save a right of action for damages foreseen but miscalculated.<sup>2</sup>

§ 588. **Case — Incidental injuries.**— The right to compensation for incidental injuries caused by works of public utility is elsewhere considered.<sup>3</sup> With respect to remedies where the right to compensation for incidental injuries is admitted, but is not provided for as a taking, the remedy is usually held to be by an action on the case.<sup>4</sup> Where certain Acts authorized the defendant to enter upon a river-bed and alter it for the purpose of improving its channel, and provided a special rem-

within the protection of the statute. But injuries to personal property upon the lands flowed, *e. g.*, peat, dry or curing upon a meadow, are not grounds for recovery under the statute. And injuries to manure placed upon land cannot be made an item of damages, apart from the realty. For such injuries the remedy is at common law. *Gile v. Stevens*, 13 Gray, 146.

<sup>1</sup> *Ellis v. Harris*, 32 Gratt. 684.

<sup>2</sup> *Kepley v. Taylor*, 1 Blackf. 152. See *Bell v. Elliot*, 5 Blackf. 113.

<sup>3</sup> See *ante*, §§ 248-250.

<sup>4</sup> In *Wabash v. Erie Canal Co.*, 16 Ind. 441, it was held that the flowing of lands by a canal company by statutory authority was not a taking within the statutory provision, and that an action at law could be maintained for such flowage. In *Snowden v. Wilas*, 19 Ind. 10, the same question is raised as a new question, but not decided. The action on the case will lie for such injuries. *Locks & Canals v. Nashua R. Co.*, 10 Cush.

385, 388; *Estabrooks v. Peterborough R. Co.*, 12 Cush. 224; *Trenton Water Power Co. v. Raff*, 7 Vroom, 885; *Hooker v. New Haven Co.*, 14 Conn. 146; *s. c.* explained, 15 Conn. 312; *Burroughs v. Housatonic R. Co.*, 15 Conn. 124, 132. See *Grand Rapids Booming Co. v. Jarvis*, 80 Mich. 321; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Nevins v. Peoria*, 41 Ill. 502, 510. An injunction may also be had against such injuries, unless compensation is made. *Pettigrew v. Evansville*, 25 Wis. 223. That any such injury constitutes a taking, see *Eaton v. Boston R. Co.*, 51 N. H. 504; and see *Cooley Const. Lim.* (5th ed.) 570. But see *Bellinger v. New York Central R. Co.*, 23 N. Y. 42; *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101; *West Branch & Susquehanna Canal Co. v. Mulliner*, 68 Penn. St. 357; *Selden v. Delaware Canal Co.*, 29 N. Y. 634; *Losee v. Buchanan*, 51 N. Y. 476; *Moyer v. New York Central R. Co.*, 88 N. Y. 351; *Illinois Central R. Co. v. Bethel*, 11 Brad. (Ill.) 17.



edy for injuries caused in carrying the Acts into effect, it was held that this remedy did not extend to injuries caused by the defendant in floating timber over the plaintiff's dam, and that the action on the case would lie.<sup>1</sup>

§ 589. **Negligence — Abuse of power.**— For injuries caused by negligence or by abuse of the powers delegated by statute to persons or companies, for the public good, the common-law remedies will lie. Such acts are not authorized, and are not within the scope of the statutory remedies.<sup>2</sup> A mill-owner maintaining a dam under the statute is liable at common law for letting out water in unreasonable quantities, and wrongfully overflowing the lands and damaging the property below.<sup>3</sup> So where the defendant maintained a dam under the Mill Act,

<sup>1</sup> *Coe v. Hall*, 41 Vt. 325. The case of *Denslow v. New Haven & Northampton Co.*, 16 Conn. 98, must, it seems, be referred to the principle of injuries unprovided for, if supported at all. There the defendants erected a dam under the authority of their charter, and with the approval of the commissioners appointed under it. The dam caused injury to a mill-site above belonging to A. The commissioners were never called on to assess damages on this account. A afterwards sold his mill-site to B. It was held that the commissioners could not take cognizance of subsequent injuries arising from time to time, and that B. could maintain an action on the case for the injuries. The court held that "where no steps are taken to present the case before them in the proper manner, the parties are left in the same situation as if no such authority was given, and, of course, that the defendants must be responsible as at common law." But if a mere failure by the injured party to bring his injuries before the commissioners in the method provided, would not entitle him to an action at law, this would abrogate

the doctrine of *res adjudicata*, and in effect give the plaintiff an election of remedies. The case approves the rule in *Crittenden v. Wilson*, 5 Cowen, 165, which gives such an election, and must be considered so far wrong. For injuries caused by dams erected to create artificial floods and float logs to market, the remedy is in case. *Dubois v. Glaub*, 52 Penn. St. 238.

<sup>2</sup> *Estabrooks v. Peterborough R. Co.*, 12 Cush. 224; *Gile v. Stevens*, 18 Gray, 146; *Thompson v. Moore*, 2 Allen, 350; *Hamor v. Bar Harbor W. Co.*, 78 Maine, 127; *Rich v. Keshena Improvement Co.*, 56 Wis. 287; *Steele v. Western Nav. Co.*, 2 Johns. 283; *West Branch & Susquehanna Canal Co. v. Mulliner*, 68 Penn. St. 357; *Fehr v. Schuylkill Navigation Co.*, 69 Penn. St. 161. Negligence or wantonness by a *public officer*, acting under a statute providing a special remedy, will not be ground for an action at common law. The ground for this exception is that the discretion of public officers is not controllable. But in such case the special remedy lies. *Benjamin v. Wheeler*, 8 Gray, 409; 15 Gray, 486.

<sup>3</sup> *Clapp v. Herrick*, 129 Mass. 292.

but wrongfully withheld water from the plaintiff by closing his gates at night, the plaintiff's remedy was held to be at common law.<sup>1</sup> In *Schuylkill Navigation Co. v. McDonough*, which was an action on the case by McDonough against the company, for injuries caused by suffering a dam and pond to become filled with dirt,<sup>2</sup> the court said: "The remedies against the company, provided by the Act of incorporation, are for the injuries arising from the construction of the dam as a part of the navigable highway; and they do not exclude the common-law remedies for injuries arising from an abuse of the privileges granted to the company, or for the neglect of its duties." So the common-law actions lie for the negligent diversion or obstruction of a watercourse, or for the detention and accumulation of water, in the construction of a public work.<sup>3</sup>

<sup>1</sup> *Thompson v. Moore*, 2 Allen, 850. In this case, Bigelow, C. J., after alluding to the broad terms of the Act ("overflowed or otherwise injured"), said: "Looking at the original design and intent of the legislature in enacting laws for the support and regulation of mills, and taking into view the successive Acts which have been passed *in pari materia*, it is clear that the remedy thereby provided is intended to be confined solely to cases where land is overflowed by raising a head of water, and to the incidental and consequential damages which necessarily and naturally arise therefrom. This is settled by a series of adjudicated cases. For all other injuries the remedy at common law still remains, and the party sustaining damage can maintain an appropriate action to recover it. *Hill v. Sayles*, 12 Met. 142; *Andover v. Sutton*, id. 182; *Eames v. N. E. Worsted Co.*, 11 Met. 571; *Murdock v. Stickney*, 8 Cush. 116." So the remedy under the act does not extend to trespasses. *Henley v. Wilson*, 77 N. C. 216.

<sup>2</sup> 88 Penn. St. 78, 79. The injuries

here considered are those alleged in the fourth count.

<sup>3</sup> *Bailey v. Mayor of New York*, 8 Hill, 581; *Bellinger v. New York Central R. Co.*, 28 N. Y. 42; *Bryant v. Bigelow Carpet Co.*, 181 Mass. 492; *Delaware Canal Co. v. Lee*, 22 N. J. L. 248; *Pittsburgh Railway v. Gilleland*, 56 Penn. St. 445; *Dearborn v. Boston R. Co.*, 24 N. H. 179; *Hatch v. Vermont Central R. Co.*, 25 Vt. 49; *Waterman v. Connecticut R. Co.*, 80 Vt. 610; *Spencer v. Hartford R. Co.*, 10 R. I. 14; *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Selma R. Co. v. Keith*, 53 Ga. 178; *Terre Haute R. Co. v. McKinley*, 88 Ind. 274; *King v. Iowa Midland R. Co.*, 84 Iowa, 458; *McCormick v. Kansas City R. Co.*, 57 Mo. 33; *St. Louis Ry. Co. v. Morris*, 85 Ark. 48; *Oregon R. Co. v. Barlow*, 3 Oregon, 311. The same is true of injuries from the negligent construction of a drain, under statutory authority, though the statute provides a remedy for damages by the proper exercise of the power. *Jackson v. Portland*, 68 Maine, 55. See *Tearney v. Smith*, 86 Ill. 391. A reservation in the Act of power of

§ 590. **Contracts — Arbitration.**— Rights upon contracts between land-owners and mill-owners are usually not affected by the statutes, and are enforceable by the ordinary remedies at common law and in equity, and not by proceedings under the statutes.<sup>1</sup> A grantee, whose right of flowage is limited by his deed to a certain height, is not thereby precluded from obtaining a higher flowage under the Mill Act.<sup>2</sup> The decisions as to the effect of the statutory remedy upon the power of the parties to bind themselves by a submission to arbitration, which will be enforced at law, are by no means uniform. In *Hunt v. Whitney*,<sup>3</sup> the claim for damages by flowage was submitted to referees, who awarded damages for both past and future flowage, and a sum in gross for all damages thereafter to be sustained. The award was approved, and judgment rendered thereon, and the complainant elected to take the sum in gross. The defendant paid the award for past damages, gave notice at once of his abandonment of the right to flow the lands in future, and drew down the water so as to leave the plaintiff's land free. The plaintiff brought suit on the award for the future damages. The court held that the defendant had the right, under the circumstances, to abandon his right of future flowage and avoid liability therefor. No question was raised as to the validity of the award. If the award had been deemed invalid, the case could have been disposed of on that ground. In the next case involving the question, it was held that where a mill had been abandoned, the dam was not protected, and that the common-law remedies lay. A submission to arbitration was therefore upheld.<sup>4</sup> In *Henderson v. Adams*<sup>5</sup> the question was raised as to the validity of a statutory arbitration of a claim for flowage, and it was held invalid because the claim for flowage was not within the terms of the statute on arbitrations. The statute provided a method for the arbitration of "all controversies which might be the subject of a personal action at law or of a suit in equity." It was held that the Mill Act had rendered flowage not the

abatement does not exclude equitable jurisdiction therefor. *State v. Bell*, 5 Porter, 365.

<sup>1</sup> *Harding v. Goodlett*, 3 Yerger, 41.

<sup>2</sup> *Graham v. Virgin*, 78 Maine, 388.

<sup>3</sup> 4 Met. 603. See *James v. Sterrett*, 137 Penn. St. 234; *Russell v. Page*, 147 Mass. 282.

<sup>4</sup> *Hodges v. Hodges*, 5 Met. 205.

<sup>5</sup> 5 Cush. 610.

subject of such actions and suits. This was affirmed in *Carpenter v. Spencer*.<sup>1</sup> But here the court went further, and held that the power of the courts to give judgment for future damages under the Mill Acts was purely statutory, and that such judgments must be rendered in proceedings conforming to the statute. The court, therefore, could not enter judgment for such damages upon an award. In *Winkley v. Salisbury Manuf. Co.*<sup>2</sup> a claim for flowage was submitted to arbitrators, giving them "all the authority to decide upon said actions and causes of action and damages, which a court of law or jury might have, in deciding on the same by virtue of the law and statutes of the Commonwealth of Massachusetts, especially the statutes for the support and regulation of mills." The arbitrators awarded past and future damages, and decided upon the height at which it was necessary to maintain the dam. The court held that the same effect was to be given to such an award as to the verdict of a jury under proceedings duly had according to the statute. This rule has been followed in several cases, but the cases of *Henderson v. Adams*, and *Carpenter v. Spencer*, are not referred to, either in the leading case of *Winkley v. Salisbury Manuf. Co.* or the succeeding cases.<sup>3</sup>

<sup>1</sup> 2 Gray, 407. Shaw, C. J., said: "The power to render such judgment, not only affording a remedy for an injury actually incurred, but looking to the future, and declaring the rights of the parties specifically, and giving a remedy by action of debt or assumpsit, by and against privies in estate, depends wholly on statute, and can exist only in cases provided by statute. The statute gives this right only in cases commenced, prosecuted, and determined, according to the Mill Act. Rev. Sts. ch. 116. Whether such a judgment for damages already accrued would be binding upon the parties and their personal representatives, we have no occasion now to consider; beyond that, we are of opinion that it is void, because not within the statute."

<sup>2</sup> 14 Gray, 443.

<sup>3</sup> *Bates v. Sloan*, 5 Allen, 178; *Leonard v. Wading River Reservoir Co.*, 113 Mass. 235; *Wight v. Packer*, 114 Mass. 473. The same doctrine is held in *Fitch v. Taft*, 126 Mass. 503, but the earlier cases are not referred to. In Maine, the claim under the statute may be arbitrated. *Bradstreet v. Erskine*, 50 Maine, 407; *Duren v. Getchell*, 55 Maine, 241. Unless the title to real estate is expressly involved. *Quinn v. Besse*, 64 Maine, 366. And it was held in *Fryeburg Canal Co. v. Frye*, 5 Maine, 38, that a claim for damages, caused by the company in proceeding under a special Act providing a remedy, might be arbitrated. But the statutory remedy was expressly held merely cumulative. For the effect of an award as a defence in proceedings under the statute, see *ante*, § 582.

§ 591. **Repeal of statute — Effect.**— The repeal of a statute delegating the power of eminent domain renders any further acts by the grantee, in the exercise of such power, torts for which the parties injured may maintain the common-law remedies.<sup>1</sup> In Wisconsin the Mill Acts are held to be such delegations of the power of eminent domain, and their repeal is held to restore the common-law remedies to parties injured by flowage continued after the repeal.<sup>2</sup> Where, as in Massachusetts, the Mill Acts are held not an exercise of the power of eminent domain, but merely an alteration of the remedies for injuries caused by mills and dams, it would follow upon principle that the sovereign might again alter the remedies; that a repeal of the Mill Acts would be such an alteration, and that the effect of such a repeal would be to restore the common-law remedies. Where the power is delegated by a special Act, which is in terms subject to all the provisions of the general Act, and adopts its remedies, a repeal of the general Act will not operate as a repeal of the special Act also, and the statutory remedies for injuries authorized by the special Act remain in force.<sup>3</sup> In such a case it was held, accordingly, that an equitable action to abate would not lie after the repeal of the general Act.<sup>4</sup> The Legislature may alter the provisions of a special charter as to remedies for flowage, and provide new remedies.<sup>5</sup>

<sup>1</sup> That the statutory remedy is taken away by such repeal, see *Commonwealth v. Beatty*, 1 Watts, 382; *Hampton v. Commonwealth*, 19 Penn. St. 329. The right of the State to revoke a license granted by statute, to divert a watercourse for manufacturing purposes, or to grant another license impairing the former, is affirmed in *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *New York R. Co. v. Young*, 33 Penn. St. 175; *Rundle v. Delaware Canal Co.*, 14 How. 80.

<sup>2</sup> In *Stephens v. Marshall*, 8 Pin. (Wis.) 208; 3 Chand. 222, it was held that the Mill Act gave vested rights

to mill-owners taking the benefit of it, which could not be taken away by repeal. This was overruled in *Pratt v. Brown*, 3 Wis. 603. Here the court held (*per* Smith, J.) that the taking was by the sovereign, through the medium of the mill-owner, and that his holding is dependent on the will of the government. This is followed in *French v. Owen*, 5 Wis. 112.

<sup>3</sup> *Wood v. Hustis*, 17 Wis. 416; *Crosby v. Smith*, 19 Wis. 449. An amendment to the general Act amends such special Act. *Hooker v. Greene*, 50 Wis. 271.

<sup>4</sup> *Crosby v. Smith*, 19 Wis. 449.

<sup>5</sup> *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433.

§ 592. **Mills Acts — Remedies under.**—Historically the Mill Acts may be divided into two classes,<sup>1</sup> viz.: first, the earlier New England statutes and that of Wisconsin, of which the original is found in Massachusetts; and second, those pre-

<sup>1</sup> That these acts are quite generally held to be constitutionally valid, see *ante*, § 253; also *Stewart v. Supervisors*, 80 Iowa, 920; *Burnham v. Thompson*, 35 Iowa, 421; *Rhines v. Clark*, 51 Penn. St. 96. The Mill Acts of the different States are added in the following note to the opinion of Mr. Justice Gray in *Head v. Amoskeag Manuf. Co.*, 113 U. S. 9, 17 (1884-5):

**ALABAMA.** Terr. Stats. 1811, 1812, Toulmin's Dig. 1823, tit. 45; Clay's Dig. 1843, p. 376; Code 1852, §§ 2089-2115; Rev. Code 1867, §§ 2481-2508; Code 1876, §§ 3555-3579.—**ARKANSAS.** Rev. Stat. 1837, c. 98; Dig. 1846, c. 107; Dig. 1858, c. 114; Gantt's Dig. 1873, c. 95.—**CONNECTICUT.** Stat. 1864, c. 26; Gen. Stat. 1866, tit. 1, c. 16; Gen. Stat. 1875, tit. 19, c. 17, pt. 6.—**DELAWARE.** Prov. Stat. 1719, 1760, 1773, 1 Laws 1700-97, p. 535, appx. pp. 53, 72; Rev. Stat. 1852, c. 61; Stat. 1859, c. 538; Rev. Code 1874, c. 61.—**FLORIDA.** Terr. Stats. 1827, 1829, Duval's Compilation, pp. 51-55; Thompson's Dig. 1847, c. 10; McClellan's Dig. 1881, c. 152.—**GEORGIA.** Stat. 1869, c. 98. Repealed by Code of 1882, § 3018.—**ILLINOIS.** 2 Terr. Laws 1815, p. 456; Stat. 1819, p. 265; Rev. Code 1827, p. 297; Rev. Stat. 1845, c. 71; Rev. Stat. 1869, c. 71; Rev. Stat. 1874, c. 92; Rev. Stat. 1880, c. 92.—**INDIANA.** Terr. Stat. 1807, p. 194; Rev. Laws 1824, c. 117; Rev. Laws 1831, c. 1; Rev. Stat. 1838, c. 1; Rev. Stat. 1842, c. 48, art. 5; Rev. Stat. 1852, pt. 2, art. 41; Rev. Stat. 1881, §§ 882, & seq.—**IOWA.** Terr. Stat. 1839, p. 343, 1843, p. 437; Stat. 1855, c. 92; Rev. Stat. 1860, tit. 11, c. 54, art. 4; Code

1873, tit. 10, c. 1; Code 1880, tit. 10, c. 1.—**KANSAS.** Stat. 1867, c. 87; Gen. Stat. 1868, c. 66; Comp. Laws 1879, c. 66.—**KENTUCKY.** Stat. Feb. 22, 1797, 1 Littell Stat. 606; 2 Littell & Swigert's Dig. 1822, p. 933; Rev. Stat. 1852, c. 67; Gen. Stat. 1883, c. 77.—**MAINE.** Stat. 1821, c. 45; Rev. Stat. 1840, c. 126; Rev. Stat. 1857, c. 92; Rev. Stat. 1871, c. 93; Rev. Stat. 1883, c. 92.—**MARYLAND.** Prov. Stat. 1719, c. 15; Bacon's Laws 1765, and 1 Kilty's Laws. Repealed by Stat. 1832, c. 56.—**MASSACHUSETTS.** Prov. Stat. 1714, c. 15, 1 Prov. Laws (State ed.), 729, and Anc. Char. 404; Stats. 1795, c. 74, passed Feb. 27, 1796; 1824, c. 153, Feb. 26, 1825; 1825, c. 109, Feb. 28, 1826; 1829, c. 122, March 12, 1830; Rev. Stats. 1836, c. 116; Gen. Stats. 1860, c. 149; Pub. Stats. 1882, c. 190.—**MICHIGAN.** Terr. Stat. 1824, 1828, 2 Terr. Laws, 192, 699; Stat. 1865, c. 304; Comp. Laws 1872, c. 221; Stat. 1873, c. 196.—**MINNESOTA.** Terr. Stat. 1857, Pub. Stat. 1849-1858, c. 129; Rev. Stat. 1866, c. 31; Gen. Stat. 1878, c. 31.—**MISSISSIPPI.** Terr. Stat. 1811, 1812, p. 344; Rev. Code 1824, c. 65; Rev. Code 1871, c. 34; Rev. Code 1880, c. 27.—**MISSOURI.** Stat. 1823; 2 Rev. Stat. 1825, p. 587; Rev. Stat. 1835, p. 405; Rev. Stat. 1845, c. 121; Rev. Stat. 1855, c. 112; Gen. Stat. 1865, c. 101; Wagner's Stat. 1872, c. 98; Rev. Stat. 1879, c. 132.—**NEBRASKA.** Terr. Stat. 1861-2, p. 71; Rev. Stat. 1866, c. 36; Gen. Stat. 1873, c. 44; Comp. Stat. 1881, c. 57.—**NEW HAMPSHIRE.** Prov. Stat. 1718; Prov. Laws (ed. 1771), c. 60; Stat. 1868, c. 20; Gen. Laws 1878, c. 190.—**NORTH CAROLINA.** Prov. Stat. 1758, c. 5, Revision



vailing in the Southern and Western States, of which the original is found in Virginia. In some of the more recent statutes, provisions from both systems are combined. Statutes of the Massachusetts or New England system authorize the building of dams and the flooding of lands by persons desiring to build and maintain mills, and prescribe a remedy to be pursued by persons injured thereby. Statutes of the Virginia system empower the mill-owner to obtain the right to flow lands by proceeding in the manner and performing the conditions prescribed by the statutes. The fundamental difference in the systems is, therefore, in the lodgment of the initiative in the proceedings.

§ 593. **Extra-territorial injuries.**—The Mill Acts, like other statutes, have force only within the territory of the State enacting them. It follows that for any extra-territorial injuries caused by dams and works maintained within the State, the same remedies apply as if there were no statute.<sup>1</sup> So, on the other hand, the Acts for the encouragement of mills apply only to mills within the State. If lands in such State are injured by mills or dams situated without the State, the mill-owner is not entitled to the benefit of the statute. For

1773, p. 219; Stat. 1777, c. 23, Laws 1791, p. 343; Stat. 1809, c. 15; 1813, c. 19; Rev. Laws 1821, c. 122, 773, 863; Rev. Stat. 1837, c. 74; Rev. Code 1854, c. 71; Battle's Revisal 1873, c. 72.—OREGON. Stat. Dec. 19, 1865, Gen. Laws 1843-72, p. 679.—PENN-  
SYLVANIA. Stat. March 23, 1803, 4 Smith's Laws, p. 20; Purdon's Dig. (10th ed.) p. 1065.—RHODE ISLAND. Col. Stat. 1734, Laws 1744, p. 180; Public Laws 1798, p. 504; Rev. Stat. 1857, c. 88; Pub. Stat. 1882, c. 104.—  
TENNESSEE. Rev. Laws 1809, c. 23; Compilation 1836, p. 486; Code 1858, §§ 1908-1915; Code 1884, §§ 2651-2661.—VERMONT. Stats. 1866, c. 12; 1867, c. 27; 1869, c. 27; Gen. Stat. 1870, appx. pp. 906, 953, 1025; Rev. Laws 1880, c. 148, §§ 3215-3224.—  
VIRGINIA. Col. Stat. 1667, c. 4, 2 Henning's Stat. 260; Col. Stat. 1705, c. 41,

3 Henning, 401; Col. Stat. 1745, c. 11, 5 Henning, 359; Stat. 1785, c. 82, 12 Henning, 187; Rev. Code 1814, c. 105; Rev. Code 1819, c. 235; Code 1849, c. 63; Code 1873, c. 63.—WEST VIR-  
GINIA. Code 1870, c. 44, §§ 29-36.—  
WISCONSIN. Terr. Stat. 1840, c. 48; Rev. Stat. 1858, c. 56; Rev. Stat. 1878, c. 146.

<sup>1</sup> *Wooster v. Great Falls Manuf. Co.*, 39 Maine, 246; *Salisbury Mills v. Forsaith*, 57 N. H. 124; *Holyoke Water Power Co. v. Conn. River Co.*, 20 Fed. Rep. 71, 79. So in the case of a canal company chartered by the State of Rhode Island, and whose works injured property in Massachusetts, it was admitted by the company that the charter gave them no right to commit such injury. *Farnum v. Blackstone Canal Co.*, 1 Sumner, 46. See remarks of Story, J., p. 57.

injuries in both these cases the remedy is at common law in the courts of the State where the injured property lies. Where a State cedes a portion of its territory, and the jurisdiction over it, to the United States, that territory is governed by the laws of the United States. Therefore, if a Mill Act is in force in such State, it will not apply to mills maintained upon the land ceded to the United States; nor, on the other hand, will the Mill Act authorize the flowage by a mill within the State, of lands within the territory ceded.<sup>1</sup> But where the United States simply holds the title to lands within the State, the State may exercise the right of eminent domain over such lands, and the laws of the State, including such statutes as the Mill Acts, apply to such lands.<sup>2</sup>

§ 594. **The Massachusetts system.**—The proceedings under the Massachusetts Mill Act are not founded upon any common-law writ, but are purely statutory.<sup>3</sup> The present statute<sup>4</sup> authorizes mill-owners to maintain dams<sup>5</sup> subject to its provisions, and provides that any person whose land is overflowed or *otherwise* injured may obtain compensation by proceeding according to the Act. The statute is limited to injuries to the complainant's land caused by flowage.<sup>6</sup> It extends to injuries caused by reservoir dams,<sup>7</sup> including injuries to land interven-

<sup>1</sup> *United States v. Ames*, 1 Wood. & M. 76.

<sup>2</sup> *Boggs v. Merced Mining Co.*, 14 Cal. 279, 375; *Hendricks v. Johnson*, 6 Porter, 472.

<sup>3</sup> Act of 1714; Ancient Charters, p. 404, ch. cxi., providing for complaint by the party injured to the court of general sessions, and the appraisal of yearly damages by a jury; which should bar any action save that of debt, for the recovery of such yearly damages "from the owner or occupant of such mill, assessed as aforesaid, during the time of such flowage." Act of 1795; 2 Perpetual Laws (1801), ch. 74, p. 344; St. 1825, ch. 153; Rev. Sts. 1836, ch. 116; Gen. Sts. ch. 149; Pub. Sts. ch. 190.

<sup>4</sup> Public Statutes (1882), ch. 190.

<sup>5</sup> That a coffer-dam or other like temporary structure is not a dam, see *Heacock v. State*, 105 N. Y. 246.

<sup>6</sup> *Palmer Co. v. Ferrill*, 17 Pick. 58, 66, where the injuries for which the action lies, and the benefits which may be set off, are limited to those caused by flowage. The same doctrine is adhered to in Wisconsin. *Brower v. Merrill*, 3 Pin. (Wis.) 46. As to injuries not within the Act, and remediable at common law, see *ante*, § 580.

<sup>7</sup> *Wolcott Woollen Co. v. Upham*, 5 Pick. 292; *Shaw v. Wells*, 5 Cush. 537. And see *Nelson v. Butterfield*, 21 Maine, 220; *Dingley v. Gardiner*, 73 Maine, 63. Where a Massachusetts statute in 1791, incorporating a navigation company, authorized it to

ing between the reservoir and the mill,<sup>1</sup> but not to a reservoir dam upon one stream supplying power to a mill upon a different stream.<sup>2</sup> It does not include injuries by tide-mills.<sup>3</sup> The present statute provides that the jury may consider damages to other lands than those overflowed. Injuries caused by flowage below the dam are within its provisions;<sup>4</sup> increased flowage caused by enlarging the mill and proportionally increasing the height of the dam is a new taking within the statute.<sup>5</sup> An injury caused by flooding a cellar is within the statute, and not remediable at common law.<sup>6</sup> A complaint

build such dams, locks, and canals as were necessary for its purposes, and provided a special remedy for all persons injured in their property by the works of the corporation, by application to a certain court; and a statute passed in 1880, legalized the existing dams, locks and canals of the corporation, authorized it to construct other dams, locks and canals for the creation of a water-power to use or to lease for manufacturing purposes; provided that, for those purposes, the corporation should have all the powers and privileges, and be subject to all the duties, liabilities and restrictions, under the general laws relating to manufacturing and other corporations; relieved the corporation from the obligation to support its dams, locks and canals for the purposes of navigation; and discontinued its canal as a navigable highway, the remedy of a person injured by the raising of its dam by the corporation, after the passage of the later statute, was held to be by a complaint under the Mill Act. *Comins v. Turner's Falls Co.*, 138 Mass. 222; s. c. 140 Mass. 146; 142 Mass. 448. See *Neponset Meadow Co. v. Tileston*, 133 Mass. 189. A dam at the beginning of an unnavigable outlet of a navigable lake is within the protection of the Wisconsin statute. *Clute v. Briggs*, 22 Wis. 607.

<sup>1</sup> *Drake v. Hamilton Woollen Co.*, 99 Mass. 574; *Norton v. Hodges*, 100 Mass. 241.

<sup>2</sup> *Bates v. Weymouth Iron Co.*, 8 Cush. 548.

<sup>3</sup> *Murdock v. Stickney*, 8 Cush. 113.

<sup>4</sup> *Gile v. Stevens*, 13 Gray, 146. Such injuries are not within the Mill Act of Maine. *Wilson v. Campbell*, 76 Maine, 94.

<sup>5</sup> *Johnson v. Kittredge*, 17 Mass. 76; *Leonard v. Schenck*, 8 Met. 357; see *Brady v. Blackinton*, 113 Mass. 238. Where a person has a right to maintain a dam at a certain height, it is no ground for complaint under the Mill Act, that, owing to the non-use of his mill, the water stands higher on complainant's land than it otherwise would. *Daniels v. Citizens' Savings Institution*, 127 Mass. 534. In Wisconsin, injuries caused by the obstruction, collection, and deposition of drift-wood are held items of damages to be allowed for in proceedings under the Act. *Janssen v. Lammers*, 29 Wis. 88.

<sup>6</sup> *McNally v. Smith*, 12 Allen, 455. And so *semble*, if water is set back through a cellar drain into a cellar. *Cotton v. Pocasset Manuf. Co.*, 13 Met. 429. Injury to lands not flowed, but merely rendered less valuable by reason of odors from adjoining flowed lands, was held too remote for recovery under the statute in

cannot be entertained under the Mill Act for injuries to an unappropriated mill-site.<sup>1</sup> Injuries to highways were held not authorized by the general Act, and were remediable at common law;<sup>2</sup> but by the Act of 1873,<sup>3</sup> a mill-owner who desired to maintain a dam in such a manner as to overflow a highway is authorized to apply to the county commissioners, who may order such alteration in the way as will enable him to maintain his dam without injury to the highway, and may order the petitioner to pay all damages sustained by any person or corporation by such alteration. But the statutory remedy will lie for an injury to a private way.<sup>4</sup>

**§ 595. The complaint — Parties complainant.**— The statutory proceeding is by complaint filed in the Superior Court of the county where the land or any part thereof is situated.<sup>5</sup> It is provided in section 39<sup>6</sup> that two or more persons suffering damage from a mill-dam, whether jointly or separately interested in the lands injured, may join in a complaint, and their cases may be heard before the same jury, which may assess joint or several damages as the interest and title of the complainants may require. The language is permissive, but when co-tenants are so injured, they will be required to join. The permissive rule that they “may join” in actions for trespass or nuisance was construed “must join” by Shaw, C. J., in *May v. Parker*,<sup>7</sup> for the reason that the damages survive to all, which is equally true in this case; and it has been so ruled

*Eames v. New England Worsted Co.*, 11 Met. 570. But see the present provision of the statute, § 14, cited *supra*. Compare *Rooker v. Perkins*, 14 Wis. 79, *accord*.

<sup>1</sup> *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 43.

<sup>2</sup> *Calais v. Dyer*, 7 Maine, 155; *Monmouth v. Gardiner*, 35 Maine, 247.

<sup>3</sup> St. 1873, ch. 144; Pub. Sta. 1882, ch. 190, § 42. A town within whose limits a highway has been changed under this section, and which has no ownership in the soil of the way, is not a person or corporation entitled to damages under this provision.

*Cheshire v. Adams Reservoir Co.*, 119 Mass. 356.

<sup>4</sup> *Calais v. Dyer*, 7 Maine, 155; *Monmouth v. Gardiner*, 35 Maine, 247.

<sup>5</sup> If the land lies partly in several counties, or if injuries are done to several parcels belonging to the same persons, but lying in different counties, the complaint may be filed in the court for either county. *Bates v. Ray*, 102 Mass. 458.

<sup>6</sup> Pub. Sta. (1882), ch. 190, § 39; Gen. Sta. ch. 149, § 44.

<sup>7</sup> *May v. Parker*, 12 Pick. 84. See *Bacon Abr.*, *Joint Tenants*, etc., K.

under the statute of Maine.<sup>1</sup> A mortgagor in possession of the land injured may maintain a complaint under the Act without joining the mortgagee,<sup>2</sup> and may recover against the mortgagee;<sup>3</sup> and a land-owner may, after conveying the land away, recover under the statute for injuries to the land during his ownership.<sup>4</sup> So a person in possession under a defeasible title,<sup>5</sup> and a widow holding by devise a life estate in her late husband's lands,<sup>6</sup> have been held entitled to recover. So a purchaser of land is held entitled to the remedy, for damage done after his purchase, by flowage begun before, unless the right perpetually to flow has been acquired, the original flowing not constituting a disseisin.<sup>7</sup>

<sup>1</sup> *Tucker v. Campbell*, 36 Maine, 346; *Moor v. Shaw*, 47 Maine, 88; *Phillips v. Sherman*, 61 Maine, 548. The Maine Statute (Rev. Sts. 1871, Title 9, ch. 92) contains no provision on joinder of parties. In *Phillips v. Sherman* it was held that the non-joinder of a plaintiff could be taken advantage of under the general issue, by a brief statement denying the ownership, and that possession under claim of title was not a sufficient interest to enable the plaintiff to maintain his complaint. But a quit-claim deed to the plaintiff is held *prima facie* proof of ownership without proof of entry. *Williamson v. Carlton*, 51 Maine, 449. That part owners cannot maintain an action alone, but that complainants must have the entire title, see *Davis v. Stevens*, 57 Maine, 593; *Webster v. Holland*, 58 Maine, 168.

<sup>2</sup> *Paine v. Woods*, 108 Mass. 160.

<sup>3</sup> *Vaugh v. Wetherell*, 116 Mass. 138.

<sup>4</sup> *Walker v. Oxford Woollen Manuf. Co.*, 10 Met. 203; *Turner v. Whitehouse*, 68 Maine, 221.

<sup>5</sup> *Charles v. Monson Manuf. Co.*, 17 Pick. 70.

<sup>6</sup> *Howe v. Ray*, 110 Mass. 298.

<sup>7</sup> *Charles v. Monson Manuf. Co.*, 17

Pick. 70; *Craig v. Lewis*, 110 Mass. 377. In *Ballard v. Ballard Vale Co.*, 5 Gray, 468, the company, having the right to flow land to a certain height, wrongfully increased the height to their dam and the extent of flowage. The owner then sold the land and took a mortgage back for the purchase money. The purchaser by a quit-claim deed conveyed to the company for a valuable consideration all his right in the lands flowed. The vendor afterwards entered for breach of condition, foreclosed the purchaser's equity of redemption, and then brought a complaint under the Act for damages accruing from the flowage after the entry. He was held entitled to recover. In *Newell v. Smith*, 15 Wis. 101, the purchaser of land already flowed, for which no compensation in gross had ever been made to the former owner, was held entitled to the remedy. This was doubted in *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433, and the following rule established. The person who owns the land at the time the right to flow vests in the mill-owner has the right to recover damages for perpetual flowage. If he sells the land, he retains that right, and the vendee will have no right of action for sub-

§ 596. **Same — Same.**— Under the Maine statutes, one holding a fee, liable to be defeated by the non-performance of a condition subsequent, shows sufficient title against a stranger flowing his land.<sup>1</sup> Under the Wisconsin Mill Act the plaintiff is required to state his interest. It is held that one who

sequent flowage. Under the Mill Act the right to flow vests whenever the mill-owner chooses to flow, and is divested only by his failure to pay the damages assessed. Under the general Mill Act the vendor of land flowed at the time of sale therefore retains the right of action for damages caused by perpetual flowage. This part of the ruling was directly affirmed in *Mead v. Hein*, 28 Wis. 533. But under the special charter involved in *Pick v. Rubicon Co.*, the right of flowage did not vest in the mill-owner until proceedings had been begun for determining the right and compensation. The vendor sold the lands flowed before the proceedings were begun, and, therefore, the right of action was held vested in the purchaser. But in *Sabine v. Johnson*, 35 Wis. 185, the rule in *Mead v. Hein*, and the doctrine advanced in *Pick v. Rubicon Co.* were distinctly overruled, and the rule laid down that the grantor of lands which are flowed at the time of sale by means of a mill-dam lawfully maintained, but in respect to which no proceedings to assess damages have been maintained, is entitled only to such damages as have accrued at the time of sale, unless he specially reserves future damages; and that the purchaser is entitled to recover for damages after the sale. Where the plaintiff averred that he had been, for three years preceding, the owner in fee and actually possessed of certain lands therein described, and that during all that time he had the right to the use and profits of said lands, and the defend-

ant had for the last three years flooded such lands, the complaint was held sufficient without averring that he owned the land when the dam was erected. *Faville v. Greene*, 12 Wis. 11. Where proceedings to recover compensation have been had, and, after a sale of the property flowed, unforeseen injuries result, the purchaser can recover for such injuries in an action on the case. *Denslow v. New Haven & Northampton Co.*, 16 Conn. 98.

<sup>1</sup> *Webster v. Holland*, 58 Maine, 168. So the defendant charged with flooding lands by a dam must be alleged and proved to be owner or in possession of the dam causing the injury. A deed to him from one not shown to have had title is not sufficient evidence of such ownership, where an older outstanding title is proved in a third person; and in the absence of evidence, possession will be presumed to follow the superior title. *Sidelinger v. Hagar*, 41 Maine, 415. And where the issue involves the title to the premises flowed, a judgment will be conclusive between the parties and their privies to the estate, and is decisive of the question if raised in a subsequent suit. A title acquired after action is begun cannot be introduced to defeat the claim of the defendant. *Chick v. Rollins*, 44 Maine, 104. The flowage must be intended, and useful; hence a complaint cannot be maintained upon proof of flowage accidentally caused by water raised by a jam of drift-stuff. *Clapp v. Manter*, 78 Maine, 358.



holds the legal title, and his purchaser in possession under a contract entitling him to a deed upon full performance of its conditions on his part, may join in an action for flowage, and the court may apportion the damages.<sup>1</sup>

§ 597. **Same — Respondents.**—The complaint may be maintained against any person owning or occupying the premises upon and for which the dam is maintained. So the mortgagee in possession is held liable,<sup>2</sup> though he did not enter for the purpose of foreclosure.<sup>3</sup> A party having the record title, although he has conveyed the premises away by an unrecorded instrument;<sup>4</sup> a former owner, for damages accruing during his ownership;<sup>5</sup> a lessor, for damages caused by a dam built by his lessee for years;<sup>6</sup> a lessee;<sup>7</sup> a married woman, in whose name premises are held, though the dam is maintained by her husband;<sup>8</sup> a corporation maintaining a dam, but not the stockholders individually, where the charter does not subject them to personal liability,<sup>9</sup> all are chargeable either as owners or occupants of the premises on which the dam is maintained.<sup>10</sup> A

<sup>1</sup> *Seymour v. Carpenter*, 51 Wis. 413.

<sup>2</sup> *Fuller v. French*, 10 Met. 359; *Lowell v. Shaw*, 15 Maine, 242.

<sup>3</sup> *Abbott v. Upham*, 13 Met. 172.

<sup>4</sup> *Hennessey v. Andrews*, 6 Cush. 170.

<sup>5</sup> *Walker v. Oxford Woollen Manuf. Co.*, 10 Met. 203; *Charles v. Monson Manuf. Co.*, 17 Pick. 70; *Bean v. Hinman*, 13 Maine, 480.

<sup>6</sup> *Samson v. Bradford*, 6 Cush. 303.

<sup>7</sup> *Davis v. Brigham*, 29 Maine, 391. See *Nelson v. Butterfield*, 21 Maine, 220, 237.

<sup>8</sup> *Brigham v. Holmes*, 14 Allen, 184.

<sup>9</sup> *Norton v. Hodges*, 100 Mass. 241.

<sup>10</sup> Whether the defendant is a mill-owner or occupier within the act is a question of law for the court. *Large v. Orvis*, 20 Wis. 696. A mill-owner was not chargeable under the act of 1795, ch. 74, for damage done by flowing before his title began. *Holmes v. Drew*, 7 Pick. 141. So in Wiscon-

sin, it is held that the judgment should not include damages prior to the acquisition of title by the defendant. And if several defendants acquired title at different times, damages should be assessed from the date of the oldest title not exceeding three years prior to the beginning of suit. *Sabine v. Johnson*, 35 Wis. 185. It is here held that there is no means of apportioning damages between such defendants. Persons rightfully maintaining a dam at a certain height, whose pond is crossed by a highway, are not liable under the statute to the owner of land above the highway for flowage caused by an obstruction placed in the stream by a lessee of their grantors, who changed the location of the highway and obstructed the sluiceway conducting the stream under it. And their failure to remove the obstruction or restore the highway is not a continuance of a nuisance making them liable at com-

subsequent purchaser is liable for the yearly damages becoming due and payable after his purchase.<sup>1</sup> But a person not owing or occupying the dam, but incidentally benefited by its maintenance, cannot be made liable under the Act for injuries caused by it.<sup>2</sup>

**§ 598. Same — Description of land injured.**— The complaint must contain such a description of the land alleged to be flowed or injured, and such a statement of the damage, that the record of the case will show with sufficient certainty the matter heard and determined therein.<sup>3</sup> It must allege that flowage was caused by the defendant's dam, for the purpose of furnishing power for a mill.<sup>4</sup>

mon law. *Stetson v. E. Carver Co.*, 97 Mass. 402. Under the statute of Maine, it has been held that all the owners and co-tenants of the dam or mill causing the injury should be joined as defendants, and that the omission of one holding an interest in the dam and mill will be ground for a plea in bar. *Hill v. Baker*, 28 Maine, 9; *Turner v. Whitehouse*, 68 Maine, 221. But the complainant will be permitted to amend and summon in the other defendants. *Moor v. Shaw*, 47 Maine, 88. Where the proprietor of land flowed by a dam owned by several different persons instituted separate suits and recovered separate judgments against each, and afterwards one of the respondents became sole owner of the dam, it was held that where the land-owner brought a second suit to increase his yearly damages, he might combine the whole subject-matter in one complaint against the owner of the whole dam at that time. *Jones v. Pierce*, 16 Maine, 411. The respondents, if severally owning water-mills on a stream, and owning as tenants in common and jointly maintaining a dam across the stream, on their own land, to supply power to their mills, may properly be joined

in a complaint for flowage by the dam. But the complaint must allege that the respondents erected and maintained water-mills on their own land. *Goodwin v. Gibbs*, 70 Maine, 248; *Norton v. Hodges*, 100 Mass. 241.

<sup>1</sup> *Lowell v. Shaw*, 15 Maine, 242. The beginning of each year is reckoned from the filing of the complaint. *Bryant v. Glidden*, 36 Maine, 36. Under the Massachusetts statute, the annual damages for the first year become recoverable by action, if not paid within three months from the election of the land-owner to take annual damages instead of the gross sum. (Pub. Sta. ch. 190, §§ 20, 21.)

<sup>2</sup> *Nelson v. Butterfield*, 21 Maine, 220.

<sup>3</sup> Pub. Sta. (1882), ch. 190, § 5. A general description of the land was formerly sufficient. *Commonwealth v. Ellis*, 11 Mass. 462. And see *Paine v. Woods*, 108 Mass. 160.

<sup>4</sup> *Slack v. Lyon*, 9 Pick. 62. It is not removable by affidavit, under the Practice Act of Massachusetts, to the Supreme Court. *Humphrey v. Berkshire Woollen Co.*, 10 Allen, 420. See *Tyler v. Beecher*, 44 Vt. 648. Under the Maine statute of 1821, ch. 45, it is held that the complainant must allege

§ 599. **Same — Mode of trial.**— The statute provides for a twofold trial: first, in the court, of the right of the complainant to have a jury summoned to inquire into the damages caused; and second, a trial before the sheriff's jury, of the question of damages. The defendant must plead in court any matter in bar of the complainant's right to have the inquiry;<sup>1</sup> as a release, or misdescription in the complaint,<sup>2</sup> a presumptive right,<sup>3</sup> a contract right,<sup>4</sup> and all matters pleadable in bar will be determined by the trial in court, and if settled for the complainant, and a jury is called, cannot be considered in the trial of damages.<sup>5</sup> The question whether the land is damaged, as alleged, cannot be tried at the bar of the court, but must be left to the sheriff's jury.<sup>6</sup> If the respondent pleads

that the respondent has erected a water-mill "*on his own land, or the land of another, with his consent*" (following the words of the statute), or the complaint will be bad in substance, and a judgment thereon arrested. The Act of 1841, ch. 126, omitted the references to ownership and the consent of the owner, and both these allegations became unnecessary. *Prescott v. Curtis*, 42 Maine, 64. In the Act of 1857, the provision for a mill on another's land was omitted. It is held under this Act that the complaint must allege the defendant's ownership of the land on which the dam is erected, or it will be demurrable. *Jones v. Skinner*, 61 Maine, 25; *Stevens v. King*, 76 Maine, 197. In Wisconsin it is held that the complaint need not deny in advance the defences which are open to the defendant, as that compensation has been made. *Faville v. Greene*, 12 Wis. 11. But the complaint must allege that the stream was unnavigable, to show that the injuries are within the provisions of the statute. *Waller v. McConnell*, 19 Wis. 417. The complaint is amendable as to the description of the land. *Sabine v. Johnson*, 35 Wis. 185. And the plead-

ings under the Act are, in general, liberally construed. *Zeidler v. Johnson*, 38 Wis. 335; *Lake v. Loysen*, 66 Wis. 424.

<sup>1</sup> Pub. St. ch. 190, § 8; *Vandusen v. Comstock*, 3 Mass. 184; *Lowell v. Spring*, 6 Mass. 398.

<sup>2</sup> *Darling v. Blackstone Manuf. Co.*, 16 Gray, 187.

<sup>3</sup> *Wilmarth v. Knight*, 7 Gray, 294; *Hadley v. Citizens' Savings Institution*, 123 Mass. 301.

<sup>4</sup> *Howard v. Locks and Canals*, 12 Cush. 259.

<sup>5</sup> *Charles v. Porter*, 10 Met. 37.

<sup>6</sup> *Nutting v. Page*, 4 Gray, 581; *Charles v. Porter*, 10 Met. 37; *Prescott v. Curtis*, 42 Maine, 64. The defendant may plead the general issue with a specification of defence. *Howard v. Locks and Canals*, 12 Cush. 259. If the defendant pleads the general issue, with a specification of defence, he is confined to the specification. *Tyler v. Mather*, 9 Gray, 177. Where any one of the several defendants has the right to flow the land in the manner charged, the complaint cannot be maintained. *Butler v. Huse*, 68 Maine, 447. If a party flowing the land afterwards acquires title to the land flowed, the right to

against the complaint, the further pleadings, issue, and trial in court proceed as in civil actions;<sup>1</sup> and on default or determination of the issue for the complainant, the court issues a warrant for a sheriff's jury, to hear and determine the matter of the complaint.<sup>2</sup> The jury are authorized to determine the height at which the dam may be maintained;<sup>3</sup> whether

damages is thereby extinguished, and will not revive by a subsequent sale of the dam and mill. *Hathorn v. Stinson*, 10 Maine, 224. A contribution to the flowage by other dams is no defence to a complaint under the Mill Act. *Jones v. United States*, 48 Wis. 385. If the defendant justifies his flowage under the statute, he must aver compliance with the statute, and that compensation has been made. *Thien v. Voegtlander*, 8 Wis. 461. An award as to past damages, or a judgment on such award, is no bar to a complaint under the Act for subsequent damages. *Staple v. Spring*, 10 Mass. 72. Nor is an award for future damages for maintaining a dam at a certain height a bar to a complaint for damages caused by increasing the height. *McClellan v. Fisher*, 16 Gray, 185. An award that certain damages be paid by a certain time will not avail as a defence against a complaint to a respondent who failed to pay within the time, nor to his wife in whose name he took a conveyance of the mill-site. *Brigham v. Holmes*, 14 Allen, 184. An oral release operates as a license; is good against the licensor; but does not bind his grantee. *Stevens v. Stevens*, 11 Met. 251; *Seymour v. Carter*, 2 Met. 520; *Smith v. Goulding*, 6 Cush. 154; *Short v. Woodward*, 13 Gray, 86; *Clement v. Durgin*, 5 Greenl. 9; *Seidensparger v. Spear*, 17 Maine, 123; *Snow v. Moses*, 53 Maine, 546. Written releases, not under seal, are held not to bind the grantees, and do not bar their complaints.

*Craig v. Lewis*, 110 Mass. 377; *Cobb v. Fisher*, 121 Mass. 169. Where the complainant mortgaged his property pending the complaint, and then executed a release under seal, of all past and future claims, in pursuance of which the complaint was entered "neither party," the release was held to bind the lands in the hands of a foreclosure purchaser, though neither he nor the mortgagee had notice thereof at the time of acquiring title. *Isele v. Schwamb*, 131 Mass. 337.

<sup>1</sup> If several persons file different complaints at the same time for injuries by the same dam, the complaints should be tried together by the same jury. *Richardson v. Curtis*, 2 Cush. 341; *Wilmarth v. Knight*, 14 Gray, 112. But injuries to a tract of land by different dams, owned by different persons, cannot be joined in one complaint. *Lull v. Fox & Wisconsin Co.*, 19 Wis. 100.

<sup>2</sup> Or the parties may by stipulation have a trial by jury in the Superior Court. Pub. Sta. (1882), ch. 190, § 18. An assessment may be had by *certiorari*, if omitted from the proceedings. *Phillips v. Commissioners*, 122 Mass. 258.

<sup>3</sup> Unless the height of the dam is conclusively fixed by a verdict, an award, or a binding agreement, a mill-owner has the right under the statute to adapt his dam to the needs of his mill, and to build it to such height as he pleases, subject to the liability to pay damages, and to have a jury fix the height at which it may be maintained by proceedings under

it shall be left open during any part of the year, and if so, how long; to assess the past damages for the three years next preceding the institution of the complaint, and to the time of rendering the verdict; to set off benefits caused by the dam to the complainant's lands by the flowage; to determine the amount to be annually paid by the respondent to the complainant for the future annual damages to be caused by the dam; and also a sum in gross, which would be a just compensation for all damages thereafter to be caused, and for the right of maintaining the dam forever.<sup>1</sup> The complainant may then

the statute. *Brady v. Blackinton*, 113 Mass. 238; *Atkins v. Witherell*, 142 Mass. 482. The verdict is not defective for failing to fix and state the proper height for the dam. The existing or proposed height is held allowed, and presumed capable of proof outside the verdict. *Sabine v. Johnson*, 35 Wis. 185; *Aken v. Parfrey*, 35 Wis. 249. An award by arbitrators, or a finding by a jury authorizing the mill-owner to "raise the water" to a certain height, refers to the height of the water at that mark, and not to the height of the dam. *Winkley v. Salisbury Manuf. Co.*, 14 Gray, 443; *Hiscock v. Sanford*, 4 R. I. 55. These cases were decided by the language of the award and finding. Where the height of water is fixed by a conveyance or other instrument, the height in ordinary stages of water is referred to. *Brady v. Blackinton*, 113 Mass. 238. Where the height of the dam is fixed, the height of the dam in good repair is intended. *Voter v. Hobbs*, 69 Maine, 19. For decisions giving this rule where the height of the dam was determined by other means than by a finding, see *Bliss v. Rice*, 17 Pick. 23, 33; *Cowell v. Thayer*, 5 Met. 253; *Ray v. Fletcher*, 12 Cush. 200; *Jackson v. Harrington*, 2 Allen, 242; *Vickerie v. Buswell*, 13 Maine, 289; *Lacy v. Arnett*, 33 Penn. St. 169; *Marcy v.*

*Shulta*, 29 N. Y. 346; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 36. See *Alder v. Savill*, 5 Taunt. 454. *Contra*, see *Burnham v. Kempton*, 44 N. H. 78, 90; *Smith v. Ross*, 17 Wis. 227. Where a grant of the right to flow referred to a mark as a measure of height, and no such mark existed at the time, one fixed nineteen years afterward cannot be shown by parol to occupy the place intended. *White v. Bliss*, 8 Cush. 510. A finding authorizing a petitioner to raise the water three feet above the height at which it was raised by his dam on a day named, has been held sufficiently certain. *Todd v. Austin*, 34 Conn. 78. See *Town v. Faulkner*, 56 N. H. 255, where it is held, under New Hampshire Act, that the measure of damages is not determined by the height of the dam, but by the height to which the water is authorized to be raised.

<sup>1</sup>In estimating the damages, the jury are to compare the present value of the land, as a whole, with what its value would have been if it had not been flowed, regard being had to the injuries caused by the flowing. *Palmer Co. v. Ferrill*, 17 Pick. 58; *Bates v. Ray*, 102 Mass. 458; *Howe v. Ray*, 113 Mass. 88. See *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433. Where the verdict was for past damages up to the time of action begun, and for

elect, at any time within three months from the allowance and recording of the verdict, to take the gross sum or the annual allowance.<sup>1</sup> If the gross sum is chosen, it must be paid within three months, or the respondent will lose the benefit of the Act so long as the sum is unpaid; and the complainant is entitled to judgment and execution on the verdict for past damages. If no election is made and recorded within the three months, the statute provides that the annual compensation will become due and payable (as if it had been elected) to the complainant and those claiming under him, so long as the dam is maintained; the person entitled to compensation is given a lien on the mill and dam, for payment of the compensation for the three years prior to suit therefor. He may maintain an action of contract to recover such sum for the three years preceding the suit, and enforce his lien against the person who owns or occupies the mill when the action is brought, and may have the premises sold on execution, subject to a right of redemption within one year.<sup>2</sup> A new trial may be granted in this action, as in civil actions generally.

annual damages, after the trial, omitting the damages which accrued during the suit, the amount of such damages was reckoned for the length of time elapsed, on the basis of the annual damages, and the verdict was sustained. *Newton v. Allis*, 16 Wis. 197.

<sup>1</sup> An acceptance of the gross sum bars all right of action for future flowage of the lands in question by any one. *Chase v. Sutton Manuf. Co.*, 4 Cush. 152; *Heard v. Talbot*, 7 Gray, 113. A life tenant is entitled to future damages and to gross damages. *Howe v. Ray*, 110 Mass. 298. It was held, upon the complainant's electing to take damages in gross, that the respondent might abandon his right to flow, take down his dam, and avoid liability for future damages. *Hunt v. Whitney*, 4 Met. 603; *Blackwell v. Phinney*, 126 Mass. 458. The same rule prevails in Wisconsin. *Aiken v. Mills*, 29 Wis. 322. So in North Caro-

lina, if the dam is altered or taken down, this will be ground for reducing the annual damages on a writ of *audita querela*. *Gillett v. Jones*, 1 Dev. & B. 339. When the respondent's exceptions are carried to the Supreme Court, and there overruled, after the verdict is returned and accepted, the verdict is held not to be allowed until the overruling of the exceptions. *Hamilton v. Farrar*, 131 Mass. 572. A ruling of the Superior Court that the complaint for flowage is maintained, and excluding evidence offered by the respondent, is interlocutory only and not the subject of exception. *Comins v. Turner's Falls Co.*, 140 Mass. 146; 138 Mass. 222; 142 Mass. 443. In *Darge v. Hori-con Iron Co.*, 22 Wis. 417, it is held that the award for past damages and gross damages for the future may be in one gross sum.

<sup>2</sup> It is no defence to such action that the mill and dam are destroyed,



§ 600. **Same — New complaint.**—If either party becomes dissatisfied with the annual compensation established, a new complaint may be brought for the increase or diminution of such compensation, or for ascertaining the gross damages, as before; but if the complainant declined to accept gross damages awarded to him, they cannot be again awarded until the expiration of ten years from the former award.<sup>1</sup> Such new complaint may be maintained by and against either of the parties to the original suit, or by and against a person lawfully holding under either of them, but no such complaint can be brought until the expiration of one month after the payment of the then last year has fallen due.<sup>2</sup> A finding on the

if the defendant has not abandoned his right to flow. Nothing short of an abandonment of his right to flow will terminate the liability to answer therefor. *Fuller v. French*, 10 Met. 359. If such action to recover the damages assessed is brought jointly against the owner and the person who occupied it when the action was brought, the plaintiff may amend by discontinuing as to the former. *Fitch v. Stevens*, 2 Met. 505.

<sup>1</sup> The complaint must set forth the former complaint and proceedings, or it will be treated as an original complaint. *Vandusen v. Comstock*, 9 Mass. 202; *Ray v. Fletcher*, 12 Cush. 200. And where the complainant alleged an increase in the height of the dam, and also wished to obtain a review of the former assessment, it was held that an allegation of dissatisfaction was necessary to make the complaint sustain a verdict for annual and gross damages which was larger than the preceding. Without such an allegation, the complaint might be treated simply as an original one for the damage caused by the increased height. *Leonard v. Schenck*, 3 Met. 357. See *Johnson v. Kittredge*, 17 Mass. 75, which holds that a complaint for such increase is

good. The judgment on the original complaint, that the respondent has no right to maintain a dam without paying damages, estops him from pleading to the second complaint, a right by prescription or grant, previous to the judgment. *Adams v. Pearson*, 7 Pick. 341. The defendant cannot deny the increased damage by a plea in bar. This must be determined by the sheriff's jury. *Ibid.* The statute makes no provision for reassessment of gross or annual damages against a mill-owner for flowing lands after the land-owner has elected to take the gross damages, and neither party can maintain a complaint for that purpose. The mill-owner can maintain a complaint for reassessment of annual damages only when he is liable for such damages under an existing judgment. He, therefore, cannot maintain such a complaint when the land-owner has elected the gross damages. *Stevens v. Fitch*, 2 Met. 507. So in Wisconsin, the plaintiff accepting gross damages is held estopped from questioning the height of the dam. *Aken v. Parfrey*, 35 Wis. 249.

<sup>2</sup> The effect of this provision is to suspend the complaint for one year and one month following the time

original complaint that the complainant is not entitled to damages is no bar to a new complaint for damages alleged to have arisen after the former verdict, and for compensation for damages thereafter sustained.<sup>1</sup>

§ 601. *Same — Wisconsin — Maine.*—The statute of Wisconsin is almost an exact copy of that of Massachusetts.<sup>2</sup> The principal difference is that the remedy provided is by “a civil action;”<sup>3</sup> that the case is tried before a jury at the bar of the court;<sup>4</sup> and therefore the distinction between issues which must be presented to the court and issues for the jury does not affect the order of pleading. The defendant is not, as in Massachusetts, forbidden to deny by his pleading the allegations of injury in fact.<sup>5</sup> The verdict in the action may be set aside and a new trial ordered, as in other cases, and an appeal may be taken from any final judgment rendered therein, in like manner and with like effect as in other civil actions.<sup>6</sup>

comprised in the prior decision. *Staple v. Spring*, 10 Mass. 72, 77; *Stevens v. Fitch*, 2 Met. 507, 508. The time comprised in the prior decision is, under the present act (§ 16), for past damages up to the time of rendering the verdict. Such complaint, therefore, cannot be brought until after the first yearly payment has been made. Under the statute of Maine, the damages, past and future, are assessed in yearly sums, and the judgment includes the sum due on the date of its entry, viz., the last day of the preceding term, and the new complaint cannot be brought until one month after payment of the yearly sum next falling due. *Billings v. Berry*, 50 Maine, 31. In both cases the judgment is conclusive for the amount of yearly damages for the year succeeding the time comprised in the former decision.

<sup>1</sup> Pub. Sts. ch. 190, § 36. But it is considered by Sewell, J., in *Staple v. Spring*, 10 Mass. 72, 77, that the postponement of a second action for one year and one month (under the pres-

ent section 31) applies to this case also.

<sup>2</sup> Wis. Rev. Sts. (1878) ch. 146 of Sanborn and Berryman's Annotated Edition (1889). See *Kearns v. Thomas*, 37 Wis. 118; *Janesville Cotton Manuf. Co. v. Ford*, 55 Wis. 197 (partition of water-power).

<sup>3</sup> Rev. Sts. (1878) 78, ch. 146, § 3377. The action is legal and not equitable. *Bevier v. Dillingham*, 18 Wis. 529; *Kearns v. Thomas*, 37 Wis. 118; *Schiffer v. Eau Claire*, 51 Wis. 385; *Seymour v. Carpenter*, id. 418. The complaint need not state the dimensions of the dam or its excess over a reasonable height. *Lake v. Loysen*, 66 Wis. 424.

<sup>4</sup> § 3380. A trial of all the issues of fact by one jury is (*semble*) sufficient. *Kearns v. Thomas*, 37 Wis. 118.

<sup>5</sup> § 3379.

<sup>6</sup> § 3400. See *Kearns v. Thomas*, *supra*, which holds that appeals in the action were governed by the general statute of appeals prior to the passage of § 3400. A special ver-

The statute of Maine<sup>1</sup> is substantially like that of Massachusetts, and the rulings upon the latter have generally been followed in construing the former. The principal differences in the Maine statute, resulting from subsequent legislation, are the following: 1. It authorizes mill-owners to dig canals upon their own land, not exceeding one mile in length, and thereby divert the water of unnavigable streams to their mills, upon making compensation, to be ascertained by the same form of procedure as in the case of flowage. 2. It does not provide for other injuries than those caused by such flowage and diversion.<sup>2</sup> 3. It directs the appointment of three commissioners, by whom the damages are to be appraised, and the height and period for maintaining the dam are to be determined, instead of by a sheriff's jury. On request of either party, a jury may be impanelled to try the cause at the bar of the court; and the report of the commissioners shall then be given in evidence to the jury. The report will be conclusive evidence until impeached, and it may be impeached only for misconduct, partiality, or unfaithfulness on the part of some commissioner.<sup>3</sup> 4. The commissioners are not empowered to assess a gross sum as compensation for permanent future damages. 5. The court may, in its discretion, on the complainant's motion, require the owner or occupant of the mill or canal property to give security for the payment of annual damages; and on failure of such owner or occupant to give security as required, he shall lose the benefit of the statute and become

dict is not inconsistent, because the past damages are much less than the prospective damages for a similar period. *Murray v. Scribner*, 70 Wis. 228; 74 Wis. 602. See *Mack v. Bensley*, 74 Wis. 112; *Johnson v. Boorman*, 63 Wis. 268. An action lies in the county where land is flowed, the injury being caused by a dam in another county. *Lohmiller v. Indian Ford W. P. Co.*, 51 Wis. 683.

<sup>1</sup> Maine Rev. Sts. 1883, Title 9, ch. 92.

<sup>2</sup> The Mass. Act includes flowing below or above the dam, but the Maine statute does not extend to

flowage below by water drawn from the dam. *Ante*, § 594, and note. The Maine Act does not justify drawing down a great pond below its natural low-water mark. *Fernald v. Knox Woolen Co.*, 82 Maine, 48.

<sup>3</sup> Rev. Sts. 1883, Title 9, ch. 92, §§ 12, 13; *Bryant v. Glidden*, 36 Maine, 36. It is a fatal defect in the report if it does not show that the parties were heard or notified to appear. *Coleman v. Andrews*, 48 Maine, 562. But objections to the complaint cannot be urged as reasons for not accepting the report. *Ibid.*

liable to an action at common law.<sup>1</sup> 6. If the restrictions upon the height of the dam or seasons during which lands may be flowed are violated by the mill-owner or occupant, he becomes liable to pay double damages, recoverable in an action at law.<sup>2</sup>

§ 602. Same — Prescription.— The effect of flowage not causing actual damage has caused a difference of opinion between the courts of Maine and Massachusetts in the construction of their respective statutes. By the law of Maine, flowage not causing actual damage is held lawful, and no ground for complaint. Therefore if flowage not causing damage be continued for twenty years, it confers no right to flow lands and injure another, and is no bar to an action where damage results from the flowage.<sup>3</sup> The adverse user begins at the time when actual damage is caused.<sup>4</sup> In Massachusetts, on the other hand, flowage, though causing no actual damage, if continued for twenty years, without any complaint therefor, is held to be adverse, and confers the right to flow such land in future, without payment for any damages which may thereafter be caused.<sup>5</sup> This difference may be explained in part by a difference in the wording of the statutes. The Maine statute of 1821, following the Massachusetts statute of 1795,<sup>6</sup> provided: "It shall be lawful for the owner or occupant of such mill" (before described) "to continue the same head of water to his best advantage in the manner and on the terms hereinafter mentioned." "If any person *shall sustain damages* in his

<sup>1</sup> The Massachusetts statute of 1795, ch. 74, contained a similar provision. And see *Stowell v. Flagg*, 11 Mass. 364.

<sup>2</sup> Rev. Sta. 1883, Title 9, ch. 92, § 26. As to new complaint, see *Norris v. Pillsbury*, 74 Maine, 67; St. of 1881, ch. 88; Rev. Sta. of 1883, Title 9, ch. 92, § 11. As to maintaining dams for harvesting ice, see St. of 1883, p. 124, ch. 151; *Stevens v. Kelley*, 78 Maine, 445.

<sup>3</sup> *Tinkham v. Arnold*, 3 Maine, 120; *Hathorn v. Stinson*, 10 Maine, 224; s. c. 12 Maine, 183; *Seidensparger v.*

*Spear*, 17 Maine, 123; *Nelson v. Butterfield*, 21 Maine, 220; *Wood v. Kelly*, 30 Maine, 47; *Wentworth v. Sandford Manuf. Co.*, 33 Maine, 547; *Underwood v. N. Wayne Co.*, 41 Maine, 291; *Voter v. Hobbs*, 69 Maine, 19; *Augusta v. Moulton*, 75 Maine, 284; *Wilson v. Campbell*, 76 Maine, 94; *Stevens v. King*, id. 197.

<sup>4</sup> *Burleigh v. Lumbert*, 84 Maine, 322.

<sup>5</sup> *Williams v. Nelson*, 23 Pick. 141; *Ray v. Fletcher*, 12 Cush. 200.

<sup>6</sup> 1 Laws of Mass. (Metcalf's ed.) 1801, p. 498, ch. 74.

lands by their being flowed as aforesaid, he may complain," etc.; and a similar provision has been retained in all the revisions.<sup>1</sup>

**§ 603. Same — Damages.**— The common law gave an action to a property-holder for every abridgment of the free use of his property, although no present damage was caused thereby. Such abridgment was opposed to the holder's right, and became the foundation of an adverse right. Any flowage would be such an abridgment. But for an injury of this kind, the

<sup>1</sup> Laws of Maine, 1830, ch. 43, § 2; Rev. Sts. (1841), ch. 126, § 5; Rev. Sts. (1857, 1871, and 1888), Title 9, ch. 92, § 4. In the Massachusetts Revised Statutes of 1836, ch. 116, the language of the Act of 1795 is changed. Section 4 reads: "Any person whose land is *overflowed*, or otherwise injured by such dam, may obtain compensation therefor," etc. This change was made three years before the case of *Williams v. Nelson* was decided. The point decided in the case is, therefore, simply that under the Massachusetts statute the complainant had a right of action which he had lost by failing to exercise it for twenty years. Shaw, C. J., did not, however, place the decision upon the words of the statute. He held in effect that the statute of 1795 was to be construed in the same way, and that the Maine doctrine was erroneous. The Maine decision went upon the ground that the user was no evidence of a grant because it was lawful and needed no grant. He replies that the grant pleaded was of the right to flow, paying no damage. The statute conferred only a right to flow, paying damage. The right asserted, therefore, went beyond that conferred by the statute. Such a right could only be accounted for by the presumption of a grant. The Maine case held that the user was not such as to be evidence of such a grant.

Of this he says: "The case also goes on the supposition that to found the presumption of a grant, the enjoyment must be adverse, and of such a nature that but for the presumed grant it would be unlawful. It may be deemed adverse, if in any degree it tend to impose any servitude or burden on the estate of another. But in many cases, as the enjoyment of air and light by the owner of a house, the act is not unlawful without a grant by the owner of the land over which they come; yet the enjoyment of such privilege for a long time, without obstruction or notice on the part of the owner of the adjoining land, is proof of a right, and may raise the presumption of a grant. The case of a mill-owner is in the same degree similar." In *Boston Manuf. Co. v. Burgin*, 114 Mass. 340, it was held that the mill-owner did not acquire such an easement as would enable him to maintain a petition against the land-owner, to compel him to try his title. Wells, J., said: "The right to occupy the surface of the land with the water is not taken, and the land-owner may exclude it if he sees fit to do so. And when the right of the mill-owner becomes absolute by paying gross damages, or by prescription, it is only a right to keep up the dam, without rendering compensation for such incidental injury."

Act of 1795 and the statutes of Maine provide no remedy. The statute of Maine<sup>1</sup> provided that if the jury find that no damage is done to the complainant by flowing his land, the respondent shall recover his costs. The Act of 1795 contained no such provision, but its intent was the same. Parker, C. J., said in *Stowell v. Flagg*:<sup>2</sup> "The process is given only to those who have actually suffered damage." The meaning of the phrase "actual damage" under the statute plainly is present pecuniary damage, and not, as at common law, the damage implied in the infringement of a right. Shaw, C. J., suggested in *Williams v. Nelson*,<sup>3</sup> that the land-owner "could maintain no action simply for erecting and keeping up the dam; but he could file and prosecute his claim for damages, or he could make his claim *in pais*, which, we think, would rebut the presumption of grant from mere use and enjoyment." The first suggestion, as applied to cases where no actual damage is suffered, is disposed of by the remark of Parker, C. J., cited above. The second suggestion, of a claim *in pais*, to prevent the operation of adverse uses, is not one of the recognized methods of defeating such a claim, and conflicts with the rule that adverse possession cannot avail to confer a right, if the owner cannot resist it at law.<sup>4</sup> Under these statutes

<sup>1</sup>St. 1821, ch. 45, § 8; Laws of Maine, 188, p. 146.

<sup>2</sup>11 Mass. 364, 367.

<sup>3</sup>23 Pick. 141, 145.

<sup>4</sup>Washburn on Easements (3d ed.), 163. In several cases, Shaw, C. J., suggested that the complainant could embank his land against the flowage. *Williams v. Nelson*, 23 Pick. 141, 143; *Murdock v. Stickney*, 8 Cush. 113, 116. See *Storm v. Manchaug Co.*, 13 Allen, 19, and *Boston Manuf. Co. v. Burgin*, 114 Mass. 340, to the same effect. But this is not a legal remedy, the failure to exercise which would bar the plaintiff's right. He is not bound to resort to such means to protect his property. In *Felton v. Simpson*, 11 Ired. 84, the plaintiff's land had for twenty years been protected from flowage by means of a dam main-

tained upon a third person's land above him. The defendant cut this dam, causing an overflow of the plaintiff's land, for which he brought suit at law. It was ruled below that he had acquired a prescriptive right to the protection. This was overruled above. Pearson, J., said: "To make this doctrine applicable, two things are necessary. There must be a thing capable of being granted; and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant; for it is the fact of his being thus exposed to an action, and the neglect of the opposite party to bring suit, that is seized upon as the ground for presuming a grant." To the same effect, see *Grigsby v. Clear Lake Water Co.*, 46 Cal. 396, 406; Par-



the land-owner was, therefore, without any remedy for the abridgment of his right. Upon these premises the Maine doctrine is founded. The land-owner cannot be held to have lost, by failing to pursue his remedy, that for which no remedy was given. And under the doctrine of *Stowell v. Flagg*, it would seem that this is the correct view of the law under the Massachusetts Act of 1795, and that the remarks of Shaw, C. J., are so far inaccurate. But under the provisions of chap. 116, § 4, of the Massachusetts Revision of 1836, for an action by any one whose lands are overflowed; and the provision for assessing damages in gross for perpetual flowage (enacted, Mass. St. 1829, chap. 122, § 2), the land-owner would always have a remedy, and could recover for future flowage, although no actual damage had yet accrued; and the Massachusetts decisions are therefore correct.<sup>1</sup>

§ 604. **Same — Rhode Island.**— Under the Mill Act of Rhode Island,<sup>1</sup> any one injured by the flowage or stoppage of water may maintain an action on the case therefor. In this action the issue is tried and adjudged by the court whether

*ker v. Hotchkiss*, 25 Conn. 821. In the latter case the common-law rule, as to the actual injury caused by flowage, is, however, stated thus: "If, indeed, the plaintiffs, by means of their dam, had thrown the water back upon the defendant's land, and had continued to do so for a period of more than fifteen years, without objection on his part, the law would presume a grant to the plaintiffs of the right to flow the defendant's land, because it is not to be supposed that he would have suffered such a continued injury to his land without objection unless the plaintiffs had acquired the right." That the taking of water from a stream under special statutory authority, is not in itself such an invasion of the rights of land-owners along the stream as will enable them to maintain a claim for damages in the absence of any actual damage, see *Dwight Printing Co. v.*

*Boston*, 122 Mass. 583. That limitations on action for injuries under the statute run from the time when actual damage is caused, see *Thornton v. Turner*, 11 Minn. 336; *Eastman v. St. Anthony Co.*, 12 Minn. 137, 143.

<sup>1</sup> Under the North Carolina statute, as we shall see *infra*, where flowage is shown, the land-owner is entitled to nominal damages though no actual damage is shown. *Wright v. Stowe*, 4 Jones, 516; *Little v. Stanback*, 63 N. C. 285. These cases are in accord with the Massachusetts rule. But in North Carolina, the act causing the injury is held a tort, and the statute is construed merely to provide a special remedy. The general rules regulating tortious user would therefore apply. *Wilson v. Myers*, 4 Hawks, 73.

<sup>1</sup> Pub. St. (1882), ch. 104, p. 279. The act of Mar. 15, 1882, ch. 271, provides for the appointment of a commissioner of dams and reservoirs.

the plaintiff is entitled to damages, and from its judgment both parties have the right of appeal. If the plaintiff is held entitled to damages, a jury is summoned to ascertain the amount thereof, under the direction of a judge of the Supreme Court. The jury are required to appraise past damages, future yearly damages, and future damages in gross. The plaintiff may elect between the yearly and gross damages, his election binding both parties and their successors forever. If no election is made, judgment is given for yearly damages; and the judgment for damages is a bar to all actions for the injuries complained of, except actions to enforce the judgment. If, after the plaintiff elects to receive yearly damages, the mill-owner should remove the matter complained of in the writ, then the plaintiff or his assigns shall recover the amount of the yearly damages for five years after the removal, but no longer.<sup>1</sup> The officer serving the writ is required to file a copy thereof in the office of the town-clerk of the town in which the dam is situated; and from the time of such filing, the mill and dam, with the appurtenances and adjoining land, become pledged and liable for any damages which may be recovered in such action.<sup>2</sup> The person maintaining the dam is required, at the request of the owner of any dam on the same stream, within one mile below, not to detain the natural stream at any one time more than twelve hours out of twenty-four, except on Sundays.<sup>3</sup> The provisions of the act are expressly extended to, and embrace, lands, water-privileges, and water-rights taken to supply towns with water.<sup>4</sup> The statute contains provisions for execution and sale under the judgment, for redemption within one year (twelve per cent. interest being added to the purchase price), for costs, and against abatement of the suit by the marriage or death of the parties.<sup>5</sup>

**§ 605. Same — New Hampshire.**— There was no general Mill Act in New Hampshire, authorizing the flowage of lands by mill-owners, until 1868. The act of 1868<sup>6</sup> contains several

<sup>1</sup> Ibid. § 15.

<sup>2</sup> Ibid. § 2.

<sup>3</sup> Ibid. § 21.

<sup>4</sup> Ibid. § 22.

<sup>5</sup> Defences arising under convey-

ances may be asserted in such action, and are not grounds for equitable interference. *Wilbor v. Matheson*, 8 R. L. 166.

<sup>6</sup> See N. H. Gen. Laws (1878), Title

features of the Massachusetts Act, but differs from it and from the other Mill Acts in many important respects. It authorizes either party to take the initiative in the proceedings by petition to court, after the flowage or other injury has continued for thirty days, without an adjustment; provides for the reference of the petition to a committee of three disinterested persons, who shall hear the parties, view the premises, determine the extent, if any, to which the flowage and injury are for the public use, and necessary to the mill or mills for which they are designed, estimate the damages, and make report to the court. Before the reference of the petition, if either party so elects, the court is required to direct an issue to a jury to try the facts alleged, and assess the damages. Upon the return of the report of the committee, any person interested therein may object to its acceptance for any irregularity or improper conduct on the part of the committee. The court may set aside the report for any just and reasonable cause, "and if required, shall inquire for itself whether the erection of said dam is of public use or benefit, any finding of the committee upon that point notwithstanding; and if the court shall be of opinion that the erection of said dam is not of public use or benefit, the petition shall be dismissed." But if the report is accepted and established, the court is required to render judgment thereon, after adding fifty per cent. to the estimate of the damage; or if the issue is submitted to a jury, the judgment on the verdict must include an addition of fifty per cent. to the amount of damages assessed, which judgment shall be final.<sup>1</sup> It is specially provided that no person or corporation shall derive any title from these proceedings, or be discharged from any liability in relation to the premises injured, until he

17, ch. 141, §§ 15, 17, 19. Section 6 was amended by the statute of August 31, 1883, ch. 63.

<sup>1</sup> A land-owner who files the petition for the assessment of damages, but who is dissatisfied with the report, cannot by motion become nonsuited. *Pollard v. Moore*, 51 N. H. 188. It was objected in this case that there was no provision for appeal or review. But the court held that

this did not render the proceedings unconstitutional or invalid. There is no provision in the Act for a new trial, unless that cited in the text *supra* is intended to answer that purpose. So on a petition to abate water, there is no right to jury trial. But the court may take an advisory verdict or report. *Cocheco v. Strafford*, 51 N. H. 455.

or it has paid or tendered the amount of the judgment. This provision reverses the rule laid down in the early case of *Lebanon v. Olcott*,<sup>1</sup> that where a mill company was authorized to flow lands, the damages need not be assessed or paid until after the flowage.<sup>2</sup> The assessment of damages is to include all damages, past and future, which may accrue from the acts alleged.<sup>3</sup> There are no provisions for annual damages, suits upon the judgment, or reassessment. The proceeding is reduced to a single trial. In *Ash v. Cummings*, after construing the act, Sargent, J., says: "This construction of the Mill Act leaves the land-owner in possession of his constitutional rights, and gives him compensation before his property is destroyed or materially injured, as at common law before the passage of this Act; it enables the mill-owner to escape innumerable suits and endless litigation, by applying to have the damages assessed against himself for all future time, and all the past that has not been adjusted, by showing that his is a case in which private property ought to be taken for public use with compensation, thus giving abundant constitutional effect to the Act." In estimating and determining the extent to which the flowing or draining is of public use, the committee may fix the height of the dam, or may fix the height to which the water may be raised by any other monument; and the measure of damages is not determined by the height of the dam, but by the height to which the water is authorized to be raised.<sup>4</sup>

§ 606. *Same — Connecticut.*— The statute of Connecticut is recent, the first general statute upon the subject of flowage apparently being that passed in 1864.<sup>5</sup> This act, which, with

<sup>1</sup> 1 N. H. 339.

<sup>2</sup> See *Ash v. Cummings*, 50 N. H. 591.

<sup>3</sup> *Ash v. Cummings*, 50 N. H. 591, 619. The dam may be erected of sufficient height for a reservoir to supply other mills than that of the complainant. *Amoskeag Manuf. Co. v. Worcester*, 60 N. H. 522. Evidence of the respondent's prosperity, as shown by the payment of dividends, is incompetent. *Amoskeag Manuf.*

*Co. v. Worcester*, 60 N. H. 522. The question whether any damage will be done to the defendant's land, as well as his title, may be contested by a petitioner under the Mill Act. *Hovey v. Perkins*, 63 N. H. 516.

<sup>4</sup> *Town v. Faulkner*, 56 N. Y. 255.

<sup>5</sup> Conn. Pub. Acts, 1864, ch. 26. The Act of 1838, which remains in force (Rev. Sta. 1875, Title 16, ch. 7, part I, § 18) authorized the flowage of highways, upon the payment of damages

some amendments, constitutes the present law of the State,<sup>1</sup> authorizes mill-owners to maintain dams upon their own lands, or other lands with the consent of the owners; and to maintain ditches and raceways across the lands of others.<sup>2</sup> The procedure somewhat resembles that under the Virginia statute. The initiative is given to the mill-owner. He proceeds by petition, giving a description of the lands to be affected, and the dimensions and location of the work. The court is required to refer the petition to a committee of three disinterested freeholders of the county, who decide upon the public use of the work, and whose other powers and duties are similar to those of the commissioners in Maine.<sup>3</sup>

to be assessed by the Superior Court upon a petition in equity.

<sup>1</sup> Rev. Sts. 1875, Title 19, ch. 17, Pt. 6; Gen. Sts. of 1888, Title 18, ch. 84, § 1216 *et seq.*; *q. v.* § 2687, as to flowing highways.

<sup>2</sup> The fact that the dam in question has been before maintained under a license, is no bar to a petition. On the revocation of the license the mill-owner may maintain a petition. *Olmstead v. Camp*, 33 Conn. 551, 552. So the fact that he has already wrongfully raised, and is maintaining his dam at the height which in his petition he prays to have established, is no bar to his petition, although it may be ground for an action at law or an injunction. The mill need not be on the same tract of land as the proposed dam, and it is no objection that lands of third parties lie between the two tracts. *Todd v. Austin*, 34 Conn. 78. One maintaining a dam for the purpose of leasing power to others is protected by the statute. *Occum Co. v. Sprague Manuf. Co.*, 35 Conn. 496. See further, *Curtiss v. Smith*, 35 Conn. 156.

<sup>3</sup> By St. 1880, ch. 92, § 1, mesne process upon flowage petitions, by a writ of summons, is provided. The owner of the mill is the proper person to maintain the petition. The fact that

the mill is in the possession of a tenant at will who is not joined, is no objection. *Olmstead v. Camp*, 33 Conn. 552, 552. A petitioner may include in a single petition all persons as respondents who have lands that will be overflowed by the proposed pond. Residence of the land-owner in another county is immaterial; and it is held immaterial that the land of one of the respondents lies wholly outside of the county in which suit is brought, if lands of other respondents are within the county. *Todd v. Austin*, 33 Conn. 87. Upon a petition to raise an existing dam to a greater height, a report authorizing additional height sufficient to raise water three feet above the height at which it stood on the day named was held sufficiently certain. *Todd v. Austin*, 34 Conn. 78. In *New Britain v. Sargent*, 42 Conn. 137, the city was authorized by a special Act to divert a stream for public purposes. The Act provided for the assessment of damages by a committee whose award should be final. The owner of a part of the stream, below the point of diversion, had formerly used it for mill purposes, and had a right to flow the land of a proprietor above him. It was held that the question of damages was one wholly of fact; that the

§ 607. Same — Vermont.— The statute of Vermont is of recent date, and in many ways combines the advantages of both systems of Mill Acts.<sup>1</sup> At the first adjudication upon the Act it was in effect held unconstitutional. The court held

committee were not bound to give the owner of such privilege what it would be worth if improved to its full extent, nor to measure the value of his flowage right by the gain to the proprietors above, in being relieved of the flowage; and that their finding could not be reviewed by the court. Evidence is not admissible against the petitioner that he is financially unable to avail himself of the right sought. *McArthur v. Morgan*, 49 Conn. 847. If a mill-owner dedicates an embankment, forming a highway and dam, and containing a culvert, which after being accepted and used, is carried away by a flood, the town, in repairing, may substitute a bridge. *Welton v. Walcott*, 50 Conn. 259. See, also, *Adams v. Manning*, 51 Conn. 5; *State v. Ousatonic Water Co.*, id. 187; *Hartford Manilla Co. v. Olcott*, 52 Conn. 452.

<sup>1</sup> Rev. Laws of Vt. (1880), ch. 148. The present statute of Vermont is made up from Acts passed in 1866, 1867, and 1869, and these Acts include the first general legislation of the State upon the subject. The proceedings are begun by petition by the mill-owner, upon which the court appoints commissioners, whose powers are like those of the commissioners appointed under the Acts of Maine. The report is open to objection and liable to be set aside as under the other statutes, but, if accepted and established, it is conclusive in the matter, with this exception (§ 3221), "except that the court may inquire into the damages, and render judgment against the petitioner in favor of the persons interested in the lands

for such damages as they sustain; and the court may set aside the report for any cause which appears just, and, if required, shall inquire for itself whether the erection or continuance of the dam, flume, or trunk, will be a public benefit, notwithstanding the finding of the commissioners, and if it finds that the public will not be benefited by such erection or continuance, the petition shall be dismissed." The Act authorized the erection and continuance of dams, flumes, or trunks, and the elevation of existing dams, for obtaining water from streams not navigable, to work mills or manufactories erected on the miller's own land, or on the land of another by his consent, whereby the water should be carried or made to flow over or upon the lands of other persons. It contained several salutary provisions for the protection of property holders. It required the party desiring to maintain works for the benefit of a mill to petition the County Court before any injury was done for permission to erect the desired work (§ 3215); to give security for costs and for prosecuting his petition to effect (§ 3216); to pay or deposit the amount of damages assessed and costs for the persons entitled to the same, before the water should be flowed upon or conducted over or through the land (§ 3222); provided that no action should be maintained by the petitioner against the petitioner for the damages in question during the pendency of the petition, but that the court or judge before whom the petition is pending might order such



that no public duties were imposed on mill-owners by the Act, such as the duty of receiving and grinding grain for all who offered it, and therefore the taking contemplated would not be for public, but for private use.<sup>1</sup> But constitutional questions have been considered in another place.<sup>2</sup> The court held incidentally that the county court had exclusive jurisdiction of proceedings under the act, that a case could not be carried up to the Supreme Court by exceptions, but that questions involved in the proceedings could be brought before the Supreme Court by a writ of *certiorari*, *mandamus*, or other appropriate writ.<sup>3</sup>

§ 608. Same — Pennsylvania.— The Pennsylvania statute is peculiar. It protects navigation and the passage of fish, but makes no provision for compensation to persons whose lands are flowed or damaged. By the statute of 1803,<sup>4</sup> owners of lands adjoining navigable streams are authorized to erect dams for mills or water-works,<sup>5</sup> and are not to obstruct navigation or the passage of fish. The statute provided that on complaint

security for damages to be given by the petitioner to the petitionee, as should be deemed expedient (§ 3222); and that if the costs and damages should not be paid within sixty days after the proceedings on the petition should be ended, the proceedings should be of no legal effect. Upon the repealed act of 1869, see *Glover v. McGaffey*, 55 Vt. 171.

<sup>1</sup> *Tyler v. Beecher*, 44 Vt. 648.

<sup>2</sup> See *ante*, § 254.

<sup>3</sup> See *ante*, ch. 18.

<sup>4</sup> 2 Brightly's Purdon's Digest (11th ed. 1885), p. 1173.

<sup>5</sup> Possessors of such land are treated as owners under the act, except as against those who claim by better titles. *Bigler v. Antes*, 21 Penn. St. 288. The statute excepts the Delaware, Lehigh, and Schuylkill rivers. It extends to streams subsequently declared highways. *Brown v. Commonwealth*, 8 S. & R. 273; *Coover v. O'Conner*, 8 Watts, 470. And to

streams navigable at common law. *Ensworth v. Commonwealth*, 52 Penn. St. 320. It authorizes only works for the use of water-power, and not pools for rafts. *Commonwealth v. Church*, 1 Penn. St. 105; *Dubois v. Glaub*, 52 Penn. St. 238; *Dedrick v. Wood*, 15 Penn. St. 9. As to navigable streams, the Act gives only a license revocable when public interests may require. *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Susquehanna Canal Co. v. Wright*, 9 id. 9; *New York & Erie R. R. Co. v. Young*, 33 Penn. St. 175. But when extended to small streams by Acts making them public highways, it changes the remedy, but does not reduce owners or builders of dams to licensees. *Barclay R. R. Co. v. Ingham*, 36 Penn. St. 194. Indictments for offenses under the Act must be brought in the method provided by it. *Commonwealth v. Plumer*, 1 Am. Law Reg. 124.

to the judges of quarter session that such obstruction was caused, the court should appoint three commissioners to inquire and report upon the state of the dam; that if it appeared that an offence was committed, the court should direct an indictment to be sent to the grand jury; and upon the prosecution of such offence to conviction, impose a fine not exceeding one hundred dollars upon the person maintaining such dam, and direct the supervisors of highways of the adjoining township to remove such obstruction and reduce the dam to conformity with the statute, at the offender's cost. The court may also direct a jury to assess the damages of the persons bringing the complaint.<sup>1</sup> In 1841 an act was passed which provided for compensation to owners or possessors of vessels or rafts delayed or damaged by such dams, to be determined by three persons appointed by a justice of the peace of the county where the dam is maintained, upon the application of the parties injured.<sup>2</sup>

§ 609. **The Virginia system.**—The Virginia statute is the original of a series of statutes in force in the Southern and Western States. It differs in many ways from that of Massachusetts. The remedy provided is an adaptation of the writ of *ad quod damnum*.<sup>3</sup> The present law provides that the owner

<sup>1</sup> If the person injured begins an action at common law, and subsequently makes complaint under the statute to have the dam abated by indictment, and no damages are given in the statutory proceeding, it is held that a conviction therein will not bar further pursuit of the action. *Gould v. Langdon*, 43 Penn. St. 365. See *James v. Sterrett*, 137 Penn. St. 234; *Ensworth v. Commonwealth*, 52 Penn. St. 820.

<sup>2</sup> Prior to the passage of this Act, damages were recoverable by an action on the case (*Bacon v. Arthur*, 4 W. 437; *Bell v. McClintock*, 9 id. 119), and actions on the case have been allowed since its passage. *Plumer v. Alexander*, 12 Penn. St. 81; *Newbold v. Mead*, 57 Penn. St.

487. "Raft" includes logs floated together, though not attached. *Dedrick v. Wood*, 15 Penn. St. 9.

<sup>3</sup> *Ad quod damnum* is a writ which ought to be sued before the king grant certain liberties, as a fair, market, or such like, which may be prejudicial to others. And thereby it shall be inquired if it should be a prejudice to grant them, and to whom it shall be prejudicial, and what prejudice shall come thereby. There is also another writ of *ad quod damnum*, if any one will turn a common highway, and lay out another way as beneficial. *Termes de la Leye*, 25. In *Fitzherbert*, N. B. 225, D., E., the writ is shown to have been used at common law for purposes similar to those to which it is applied by the

of lands upon a stream, owning or projecting a manufactory useful to the public, and desiring to build or enlarge a dam or canal above or below the mill, may obtain, on application to the court of the county where the mill stands, a writ of

Virginia statute. "And if the king will grant to one to make a ditch of a certain length in his own land, adjoining to the king's pond, to draw the water from the pond by the ditch to his mill, rendering yearly to the king and his heirs a certain rent, a writ of *ad quod damnum* shall be awarded for to inquire what damage the same will be to the king, and the writ shall recite the grant, and the rent reserved. And if there be an ancient trench or ditch coming from the sea, by which boats and vessels used to pass to the town, if the same be stopped in any part by the outrageousness of the sea, and a man will sue to the king to make a new trench, and to stop the ancient trench, &c., he ought first to sue a writ of *ad quod damnum*, to inquire what damage it will be to the king or others." An ancient highway cannot be changed without the king's license first obtained on an *ad quod damnum*, although an inquisition find that it is no damage to the king to grant the license. *Rex v. Warde*, Cro. Car. 266. The River Thames is a highway and cannot be diverted without an *ad quod damnum*, and to do such a thing ought to be by patent of the king. *Hind v. Manfield*, Noy. Rep. 103. If upon the return of an *ad quod damnum* it appears to be *ad damnum vel prejudicium of no man*, the king may then license the stopping up of an ancient highway, or diverting a water-course, or part of it, for the concern is then wholly his own; but without his license it can never be done, though a better way be set out and so returned upon an *ad quod dam-*

*num*. *Thomas v. Sorrell*, Vaugh. 341. The original Act of Virginia on the subject of flowage was passed in 1705. 3 Hening's St. at Large, p. 401. It provided that a person willing to build a water-mill, and having only one side of the run, if the owner of land on the other side should refuse to let him have an acre of land adjoining, might petition the court of the county wherein such land lay to authorize him to take such land for the purpose of abutting his dam thereon. Upon such petition the court was empowered to appoint two commissioners to view the land, and if it should not take away housing, orchards, or other immediate conveniences, to value the same and put the party desiring to build the mill in possession thereof. The applicant was required to pay the value so determined, down in money, before taking the land, to build his mill within three years, and rebuild again within three years in case of its destruction, or forfeit his right; and he was not to erect his mill within one mile of any existing mill on the same stream. The owners of such mills were given a remedy by action on the case. In 1745 the Act was amended. 5 Hening's St. at Large, p. 359. The new law required the court, on petition, as before, to issue an order to the sheriff, at the petitioner's cost, commanding him to summon a jury of twelve freeholders of the vicinage, to meet on the land petitioned for, and determine the questions of value and convenience, as before. The owner of land on both sides of the stream was required not to erect a mill with-

*ad quod damnum*.<sup>1</sup> The writ requires the sheriff to summon a jury of twelve freeholders, who must view the premises and make inquest upon substantially the same questions as those

out leave from the County Court. The court was required to consider whether others would be injured by flowage, etc.; existing mills were protected, and the title of entailed lands which were taken for mill purposes was confirmed to the mill-owners. In 1785, the law was again amended, and was given something of its present form. 12 Hening's Sts. p. 187. This act provided that the owner or projector of a water-grist mill, desiring to acquire lands on which to abut his dam, should apply to the court of the proper county for a writ of *ad quod damnum*, giving ten days' notice of his application to the proprietor, upon which a jury should be summoned and proceedings had substantially as under the more recent Acts. The jury were required to view the land, locate by metes and bounds one acre thereof, appraise its value, estimate the probable amount of flowage and of the damages thereby caused; inquire whether any house, buildings, orchards, or gardens, would be injured; whether the passage of fish and ordinary navigation would be obstructed; whether, and by what means, such obstruction could be prevented; and whether the health of the neighbors would be annoyed by the stagnation of the waters. It retained the restrictions of the former statute; provided that the title to the lands taken should vest on payment of the damages assessed; and that the inquest should be no bar to damages not foreseen. The Statute of 1792 (1 St. at Large, N. S. 136, 137; Abridgment of Public Laws of Va. 1796, pp. 209, 211) added a provision enabling the

owner of any mill to raise his dam by suing out a second writ.

<sup>1</sup> Code of Va. 1887, Title 20, ch. 61. The applicant need not own the land on either side of the stream at the point where the dam is proposed to be located. The Revised Code of 1819, vol. 2, ch. 235, provided specially for writs in cases where the applicant owned lands on one side of the stream and the bed of the stream; where he owned the land on both sides, and where, owning the land on one side, the title to the bed of the stream belonging to the Commonwealth, he desired to build a wing-dam, or abut a dam upon an island. The courts held that the petition and record must show facts defining in which of these classes the case belonged; and if the allegations placed the case in a class to which it did not belong, the writ would be quashed; — as, if the applicant alleged that he owned both sides when he owned but one, the writ was quashed. *Whitworth v. Puckett*, 2 Gratt. 528. Where he owned but one side, the record must show the title to the bed of the stream to be either in him or the Commonwealth. *Richards v. Hooime*, 2 Wash. 36; *Wroe v. Harris*, 2 Wash. 126; *Home v. Richards*, 4 Call, 441; *Martin v. Beverly*, 5 Call, 444; *Wilkinson v. Mayo*, 3 H. & M. 565. For similar decisions under the Act of Kentucky, see *O'Bannon v. Jackson*, Sneed, 201; *Bibb v. Mountjoy*, 2 Bibb, 1; *M'Afee v. Kennedy*, 1 Litt. 92; *Neale v. Cogar*, 1 A. K. Marsh. 589; *Hamilton v. Adams*, 7 J. J. Marsh. 248; *Wooten v. Campbell*, 7 Dana, 204; *Smith v. Connelly*, 1 Mon. 59. Allegations as to the bed of a stream are unnecessary where the plaintiff owned

provided by the Act of 1785.<sup>1</sup> The findings when completed must be signed by the jurors. If it appears by the inquest that any person not notified will sustain damages, he must be notified to show cause why the applicant shall not have the

both sides. *Wroe v. Harris*, 2 Wash. 126. See *accord*, *Neale v. Cogar*, 1 A. K. Marsh. 589. So if he owns both sides, the land for the abutment need not be circumscribed. *Cowan v. Glover*, 8 A. K. Marsh. 856. But in *Meade v. Haynes*, 8 Rand. 88, it was held that where the stream was unnavigable, and the petitioner owned the bed, the petition was sufficient, though alleging title in the Commonwealth. It is sufficient that the person making the application is in actual possession of the land claiming title. *Pitzer v. Williams*, 2 Rob. 241. The petition may be made *ore tenus*. *Meade v. Haynes*, 8 Rand. 22, 87; *Mairs v. Gallahue*, 9 Gratt. 94. Where upon a fair and reasonable construction the petition and inquisition are substantially responsive to the requirements of the statute, they are sufficient. *Mairs v. Gallahue*, 9 Gratt. 94. Ten days' notice of the application to the tenant of the freehold, upon which it is desired to erect or abut a dam, or through which it is intended to cut a canal, is required by the statute (§ 3). The record must show that ten days' notice was given. *Bernard v. Brewer*, 2 Wash. 76. In the head-note to *Hunter v. Matthews*, 1 Rob. 468, it is said that a judgment on the writ is valid and sufficient though the owner of the land had no notice. No such ruling was made above; an objection for lack of notice was overruled below, but the judgment was reversed above on other grounds. Notice to an acting trustee and executor considered. *Coleman v. Moody*, 4 H. & M. 1. A party appearing and contesting the application on the merits cannot afterwards

object for defect of notice. *Bernard v. Brewer*, 2 Wash. 76; *Coleman v. Moody*, 4 H. & M. 1. But a party appearing and objecting for lack of notice does not lose his rights by afterwards contesting on the merits. *Pitzer v. Williams*, 2 Rob. 241. Notice to the tenant in possession, who appears to be owner, is sufficient where it is not known who has the legal title. *Pitzer v. Williams*, 2 Rob. 241. The statute apparently contemplates notice to all who will be injured. Sec. 5 provides: "If by such inquest it appear that any person to whom notice has not been given will sustain damage, notice shall be given to him in the manner prescribed by the second section, to show cause why the applicant should not have the leave desired."

<sup>1</sup> See *ante*, § 609. The power to assess damages is in the jury alone. The court cannot increase the amount of damages allowed. But if the court is of opinion that a greater quantity of land will be overflowed than the jury estimated, the court should quash the writ and direct a new one. *Whitworth v. Puckett*, 2 Gratt. 528. The inquisition need not include and award damages for injuries below the dam from a possible breaking of the dam. For such injuries the action at law allowed for unforeseen injuries (§ 11) will lie. *Wroe v. Harris*, 2 Wash. 126. See *Ellis v. Harris*, 82 Gratt. 684. It is not error for the jury to assess the damages caused by flowage and other injuries in one sum. *Coleman v. Moody*, 4 H. & M. 1. On a petition for leave to add to the height of an

leave desired. If on the inquest or on the other evidence it shall appear that any mansion house, or its yards, out-houses, gardens, or orchards will be injured, or the health of the neighbors annoyed by the construction of the proposed works, the court will refuse permission to erect them.<sup>1</sup> If it shall not so appear, the court may at discretion grant or refuse the per-

existing dam, it is error for the jury to assess other damages accruing from the dam as already erected, and which were not contemplated by the original jury. But if such other damages are found separately, that portion of the finding may be stricken off as surplusage, and the verdict sustained. *Eppes v. Crallé*, 1 Munf. 258. An estimate of damages caused by flowage at a certain sum, and of damages to the proprietor for probable injury to other lands, at a certain sum, is sufficiently certain. *Dawson v. Moons*, 4 Munf. 535. The payment of damages will be presumed after the lapse of a long time, and the erection and maintenance of the works with the acquiescence of the land-owner. *Young v. Price*, 2 Munf. 534. In a case where L., owning lands on both sides of a stream, asked permission of the court to build a mill upon the stream, and a dam across it, it was found by the inquest that lands in possession of A., of the value of thirty-five dollars, would be overflowed. The court, on a hearing, being of the opinion that these lands belonged not to A., but to L. himself, granted L. permission to build his dam without paying any damages to A. Upon appeal this ruling was held erroneous, for the title to the lands could not be thus collaterally tried. In such case permission should be granted only on condition that L. pay A. the damages assessed by the jury; and L. might then build his dam at his peril without paying the damages, and then

defend A.'s action against him on the ground that the lands overflowed were his own, and thus put the title directly in issue. *Anthony v. Lawhorne*, 1 Leigh, 1. If the court directs an issue to try the title involved, the verdict is advisory merely, and the question is open to be heard on the merits. Such a direction is not error. *Wood v. Boughan*, 1 Call, 329.

<sup>1</sup> On a conflict of testimony as to the effect of the dam on health, the findings of the trial court will be affirmed. *Home v. Richards*, 2 Call, 507. It is not essential to the validity of the inquisition that it be dated, if it be stated under the hands and seals of the jurors, that they acted "in obedience to the annexed writ." *Dawson v. Moons*, 4 Munf. 535. Any one interested may move to quash the inquest. The service of the same jurors on a previous inquest in the same cause is ground to quash. *Hunter v. Matthews*, 12 Leigh, 228. If the inquest is quashed, the plaintiff should pray a new writ, or except and appeal. *Noel v. Sale*, 1 Call, 495. If the Circuit Court reverses the order to quash, it should remand the cause with directions for further proceedings. *Hunter v. Matthews*, 12 Leigh, 228. A juror's declaration that he agreed to the verdict in consequence of the sheriff's declaration that the defendant had consented to the erection of the mill, is no ground for quashing the writ. *Harwell v. Bennett*, 1 Rand. 282.



mission; if it grants permission, it is required to impose conditions protecting navigation, the passage of fish,<sup>1</sup> and the crossing of the stream.<sup>2</sup> Upon obtaining permission of court, and paying to the several parties entitled thereto, the compensation ascertained, the applicant becomes seized in fee-simple of the lands circumscribed and located by the jury as necessary to be taken, and is authorized to proceed with his works.<sup>3</sup> The applicant acquires title to the lands so circumscribed and located; but he does not acquire title to the lands overflowed.<sup>4</sup>

§ 610. *Same.*—Under the statutes of other Southern and Western States, founded on that of Virginia, although frequently departing more or less from that original, the initiative of proceedings lies wholly with the mill-owner or projector. A person likely to be injured cannot, under the statute, recover

<sup>1</sup> *Parker v. People*, 111 Ill. 581; *State v. Griffin*, 89 Mo. 49.

<sup>2</sup> This in effect provides for a new trial by the judge, and invests him with a large discretion whether and upon what conditions to grant permission. In *Mairs v. Gallahue*, 9 Gratt. 94, the court, on giving leave to erect the dam, provided that the applicant should keep a ferry-boat at the crossing of a public road over the stream, across which the dam was to be erected. It was held that this condition was incident to the grant, and attached to it, into whose hands soever it might pass; and that it imposed on the applicant and his successors the duty of keeping up the ferry and ferrying the public over the stream without charge. In *Humes v. Shugart*, 10 Leigh, 332, the court denied an application, made shortly after a former one, for erecting a mill in the same neighborhood, had been granted.

<sup>3</sup> There are further provisions requiring him to begin his works within one year, to complete them within three years, and in case of their de-

struction, to begin rebuilding within two years, and complete within five years; in default of which, the title to the land taken reverts; or, if held by a life tenant, the reversioner may enter and rebuild under the same limitation. The time for rebuilding has been extended by various acts affecting particular classes of cases, particularly that of mills injured during the Civil War. Acts of Assembly, 1871-2, ch. 237, p. 322; 1874, ch. 338, p. 456; 1877-8, ch. 171, p. 132. The fact that the applicant does not raise his dam in the first instance to the height authorized by the inquest does not preclude him from raising it to the full height authorized by the inquest, provided by so doing he does not occasion injury to others. *Calhoun v. Palmer*, 8 Gratt. 88.

<sup>4</sup> *Whitworth v. Puckett*, 2 Gratt. 531; *Hunter v. Matthews*, 1 Rob. 468. A dam erected in a different place from that authorized by the finding of the jury is, if obstructing the stream or causing injury, an abatable nuisance. *Dimmett v. Eskridge*, 6 Munf. 308.

his damages, even after they have been assessed. The election rests with the applicant, to pay the damages and build his mill, or to discontinue,<sup>1</sup> and he may dismiss the proceedings without the consent of the other party.<sup>2</sup> The injured person is left to his remedies at common law and in equity if the statute is not complied with. The inquest must conform and respond to the questions raised by the statute. An omission to find on any of the questions, as on the effect of the proposed works on health, invalidates the finding.<sup>3</sup> So of an omission to find as to their effect on navigation, or the passage of fish,<sup>4</sup> or on houses and gardens,<sup>5</sup> where required. So the inquest must show that the jury were sworn according to the statute, and charged as the law directs, and that they examined the lands;<sup>6</sup> must include findings as to all proprietors likely to be affected;<sup>7</sup> and show the quantity of injured land belonging to each proprietor, and find the damage to him separately.<sup>8</sup> Usually it should find the height of the dam.<sup>9</sup> And the in-

<sup>1</sup> *Cave v. Calmes*, 3 A. K. Marsh. 36.

<sup>2</sup> *Hunting v. Curtis*, 10 Iowa, 52.

<sup>3</sup> *Kownslar v. Ward*, 1 Gilmer (Va.), 127; *Trabue v. Macklin*, 4 B. Mon. 407; *Mountjoy v. Oldham*, 1 A. K. Marsh. 535; *Major v. Taylor*, id. 552; *Wooton v. Campbell*, 7 Dana, 204; *Gherky v. Haines*, 4 Blackf. 159; *Owen v. Jordan*, 27 Ala. 608. See *Bibb v. Mountjoy*, 2 Bibb, 1. A finding that health would be "as little annoyed as it was possible" is fatally defective. *Smith v. Waddill*, 11 Leigh, 532. A finding that the health of those living near the pond will probably be injured, is conclusive against petitioners. *Mayo v. Turner*, 1 Munf. 405. For recovery for injuries to health, see notes to § 621, *infra*.

<sup>4</sup> *Eppes v. Crallè*, 1 Munf. 258; *Shackelford v. Coffey*, 4 J. J. Marsh. 41; *Eubank v. Pence*, 5 Litt. 338; *Owen v. Jordan*, 27 Ala. 608. Such binding is as necessary on an application to enlarge as on one to build a dam. *Kownslar v. Ward*, 1 Gilmer (Va.), 127.

<sup>5</sup> *Martin v. Rushton*, 42 Ala. 289.

<sup>6</sup> *Owen v. Jordan*, 27 Ala. 608; *Walters v. Houck*, 7 Jones, 72; *Bibb v. Mountjoy*, 2 Bibb, 1; *Shackelford v. Coffey*, 4 J. J. Marsh. 41. If the inquest is incomplete owing to any omission from the charge, the defect is fatal. But if the jury respond to all matters required, although not charged, it is sufficient. *Neale v. Cogar*, 1 Marsh. 589; *Martin v. Rushton*, 42 Ala. 289. See *Walters v. Houck*, 7 Iowa, 72. An inquest which the report shows to have been conducted carelessly and unintelligently will be set aside. *Ibid*.

<sup>7</sup> *Honenstine v. Vaughan*, 7 Blackf. 520.

<sup>8</sup> *Smith v. Connelly*, 1 B. Mon. 58; *Smith v. Rogers*, Litt. Sel. Cas. 117.

<sup>9</sup> *Neale v. Cogar*, 1 Marsh. 589. But this is held unnecessary under the older statutes, where the applicant owns both sides of the stream. *Ibid*. The owner of the dam is entitled to have a permanent record of the height at which he may maintain the dam; of the fact that health will not be injured by it; that his

quest or judgment should show the location of the mill with sufficient certainty to enable a surveyor to determine its place.<sup>1</sup>

§ 611. *Same.*—The jurisdiction conferred by the statute is special and limited, and the record must therefore affirmatively show every fact necessary to uphold the jurisdiction.<sup>2</sup> Under the statutes of this system, and sometimes by express provision, the payment of compensation is a condition precedent to the acquisition of the right to flow or injure lands.<sup>3</sup> The provision that flowage shall not be permitted to injure mansion houses, gardens, orchards, or appurtenances, is in force in Kentucky, West Virginia, North Carolina, Tennessee, Alabama,<sup>4</sup> Mississippi, Missouri, Indiana, Iowa, and was formerly in force in Illinois; the provisions protecting navigation and the passage of fish were formerly in force in nearly all the States which adopted the Virginia statute, and are now in force in Kentucky, West Virginia, Mississippi, Missouri, and Nebraska; and that on navigation is in force in these States and in Indiana.<sup>5</sup>

mill is of public use; and of his right to maintain races and other works with his dam. *Wright v. Pugh*, 16 Ind. 106.

<sup>1</sup> *Macon v. Owen*, 3 Ala. 116. The description, "In number seven, of township nineteen, of range twenty-five," is too uncertain. *Ibid.*

<sup>2</sup> *Bottoms v. Brewer*, 54 Ala. 288. If the record fails to show that the dam was erected by order of court, or that the mill is a public mill, as defined by statute, the defect is fatal. *Ibid.* In Michigan the petition was held jurisdictional, and required to show every fact necessary to confer the right, including averments of the non-existence of any fact which would defeat the right; *e. g.* that no existing mill would be injured. *Fox v. Holcomb*, 34 Mich. 298. But in Minnesota the petition is held sufficient if it states facts bringing the case within the authorizing clause

(*i. e.* § 1) of the statute. The limitations contained in the other sections need not be negatived, nor want of consent by the respondent be averred. *Faribault v. Hulett*, 10 Minn. 30.

<sup>3</sup> *Nichols v. Aylor*, 7 Leigh, 546, 562; *Cave v. Calmes*, 3 Marsh. 36; *Kirkendall v. Hunt*, 4 Kansas, 514.

<sup>4</sup> See *McAlhilly v. Horton*, 75 Ala. 491.

<sup>5</sup> See, *infra*, citations of the statutes of these States. The fact that a spring of water for domestic use will be injured is a sufficient reason for refusing permission to erect a dam. Only a great public necessity will justify such an injury. *Morgan v. Banta*, 1 Bibb, 579; *Trabue v. Macklin*, 4 B. Mon. 407; *McDougle v. Clark*, 7 B. Mon. 448; *Payne v. Taylor*, 8 Marsh. 328; *Rosser v. Randolph*, 7 Porter, 238. A spring-house is protected as an outhouse, within the statute. *Willoughby v. Shipman*, 28 Mo. 50.

§ 612. **Same — Kentucky.**— The principal differences in the Kentucky statute<sup>1</sup> are a provision for further notice to persons not notified and not attending the inquest, and for holding the cause over in court, for them to appear;<sup>2</sup> a provision saving the rights of persons under disability from forfeiture for failure to complete their works in three years;<sup>3</sup> an omission of the special Virginia provision for the reversioner when the life tenant fails to complete his works in time; and a new section which invests the Circuit Court with power to revoke the permission and abate the dam, upon the presentment of a grand jury, in case public or private injury results from failure to comply with the conditions imposed.<sup>4</sup>

§ 613. **Same — West Virginia.**— The West Virginia statute<sup>5</sup> provides that the proceedings shall be according to the general statute on eminent domain,<sup>6</sup> for the appointment of

<sup>1</sup> Ky. Gen. St. 1879, ch. 77; Bullitt & Feland's ed. (1888), p. 960. See St. Feb. 22, 1797 — "An Act to reduce into one the several Acts concerning Mill Dams and other Obstructions in Watercourses." 2 Lit. & Swig. Dig. Ky. St. 938. The statute provides that where the lands lie in two counties, the court of that county containing the greater portion shall have jurisdiction. By the Act of 1797, the application in such case was required to be to the court of the county where the proposed abutment would be placed. *Dotson v. Sibert*, 4 Bibb, 464.

<sup>2</sup> The Act does not require the owner of property injured to be summoned unless he resides in the county, or has a known agent. *Cowan v. Glover*, 3 Marsh. 357.

<sup>3</sup> The forfeiture provision does not apply to cases where the owner of the mill owns the land on both sides of the stream. *McDougle v. Clark*, 7 B. Mon. 448, 452.

<sup>4</sup> The Kentucky statute does not apply to or authorize the taking of lands in cities or towns. *O'Bannon v. Jackson*, Sneed, 201.

<sup>5</sup> Warth's Code (2d ed., 1887), p. 352.

<sup>6</sup> 2 Kelly's St. 1879, ch. 79. The proceedings are begun by petition in writing for the appointment of five commissioners, four of whom constitute a quorum for holding the inquest. If a jury is asked by either party, a writ of *ad quod damnum* issues. The report may be set aside, recommitted, or confirmed. If the petitioner pays into court the amount of damages assessed, although after the report is set aside, he may proceed to take and use the lands without hindrance, paying into court or receiving back the difference between the amount paid and that of the second assessment. The title to lands condemned vests on confirmation of the report and payment of the damages assessed. For a statute investing boom companies with power to take lands, to enter upon lands and waters of others for the purpose of erecting booms for the purpose of stopping and securing boats and rafts, and for a determination of the compensation due for such injuries, see Acts of West Va. 1877, ch. 121, p. 178.

commissioners or impanelling of a jury. Their duties are, however, substantially the same as those of the jury under the Virginia Act. All the restrictions imposed by the Virginia Act are retained.

§ 614. **Same — Mississippi — Alabama.**— In 1812 the Mississippi Territory passed a statute which was in effect an adoption of the Virginia statute then in force, but provided for an inquest by a jury of seven freeholders, and omitted the provisions for the protection of navigation and fish; and this act was the basis of the present statutes in both Alabama and Mississippi.<sup>1</sup> These changes remain a part of the present statute of Alabama.<sup>2</sup> In 1822 Mississippi adopted a new statute, which restored the protection of navigation and fish, and required a jury of twelve freeholders. These provisions are contained in the present statute of Mississippi.<sup>3</sup> The present statute of Alabama requires the court, on the return of the inquest, to summon the owners of the lands to be affected, to show cause against granting permission; provides for a hearing, and, in effect, a new trial by the court upon the report of the inquest, and “*any other evidence;*” but if the conditions of the statute are complied with, and none of the forbidden results seem likely to follow, the application must be granted.<sup>4</sup> The damages assessed must be paid within three months after the granting of the application; and a failure herein operates as a revocation of the grant. The payment vests a conditional fee of the lands in the applicant, to become absolute on the completion of the works within three years, if begun within

<sup>1</sup> Statutes of Mississippi Territory (Natchez, 1816), pp. 345 *et seq.*; Tuolmin's Dig., Laws of Alabama, 1823, p. 624.

<sup>2</sup> Ala. Code, 1876, part 3, Title 3, ch. 17, §§ 3555 *et seq.*; 1 Code of 1887, p. 694, Title 2, ch. 15.

<sup>3</sup> Miss. Rev. Code, 1824, p. 336, ch. 65; Miss. Rev. Code, 1880, ch. 27, §§ 924 *et seq.*

<sup>4</sup> It is the duty of the judge to try the cause anew. *Rushton v. Martin*, 42 Ala. 555. The jurisdiction of the probate judge is special. *Folmar v.*

*McAllilley v. Horton*, 75 Ala. 491. That he has no discretion, see *Hendricks v. Johnson*, 6 Porter, 472. The Mississippi statute also requires such parties to be summoned to show cause, but invests the judge with discretion to decide upon all the circumstances. Miss. Rev. Code, 1880, §§ 926, 928. It is not necessary that the finding should be unanimous. If their return be signed by a majority of the jurors, and otherwise conforms to the statute, it is sufficient. *Frost v. Barnes*, 47 Ala. 279; and see *Austin v. Helms*, 65 N. C. 56.

one month from the date of the permission. One erecting or enlarging a dam, without authority, is made liable to pay double damages to any one injured thereby, and to prosecution, if the dam proves a nuisance.<sup>1</sup>

§ 615. Same — Missouri.— The original Missouri statute, passed in 1823,<sup>2</sup> was substantially a copy of the Virginia Act then in force. It contained in addition provisions saving the rights of persons under disability, from forfeiture for non-completion of their works; and in case of such non-completion within three years,<sup>3</sup> it authorized any other owner on the stream to build works under the Act, having damages to the former works assessed, and paying them; imposed a penal liability to double damages on persons maintaining dams without authority, and declared such dams nuisances. The present statute<sup>4</sup> is the result of several revisions and amendments of this Act.<sup>5</sup> It describes the procedure minutely, requires the petition to contain a description of the lands to be affected and the works proposed, an abstract of the petitioner's title, and a statement of the residences of the persons affected. Such persons are given permission to file objections to the report and show cause, but the court is not required to summon them before it. The court is given power to prevent the erection of dams which would injure lawfully existing mills, upon petition by the owner of such mills.<sup>6</sup> The privilege of maintaining a dam is to cease, in case the dam should obstruct any improvement of navigation undertaken by the State. On

<sup>1</sup> Ala. Code (1876), § 3577.

<sup>2</sup> 2 Rev. Laws of Mo. 1825, p. 587.

<sup>3</sup> Huffman v. Vaughan, 72 Mo. 465.

<sup>4</sup> 2 Mo. Rev. St. 1879, ch. 132, p. 1259 *et seq.*; 2 Rev. Sta. of 1889, p. 1633, ch. 113.

<sup>5</sup> Mo. Rev. St. 1835, p. 405 *et seq.*; 2 Mo. Rev. St. 1855, ch. 112, p. 1081 *et seq.*

<sup>6</sup> This provision gives a remedy only in cases in which a mill or other machinery, or a dam which has been erected in pursuance of the Act, is injured by the subsequent erection of a dam or obstruction under the same Act. Arnold v. Klepper, 24 Mo. 273. The deepening of the water in the

channel of a stream is in itself no ground for damages. Injury must be done to land or property to be ground for compensation. Hook v. Smith, 6 Mo. 225; *contra*, see Little v. Stanback, 63 N. C. 285; confer Johnston v. Roane, 3 Jones (N. C.), 523. The verdict may be objected to by any person who considers himself injured by the building of the proposed dam, and the court must hear the evidence offered if relevant. Groce v. Zumwalt, 4 Mo. 567. See Hunter v. Matthews, 12 Leigh (Va.), 228. In Hook v. Smith, 6 Mo. 225, it was held that when conflicting applications are made on the same day,



failure of the grantee to complete his works in three years, other owners on the stream may take the benefit of the Act "without incurring any liability on account of backing water on such dam."

§ 616. **Same — Indiana.**— The remedy in Indiana is by writ of *ad quod damnum*, called "writ of assessment of damages," and the statute<sup>1</sup> is based on that of Virginia. It authorizes the taking of land for raceways; describes the procedure minutely; requires all persons affected to be made defendants; provides that, on objection by the defendant to the report, or plea in bar of the right, issues shall be made up, and the case proceed to trial, judgment, and execution as a civil case. In case of an application by any person, after having erected his mill-dam, no damages shall be allowed, and the application shall be dismissed, unless the case be such that leave would have been given to build a mill, if the application had been filed before the erection of the mill-dam.<sup>2</sup>

or within a few days of each other, the court may exercise its discretion, and grant permission to the one which will cause least damage to individuals. The title of the plaintiff cannot be placed in issue by one not claiming title himself. *Arnold v. Klepper*, 24 Mo. 273. As to highways obstructed by mill-races, see *Swineford v. Franklin County*, 73 Mo. 279.

<sup>1</sup> Ind. Rev. St. (1881) § 881 *et seq.* (Code of Civil Procedure, art. 30). For the original Act, see Laws of Ind. Ter. (1807) p. 194, closely following the Virginia statute.

<sup>2</sup> This section is new. By former decisions it had been settled that one who erected a mill-dam without first applying for a writ could not afterwards avail himself of the statute. *Smith v. Olmstead*, 5 Blackf. 37; *Summy v. Mulford*, *id.* 113, 202; *Miller v. Stowman*, 26 Ind. 148. But in *Wright v. Pugh*, 16 Ind. 106, the statute was held to authorize the writ in every case where the mill was erected prior to assessment. The present statute, § 883, pl. 9, author-

izes any person injured by a mill-dam already built, to have the damages assessed or the dam declared a nuisance, as the case may require. A dam which has been enjoined as a nuisance may be rendered legal by proceedings upon the writ afterwards, and a plea to the inquest alleging in bar such former injunction is insufficient. *Peck v. Van Rensselaer*, 8 Blackf. 312. A person applying for leave to build a dam acquires the right, under the permission, only as against those who were notified as required by the statute, and whose lands the jury find will probably be affected. The proceedings are not a *lis pendens* constituting notice; and actual notice will not bind persons not notified. *Lane v. Miller*, 17 Ind. 58. An appearance in court and objection to the inquest, on the merits merely, is a waiver of notice. *Wood v. Wilson*, 12 Ind. 657. Such appearance waives a formal defect in the oaths of the jurors. *Ibid.* The assessment of damages is reviewable by the court to which the inquest is returned, and may be set

§ 617. **Same—Iowa.**—The first Iowa territorial statute, adopted in 1839, was a copy of the Illinois statute then in force.<sup>1</sup> In 1855 the statute was altered.<sup>2</sup> A copy of the peti-

aside if too high or too low, and another assessment ordered. *Chapman v. Groves*, 8 Blackf. 809. The question is for the court. *Peck v. Van Rensselaer*, id. 312. If an issue is raised upon the inquest as to the amount of damages, it must be disposed of by the court before an order of confirmation is entered. *Wood v. Wilson*, 12 Ind. 657. Where a dam had been built before the writ was issued, but damages were assessed without objection, and the court gave judgment on the assessment, and ordered that, on payment of damages and costs, the petitioner should "have leave to continue his dam, and to flow said lands *as they were flowed* by said dam *at the time* of said inquest," it was held that the order was not open to objection by the petitioner for failing to provide for different stages of water at different seasons. *Chapman v. Groves*, 8 Blackf. 808.

ILLINOIS.—The Virginia Mill Act was adopted by the Territory of Illinois at an early date (Laws of Indiana Territory, 1807, p. 194 (including Illinois); 2 Laws of Ill. Terr. 1815, p. 456); was re-enacted by the first legislature of the State (Laws of Ill. 1819, p. 265); and, with minor changes, remained in force until 1872. (Rev. St. 1845, p. 378; Gross, Ill. St. 1871, ch. 71, p. 442. By the revision of 1827, four weeks' notice in writing of the application was required, and notice to owners mentioned in the inquest, to show cause. The protection to navigation and fish was omitted. Ill. Rev. Laws, 1827, p. 297.) By the Act of 1872 this method of procedure was abolished, and that authorized by the statute upon eminent domain substi-

tuted. This is by petition, and an assessment by a jury of twelve freeholders. (Ill. Pub. Laws, 1871-72, p. 563; Rev. St. 1883, ch. 92; annotated editions by Starr & Curtis, and by Cothran (1887). For statute on eminent domain, see Rev. St. 1883, ch. 47.) The Act of 1872 requires a publication of notice of application for sixty days, and personal notice to all persons interested, whose residences are known. Provisions protecting existing mills and mill-sites were retained; those protecting dwellings, appurtenances, and gardens were omitted. In an action on the case for injury to the plaintiff's mill by the erection of a dam by the defendant on his own land, the plaintiff showed that he had built his dam by permission of court, obtained by proceedings on the writ of *ad quod damnum*. The court held that, while the defendant had a right to erect a dam upon his own land, he had no right to injure the plaintiff; and that the plaintiff could recover nominal damages on proving flowage of his land. *Hill v. Ward*, 2 Gilman, 285. See *Adams v. Miller*, 12 Ill. 27; *Spangler v. Eicholtz*, 25 Ill. 297; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590.

<sup>1</sup>Iowa Ter. Sta. 1839, p. 343. This was re-enacted in 1843, with additions protecting mills and their appurtenances from diversion or injury, under penalty of treble damages. Iowa Ter. Sta. 1843, p. 437. The present statute provides for single damages. Code 1882, § 1205.

<sup>2</sup>Iowa Laws, 1855, ch. 92, p. 151; Revision of 1860, Title 11, ch. 54, art. 4, p. 211.

tion was required to be served by way of notice; the ten days' period of notice was restored; and the clerk of court was required to summon the parties affected to show cause. By the code of 1873, now in force,<sup>1</sup> the applicant is required simply to file his petition, describing all lands and naming all owners likely to be affected, whereupon the clerk issues an order including a copy of the petition, to be served by the sheriff as an original notice in beginning an action. A jury of twelve freeholders are then summoned, who are authorized to examine witnesses as well as view the premises, and the further proceedings and principal conditions upon which the right is granted are similar to those in other States in which acts of the Virginia system are in force. The defendants may file written objections to the report, and for proper cause obtain a new jury to re-assess the damages. Either party may appeal to the court where the proceedings are pending for the assessment within thirty days, and appeals are tried and disposed of as in civil causes.<sup>2</sup>

<sup>1</sup> Code 1873, Title 10, ch. 1, §§ 1188-1206; Code 1882, Id.; 1 Miller's Annotated Code (1888), p. 413.

<sup>2</sup> Code 1882, §§ 1114, 1254. It is not necessary that proceedings be had before the work is begun. They may be instituted while the work is in progress. *Burnham v. Thompson*, 35 Iowa, 421. But an action will lie at common law for damages caused by the work before the proceedings began. *Watson v. Van Meter*, 43 Iowa, 76; *State v. Close*, 35 Iowa, 570; *Hunting v. Curtis*, 10 Iowa, 152. Compare Indiana Statute, *supra*. The petition need not be verified. Signature by counsel is sufficient. *Gammell v. Potter*, 2 Iowa (Cole's ed.), 562. Under the later statutes, notice may be given to the defendant after the petition has been filed, provided it is given in sufficient time. *Hoag v. Denton*, 20 Iowa, 118. Under the former statute notice was required to precede the petition. *Gammell v.*

*Potter*, 2 Iowa (Cole's ed.), 562. Where the first writ is quashed and a second one issues, no further notice is necessary. *Burnham v. Thompson*, 35 Iowa, 421. The defendant may plead and prove facts tending to show that the granting of the license would be unreasonable or not for the public benefit; but not matters tending only to impeach the finding. The finding is conclusive until set aside. Misconduct of the jurors, and interference with them by the plaintiff, are grounds only for setting aside the inquest. For an improper assessment, the remedy is either a motion to set aside or the action for damages not provided for. *Gammell v. Potter*, 6 Iowa, 548. See *Wilson v. Hanthorn*, 72 Iowa, 451, as to laches. An order of court overruling a motion to set aside the verdict and quash the writ is appealable, though no judgment has been rendered. *Burnham v. Thompson*, 35 Iowa, 421.

§ 618. **Same — Michigan.**— In 1824, the territory of Michigan adopted the Massachusetts Act of 1795;<sup>1</sup> but in 1828, the portions of the Act relating to flowage, and the remedies therefor, were repealed.<sup>2</sup> In 1865, a new statute was passed, which was precisely similar to that of Connecticut, passed in the preceding year.<sup>3</sup> In 1871,<sup>4</sup> the proviso that the court should add fifty per cent. to the amount of damages found by the committee or jury was repealed. In 1873,<sup>5</sup> the act was revised and amended. The new Act more fully resembled that of Massachusetts. It required the hearing of pleas in bar to precede the inquest, and secured the rights of land-owners who were not residents of the State, and persons under disability. A case arising under it was determined by the Supreme Court, in 1876,<sup>6</sup> but in 1877 the act was held unconstitutional.<sup>7</sup>

§ 619. **Same — Nebraska.**— The statute in force in Nebraska, which took effect in 1873,<sup>8</sup> is an adoption of the principal provisions of the later statutes founded on the Virginia Mill Act. Special provision is made for notice to non-resident defendants by publication. In this State it has been held that a mill-owner will not be allowed to increase the height of his dam so as to injure the owner of a mill-site above, who has begun the erection of another mill,<sup>9</sup> and that in proceedings in *ad quod damnum* the damages may include the diminution in value of the part of land which is not overflowed.<sup>10</sup>

<sup>1</sup> 2 Mich. Ter. Laws (1824), reprint, 1874, p. 192.

<sup>2</sup> Ibid. p. 699 (1828).

<sup>3</sup> Mich. Laws of 1865, No. 304, p. 651.

<sup>4</sup> Mich. Laws of 1871, No. 56, p. 67; 2 Compiled Laws, 1871, ch. 221.

<sup>5</sup> Mich. Laws of 1873, No. 196, p. 486.

<sup>6</sup> In *Fox v. Holcomb*, 34 Mich. 298, the case concerned a dam across a navigable stream. The State constitution forbids the damming of such streams, except by authority from the supervisors of the proper county. The court held that permission of court in proceedings under the Act would not dispense with this author-

ity, and that the petition must show that such authority had been obtained.

<sup>7</sup> *Ryerson v. Brown*, 35 Mich. 333; *ante*, § 214. See 1 Howell's Annotated Stats. ch. 37.

<sup>8</sup> Neb. Compiled Sta. 1885, ch. 57, p. 437. Upon § 14 of the statute, see *Pierce Mill Co. v. Kolterman*, 26 Neb. 722.

<sup>9</sup> *Seeley v. Bridges*, 13 Neb. 547. Damages held too remote and uncertain in *Bridges v. Lanham*, 14 Neb. 369. As to costs, see *Johnson v. Sutliff*, 17 Neb. 423. As to compromise of *ad quod damnum* proceedings, see *Culver v. Garbe*, 27 Neb. 312.

<sup>10</sup> *Sutliff v. Johnson*, 17 Neb. 575. A

§ 620. *Same — Kansas — Minnesota.*— The statutes of Kansas<sup>1</sup> and Minnesota<sup>2</sup> closely resemble each other. Their peculiarity is in prescribing an order in which the different amounts of damages assessed shall be paid. The assessments are made by three commissioners, and the method of review is by appeal to the court appointing them, upon which issues are made up and the case is tried and heard as a civil case, with the right of further appeal. Actions at common law for damages are limited to be brought within two years from the erection of the dam,<sup>3</sup> and the courts are authorized to suspend proceedings in any action at law begun after the institution of statutory proceedings, until such proceedings are determined.

mill-owner injured by an unauthorized dam is not restricted to the proceeding by *ad quod damnum*, but may sue for damages under § 14 of the Code. *Kyner v. Upstill* (Neb.), 46 N. W. 281.

<sup>1</sup> Kansas Compiled Laws, ch. 66; 1 Taylor's Annotated Gen. Stats. p. 1089, ch. 66. As to the limitation of two years prescribed by § 14, see *Hardesty v. Ball*, 43 Kansas, 151; as to *ex parte* testimony, see *Ball v. Hardesty*, 38 Kansas, 540.

<sup>2</sup> Minn. Sta. 1878, ch. 31; 1 Kelly's Annotated Stats., ch. 31. The Stat. of 1879, ch. 74, provides for entry upon the servient estate for repairs. Rights acquired under the statute date from the beginning of proceedings. If at that time the petitioner has to any extent made improvement of the power with the *bona fide* intention to use it as a water-power, it is a "power previously improved," under § 16 of the statute. *Miller v. Troost*, 14 Minn. 365. An appeal from the award of the commissioners brings up to the District Court only the question of the propriety of the damages assessed. Therefore, a motion to set aside the order appointing commissioners, is not entertain-

able by the District Court. The appeal lies only after the entry of judgment. *Turner v. Holleran*, 11 Minn. 253. The petitioner cannot, after appeal and judgment, object to judgment in favor of an owner, on the ground that a mortgage on his interest, which existed prior to such proceedings, has been since foreclosed, and such owner's interest divested. It will be presumed in such case that damages were assessed on the basis of the mortgagor's interest only, and if the party instituting the proceedings omitted on the trial to prove the existence of such mortgage, he must excuse his omission before he can be relieved from the effects thereof. *Siman v. Rhoades*, 24 Minn. 25. See *Dorman v. Ames*, 12 Minn. 451; *Ames v. Cannon Manuf. Co.*, 27 Minn. 245. The Act must be strictly complied with to give rights thereunder. *Akin v. Davis*, 11 Kansas, 580. The right of flowage acquired under the statute does not include the right to flow a highway. *Venard v. Cross*, 8 Kansas, 248.

<sup>3</sup> In *Thornton v. Turner*, 11 Minn. 336, it is held that until damage is occasioned the statute does not begin to run. See *Eastman v. St. Anthony*

§ 621. **Same — North Carolina.**— The North Carolina statute<sup>1</sup> differs from those of other States in prescribing two sets of proceedings. The first is begun by petition by the owner or projector of a mill to obtain permission to build the mill and dam and to acquire the land on the opposite side of the stream. The petition is open to objection or answer, issues of fact being tried by a jury;<sup>2</sup> but if granted, a commission of three freeholders is appointed by the court, whose duties are like those of commissioners under the Virginia Acts (omitting the inquest of damages to lands not taken, and of injuries to navigation and the passage of fish). The court has discretion to permit either the petitioner or the opposite proprietor to build the mill. The second series of proceedings is in the nature of an action by persons whose property is injured by the dam, to recover compensation, and is begun by summons and complaint, upon which issues of law and fact are tried and determined as in civil actions.<sup>3</sup> If the mill-owner is insolvent

Co., 12 Minn. 137, 143; *Barrows v. Fox*, 39 Minn. 61. This provision does not extend to actions to abate or enjoin a nuisance. *Ibid.*; *Cook v. Kendall*, 13 Minn. 324; *Thornton v. Webb*, 13 Minn. 498. See *Anderson v. Munch*, 29 Minn. 414.

<sup>1</sup> *Tourgee's Code*, with notes, 1878, Part II, ch. 5; 1 *Code of 1883*, ch. 43 and notes; 2 *id.* ch. 56. See *Battle's Code*, 1873, ch. 72. For the original Act, see Act of 1787, 1 *Rev. Laws of N. Car.* 1821, ch. 122. As to saw-mills in Pamlico County, see act of February 1, 1889, ch. 52. As to what statutes are now in force, see *Hester v. Broach*, 84 N. C. 251; *Goodson v. Muller*, 92 N. C. 207.

<sup>2</sup> *Jones v. Clarke*, 7 Jones, 418. See *Sumner v. Miller*, 64 N. C. 688.

<sup>3</sup> The former statute required a petition (see *Mumford v. Terry*, 2 *Law Repos.* 425), a hearing of the petition, including a trial by jury, if necessary; the appointment of a second commission, to inquire, summon, and hear witnesses, and report; a hear-

ing of objections to the report; and on appeal, a trial by jury, of issues made on the report, before reaching judgment. The assessment was to be of annual damages, and to be binding for five years, unless the dam and flowage should be altered. The payments for each year were collectible by execution to be sued out on the judgment rendered on the report. See *Gillet v. Jones*, 1 *Dev. & B.* 339. If the annual damages were found to exceed twenty dollars, the judgment was binding only for the year preceding. *Battle's N. Car. Code*, 1873, §§ 13-18. After the expiration of the five years, the damages for the ensuing year were recoverable only by a new petition. *William v. Canada*, 11 *Ired. L.* 106. The present statute contemplates the assessment of annual damages, and limits the effect of a finding of above twenty dollars to the preceding year, but has repealed the five-year limit of § 15 (*Code of 1873*, ch. 72), without fixing any other limit.



or the judgment cannot be collected, the court has power to order the abatement of the dam or of the portion causing the injury as a nuisance.

*a. Proceedings to Condemn.*—The defendants have a right to appeal from an interlocutory order appointing four freeholders. *Minor v. Harris*, Phil. Law, 322. *b. In Proceedings to Recover Damages.*—The act causing injury is a tort. The statute has not changed its character. *Wilson v. Myers*, 4 Hawks, 73. The liability for an act by several is therefore joint and several, and survives against the survivors. *Ibid.* It was formerly held that the liability did not survive against the heir. *Fellow v. Fulgham*, 3 Murph. 254. But the executors are liable for their testator's act under the statute. *Howcott v. Coffield*, 7 Ired. 24. The mill-owner cannot escape liability by conveying his mill away. *Purcell v. McCallum*, 1 Dev. & B. 221. Only one whose land is injured can maintain an action under the statute; but he may recover for any injury resulting from the overflowing of his land. *Waddy v. Johnson*, 5 Ired. 333. Injury to the health of his family, or healthfulness of the property, resulting from such cause, is ground for recovery. *Ibid.*; *Gillet v. Jones*, 1 Dev. & B. 339. But such injury must result from the inundation of his own land. The plaintiff cannot recover for such an injury resulting from *other parts* of the mill-pond, and is confined to his allegations. *Bridges v. Purcell*, 1 Ired. 232. An intermittent injury, by flowage at certain seasons, is ground for recovery. *Pugh v. Wheeler*, 2 Dev. & B. 50. Where flowage is shown, the land-owner is entirely to nominal damages, though no actual damage is shown. *Wright v. Stowe*, 4 Jones, 516; *Little v. Stanback*, 63 N. C. 285.

The land-owner is entitled to have the question whether the flowage was an injury submitted to the jury; benefits which the land may have received from such cause are immaterial. *Kimel v. Kimel*, 4 Jones, 121. The land need not be overflowed to constitute an injury. A prevention of drainage is an injury. *Johnston v. Roane*, 3 Jones, 523. So the raising of the stream within its banks is an injury. *Little v. Stanback*, 63 N. C. 285. See *contra*, *Hook v. Smith*, 6 Mo. 225. Possession alone is sufficient ground to support a petition for injuries done under the Act. *Pace v. Freeman*, 10 Ired. 103. A license by the plaintiff's ancestor is no bar to the complaint. It died with the ancestor. *Bridges v. Purcell*, 1 Dev. & B. 492. So twelve years' delay is no bar. *Griffin v. Foster*, 8 Jones, 337. On the other hand, one injured by a mill need not wait till the expiration of the first year before bringing his action. But the past damages will be confined to the time during which the injury has existed. *Cochran v. Wood*, 6 Ired. 194. It was not necessary in proceedings to recover damages to serve a copy of the petition. A written notice of intention, served ten days before filing the petition, was sufficient. *Cox v. Buis*, 12 Ired. 139. A description of the mill in the petition, as a public mill or a mill for grinding for toll, is sufficient. *Little v. Stanback*, 63 N. C. 285. The jury appointed to try the issues on the petition for damages had formerly no right to assess the damages; that was the province of the commission. On appeal, the issues on the allegations must be submitted to the jury

§ 622. **Same — Tennessee.**— Tennessee at first adopted the original North Carolina statute of 1777;<sup>1</sup> and this statute with only minor changes is still in force. In its present form it provides for the condemnation of the acre upon the opposite side of the stream on which to abut the dam, but makes no reference to compensation for flowage or other damages to lands not taken. The proceedings are begun by petition, upon which a summons issues to the proprietor of the acre; and at the same time a commission of four freeholders is appointed to lay off and value the acre and report. The court may in its discretion permit either the plaintiff or the opposite proprietor to build the mill. An appeal lies from the order of the County Court to the Circuit Court.<sup>2</sup> The statute contains the Virginia clauses protecting dwellings and their appurtenances, and other mills.<sup>3</sup>

before the damages are inquired into. *Jones v. Clark*, 7 Jones, 418. As the statute forbids an injury to dwelling-houses, such injuries cannot be included in the inquest of damages. *Burgess v. Clark*, 13 Ired. 109. The verdict is conclusive on damages up to the time when the verdict was rendered. *Beatty v. Conner*, 12 Ired. 341. The signatures of a majority of the commission to the report were sufficient to make it valid. See *Frost v. Barnes*, 47 Ala. 279, *accord*. If the dam is altered or taken down, this will be ground for reducing the annual damages on a writ of *audita querela*. *Gillet v. Jones*, 1 Dev. & B. 339. (See *accord*, Massachusetts and Wisconsin cases; *supra*, on Massachusetts Act.) But a temporary or accidental washing out of the dam will not be ground for reducing the damages. *Beatty v. Conner*, 12 Ired. 341. Irregularities previous to the verdict are no ground for dismissing an appeal. The trial must be had at bar in the Superior Court. *Harper v. Miller*, 4 Ired. 34. An early case held that the jury, on appeal, must meet on the premises. *Andrews v.*

*Johnson*, 1 Law Repos. 272. On appeal the Superior Court may permit the sheriff to amend his return of the verdict, so as to set forth that they were sworn on the premises. *Harper v. Miller*, 4 Ired. 34. Upon § 2036 of the N. C. Code, see *Wadsworth v. Stewart*, 97 N. C. 116.

<sup>1</sup> 1 Tenn. St. 1871, ch. 10, §§ 1910–1920. The statute was enacted almost in its present form in 1777. See Rev. Laws Tenn. 1809, ch. 23, p. 101; 1 Rev. Laws, N. C. 1821, ch. 122; Code of 1884, §§ 1439, 1524, 2653. As to floating logs, see Acts of 1883, p. 208, ch. 152.

<sup>2</sup> The appeal is triable *de novo* in the Circuit Court, and is not merely for review. *Towson v. Debow*, 5 Sneed, 193.

<sup>3</sup> The Act authorizes such taking only for grist-mills. If the petitioner has any rights by virtue of a contract with the owner, he must resort to the ordinary remedies at law and in equity to enforce them, and cannot enforce them in proceedings under the statute. *Harding v. Goodlett*, 8 Yerger, 41.

§ 623. **Same — Georgia — Other States.**— In Georgia an Act was passed in 1869,<sup>1</sup> extending the provisions of an Act authorizing a railway company to take lands, to all persons desiring to build mills and dams; but it was shortly after held unconstitutional.<sup>2</sup> In Delaware,<sup>3</sup> Arkansas,<sup>4</sup> Florida,<sup>5</sup> Dakota,<sup>6</sup> and Oregon,<sup>7</sup> statutes belonging to the Virginia system are in force, but there are no reported decisions of cases arising under them.

<sup>1</sup> Ga. Laws, 1869, p. 114.

<sup>2</sup> Loughbridge v. Harris, 42 Ga. 500. See Anderson v. Barksdale, 77 Ga. 86; Gorman v. Trice, 79 Ga. 731; Athens Manuf. Co. v. Rucker, 80 Ga. 291; Code (1882), §§ 1462, 2227, 3018, and notes. As to waterworks, see Pub. Laws of 1889, p. 184.

<sup>3</sup> Del. Rev. St. 1852 (ed. 1874), ch. 61, p. 348. A separate Act which has been incorporated with the Mill Act provides that the owner of an upper mill, before voluntarily discharging an unusual quantity of water, is bound to give notice to the mill-owner below, and that for neglecting this duty he shall be liable to

double damages. Ibid. § 8 (Act of 1819). This liability is enforceable by an action on the case. McIlvaine v. Marshall, 8 Har. 1; Ross v. Horsey, 8 Har. 60. As to highways crossing mill-dams, see Tatnall v. Shallcross, 4 Del. Ch. 684.

<sup>4</sup> Ark. St. 1874, ch. 95; Digest of 1884, p. 921, ch. 106.

<sup>5</sup> McClellan's Dig. Laws of Fla., ch. 152.

<sup>6</sup> Code of Civil Proc. (1888), p. 193, ch. 89.

<sup>7</sup> Gen. Laws, Oregon, 1874, p. 679 (Misc. Laws, ch. 87); 3 Hill's Annotated Laws (1887), p. 1626, ch. 59.

## APPENDIX.

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- Page 13, note 2, end. See *Petrel Guano Co. v. Jarnette*, 25 Fed. Rep. 675.
- Page 67, note 3. See *Pierce v. Kennedy* (Wash.), 26 Pac. 554; *Eisenbach v. Hatfield* (id.), id. 539.
- Page 90, note 2, end. Add *Wright v. Roseberry*, 121 U. S. 488.
- Page 127, note 5. See *Re State Reservation at Niagara*, 16 Abb. N. C. 159.
- Page 130, note 4. See 10 Va. L. J. 321.
- Page 157, note 2. Add *Chandos v. Mack*, 77 Wis. 573.
- Page 159, note 5, end. See *McLaughlin v. Sandusky*, 17 Neb. 110.
- Page 164, note 4. Add *People v. Collison* (Mich.), 48 N. W. 292.
- Page 167, notes 2, 5. See *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.* (Wis.), 48 N. W. 371.
- Page 168, note 6. See *Union Depot Street Ry. Co. v. Brunswick*, 31 Minn. 297; *Bennett v. Murtaugh*, 20 Minn. 151.
- Page 181, note 3. See *Silsby Manuf. Co. v. State*, 104 N. Y. 562.
- Page 194, note 5. See *Merchants' Wharf-Boat Asso. v. Wood*, 64 Miss. 661.
- Page 213, note 1. With the Canadian Statute, see 1 Canada Rev. Stats. (1886), p. 156, art. 27; *The Athabasta*, 45 Fed. Rep. 651, 654.
- Page 251, note 4. Add *Pittsburgh R. Co. v. Jones*, 111 Penn. St. 204.
- Page 302, note 4. Add *Jones v. Westerhausen*, 131 Penn. St. 62.
- Page 308, note 6. Add *Kerr v. West Shore R. Co.*, 37 N. Y. State Rep. 913.
- Page 324, note 4. Add 67 L. T. 93.
- Page 337, note 5, end. See *Hastings v. Grimshaw* (Mass.), 27 N. E. 521.
- Page 349, note 5. In Washington, see *Pierce v. Kennedy* (Wash.), 26 Pac. 554.
- Page 366. That a riparian owner or one lawfully obtaining access to a meandered, non-navigable stream, may cut the ice forming thereon. *Brown v. Cunningham* (Iowa), 48 N. W. 1042. As to when ice is personality, see 13 Ir. L. T. 549; 14 L. J. 635.
- Page 403, note 1. Add *Mason v. Hoyle*, 56 Conn. 255.
- Page 440, § 224. See 18 L. J. 463; 29 Sol. J. 142.
- Page 443, note 4. Add *Murchie v. Gates*, 78 Maine, 300.
- Page 449, § 228. Recent cases of general interest upon appropriation of water in the Pacific States are: *Bybee v. Oregon R. Co.*, 11 S. C. 641; *Van Bibber v. Hilton*, 84 Cal. 585; *Stowell v. Johnson* (Utah), 26 Pac. 290; *Riverside W. Co. v. Gage* (Cal.), id. 889; *Strickler v. Colorado Springs* (Col.), id. 313; *Greer v. Heiser* (Col.), id. 770 (on Col. Stats. § 1763); *Carron v. Wood* (Mont.), id. 388; *Speake v. Hamilton* (Oregon), id. 855. That the legislature cannot prohibit, but may regulate the appropriation of water on public land for useful purposes, see *Larimer Co. R. Co. v. People*, 12 Col. 531; 8 Col. 614.

Page 471, § 241. As to storage basins, see *Johnson v. Boston*, 130 Mass. 452.

Page 472. In last sentence of note 1, after "In such case," add "if an aqueduct is built beneath the surface," and transfer this sentence to end of the next note.

Page 473, note 1. See *Koopman v. Blodgett*, 70 Mich. 610.

Page 487, note 5. Add *Pickman v. Peabody*, 145 Mass. 480.

Page 514, § 260. See also, generally, *Young v. Kansas City*, 27 Mo. App. 101; *Seifert v. Brooklyn*, 101 N. Y. 136; *Lehn v. San Francisco*, 66 Cal. 76; *San Antonio v. Gwynn* (Texas), 15 S. W. 509; *Wright v. Wilmington*, 92 N. C. 156.

Page 538, § 280. Upon subterranean waters generally, see also 20 L. J. 121; 7 Sol. J. 601; 15 id. 523; 19 id. 371; 19 Ir. L. T. 177, 821; 76 L. T. 295; 23 Am. L. Reg. N. S. 513; 2 id. 65; *Swett v. Cutts* (50 N. H. 439), 11 Am. L. Reg. 11, and note.

Page 546, note 4. The case of *Ballard v. Tomlinson* is also reported in 24 Am. L. Reg. N. S. 634, and note.

Page 558, § 298. See also, generally, 11 Ir. L. T. 188; 12 Ir. L. T. 899, 507; 23 Sol. J. 599; 10 L. T. 469; 27 Co. Ct. Chronicle, 198.

Page 619, § 340. See *Smith v. Musgrove*, 32 Mo. App. 241.

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